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Judicialization of the Sea: Bargaining in the Shadow of UNCLOS

By Sara McLaughlin Mitchell and Andrew P. Owsiak***

Abstract

Based on a comprehensive empirical analysis of maritime disputes during the twentieth century, this Article argues that international courts cast a shadow that markedly changes bargaining by potential litigating states. In particular, the filing of optional declarations under Article 287 of UNCLOS increases states' use of non-binding methods of dispute settlement, and the Article theorizes that this occurs because the declarations credibly threaten court involvement and provide more information about likely litigation outcomes. The Article's central finding is that states that file Article 287 declarations have fewer maritime claims, more peaceful negotiations, and less need for judicial dispute settlement.

I. Introduction

As the number and scope of international judicial bodies has risen dramatically in recent decades, so too has their influence on world politics. Today, over sixty quasi-judicial or dispute settlement bodies operate at either the global or regional level, including the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the Court of Justice of the European Union (CJEU).[1] It therefore seems natural to ask whether and how these bodies' greater involvement in global affairs transforms interstate relations. In particular, does the possibility of international judicial review change how states bargain out of court over a disputed issue that potentially falls under the court's jurisdiction? Much like in domestic legal systems—where the likelihood that potential litigants will reach agreement outside the courtroom is affected by both whether a court will hear their case and by their ability to predict how that court is likely to rule[2]—we propose that international courts cast a shadow that markedly changes potential litigants' bargaining decisions.

Our argument is as follows. Rational potential litigants seek the best outcome possible for themselves and consider various dispute settlement mechanisms to achieve that goal. A judicial process offers one such mechanism. Yet it is not without costs—for example, it reduces

* Department of Political Science, University of Iowa.

** Department of International Affairs, University of Georgia.

[1] For a more complete list of international adjudicative bodies, see the synopsis of the Project on International Courts and Tribunals, archived *at* https://elaw.org/system/files/intl%20tribunals%20synoptic_chart2.pdf.

[2] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

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their control over the dispute settlement process and outcome—and these costs may exceed those of alternative options, such as negotiation, conciliation, or mediation.[3] As the probability of these costs rises, litigants seek to minimize them—that is, they work to settle out of court.[4]

The motivation and ability to settle a dispute, moreover, increases as litigants acquire information about which judicial body will hear their case. States often must first decide[5] or debate[6] *where* to apply for redress. If they disagree on the judicial body to use, then they need to sort this matter out first—either outside the judicial body (for example, in a *compromis* for ad hoc arbitration) or inside the body (for example, by contesting the body's jurisdiction). In contrast, if they agree on the acceptable body to hear their case (for example, when states apply to the ICJ under a special agreement), then no question about the body's jurisdiction arises. In some issue areas—for example, the law of the sea—states can make their preferences about acceptable judicial bodies known *ex ante*, meaning that if a case arises in that issue area *and* both states find a given judicial body acceptable, the likelihood rises that the acceptable body hears the case. The threat to "go to court," in other words, crystallizes, and the disputants predict—admittedly, with some uncertainty—how the judicial body will rule.[7]

As Richard Bilder has noted, "[T]he prospect of eventual judicial decision necessarily affects the way the parties think about the law. Inevitably, they will bargain and assess the value of various settlement proposals in terms of how they think a court will decide."[8] In this way, as the threat to go to court grows, states increasingly bargain outside the judicial body through other dispute settlement mechanisms, such as negotiation or mediation. Through these alternative, non-judicial mechanisms, states not only minimize or avoid the material costs of litigation; they also can pursue a more favorable outcome than the one they expect the court to provide by retaining control over their dispute's settlement terms and benefiting from extralegal considerations. Because such incentives exist *before* and *after* cases are filed, the court's shadow both prevents the filing of some cases and influences the management of the cases that states do file.

[3] *See* J. Michael Greig, Andrew P. Owsiak & Paul F. Diehl, International Conflict Management (2019).

[4] If rational litigants can reach a similar (or better) outcome through a less costly process, as opposed to a more costly one, they should use the less costly process. For similar reasoning, see James D. Fearon, *Rational Explanations for War*, 49 Int'l Org. 379 (1995).

[5] For example, see Marc L. Busch, *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*, 61 Int'l Org. 735 (2007).

[6] For example, see the history of relations between Colombia and Venezuela, during which these states negotiated the submission of their territorial disagreement to an arbitral process on two occasions—first to the Spanish crown, and later to the Swiss Federal Council. *See* Gordon Ireland, Boundaries, Possessions, and Conflicts in South America (1971).

[7] Case law within the law of the sea regime we study here can travel across disparate judicial bodies. To the extent that it differs, however, commitments to particular bodies will allow case law to influence out-of-court bargaining. Moreover, case law is not the only mechanism through which the declarations referenced here influence out-of-court bargaining. As we note and develop below, through such declarations, states also signal a more credible threat (1) to submit the dispute to *a* court (i.e., a greater commitment to judicial processes overall), and (2) to submit the dispute to a *particular* court, which—in necessarily moving from arbitration to adjudication (see details presented later)—(a) causes the disputants to lose some control over their dispute's management and outcome (i.e., incur greater costs), and (b) enhances the disputants' ability to predict how the court will decide (i.e., the court's case law, as well as its reasoning, rules, process, and composition).

[8] Richard B. Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 Emory J. Int'l Disp. Resol. 131, 141 (1986–1987).

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To develop and evaluate the merits of this general argument, we focus on judicialization within the law of the sea regime, as embodied within the United Nations Convention on the Law of the Sea (UNCLOS).[9] UNCLOS creates elaborate dispute settlement procedures to address maritime disagreements between states parties. These states agree to eschew the use of military force and may choose among numerous peaceful techniques to manage their maritime disputes, including bilateral negotiations and conciliation.[10] Should these techniques be unavailable or fail, Article 287 identifies four compulsory and legally binding forums to assist the disputing states: (1) ITLOS; (2) the ICJ; (3) arbitration under Annex VII of UNCLOS; or (4) arbitration under Annex VIII[11] of UNCLOS.[12]

Annex VII arbitration serves as the default procedure. Yet the convention also allows states parties, *a priori*, both to specify whether they find each of the four compulsory forums acceptable for deciding their potential disputes and, among the options they find acceptable, to rank the order in which they prefer these forums to be used. States parties therefore not only make a general commitment to peaceful dispute settlement procedures (including Annex VII arbitration), but also can file optional declarations in support of particular judicial bodies. These latter declarations under Article 287 allow states parties to send two additional signals: (1) a greater general openness to judicial settlement (i.e., through a willingness to involve judicial bodies); and (2) a greater threat to take future law of the sea cases to a specific court—the ICJ, ITLOS, or both. The latter signal is the most important for present purposes.

Article 287 declarations almost always select a court, moving a dispute from default arbitration to adjudication—but only if both states' declarations agree on which court to use. When that happens, the threat that the selected court hears the case in question grows. This portends the imposition of not only a binding settlement to the dispute, but also additional costs. Litigating states hold less control over their dispute's management and outcome in adjudication than in arbitration. The courts consequently cast a shadow, within which the disputing states know the court may hear the case, will rule if necessary, can often predict how it will rule, and can decide to settle the case before it does.

As of December 2020, 179 of 194 (or 92 percent of) states had signed UNCLOS, while 164 (or 92 percent of signatory) states ratified the convention. A small number of these states parties have active Article 287 declarations. Forty-seven (or 29 percent of) ratifying states recognize the jurisdiction of ITLOS, the ICJ, Annex VII arbitration, or Annex VIII arbitration for compulsory dispute settlement: thirty-nine states parties for ITLOS, twenty-eight for the ICJ, ten for Annex VII, and eleven for Annex VIII.[13]

[9] UNCLOS opened for signature in December 1982 and entered into force in November 1994. A regime is a set "of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." *See* Robert O. Keohane, After Hegemony 57 (1984) (citation omitted).

[10] *See* J.G. Merrills, International Dispute Settlement (4th ed. 2005).

[11] This elucidates an ad hoc arbitration procedure to handle disputes specifically over fisheries, environmental protection, scientific research, or navigation.

[12] Natalie Klein, Dispute Settlement in the UN Convention on the Law of the Sea (2005).

[13] Because states parties can register a preference for multiple compulsory mechanisms, the declarations in favor of individual forums will not sum to the total number of states parties' making Article 287 declarations. For a detailed breakdown, see Tables A4–5 in the online appendix. We compile these data from the United Nations, *at* http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm. The list of states comes from the Correlates of War (COW) Project, State System Membership dataset, *at* http://www.correlatesofwar.org/data-sets/folder_listing. Cabo Verde, Cook Islands, Eswatini, Niue, Palestine, or the European Union do not qualify

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We argue that these declarations send signals that fundamentally change the bargaining behavior of the states parties that make them in three ways. First, these declarations increase the frequency with which states resort to bilateral negotiations and non-binding third party efforts (e.g., mediation or conciliation) to manage their maritime disagreements. They do so, we contend, mainly to avoid the costs of litigation and to obtain a more favorable outcome. Second, the declarations curtail the use of force. The right to submit a disagreement to a judicial body provides a way to alleviate the friction that an unresolved disagreement creates—a friction that might otherwise encourage states to use military force.[14] Indeed, military force often serves as a measure of "last resort," something states use to demonstrate resolve, to bolster their bargaining position, or when other tools fail.[15] Adjudication supplies an alternative last outlet; by providing disputants with a final settlement, and through a process that does not allow military gains to prejudice adjudicated decisions, the advantages of using military force decline. Finally, fewer maritime disagreements will arise among declaring states parties in the first place, as these states parties signal a stronger commitment to the judicial processes that clarify potential areas of disagreement within UNCLOS.

We empirically evaluate the effects of UNCLOS on interstate maritime diplomatic conflicts with data from the Issue Correlates of War (ICOW) project.[16] ICOW identifies all contentious claims between 1900 and 2001 that involve maritime jurisdiction (e.g., the delimitation of Exclusive Economic Zone (EEZ) boundaries), resource, or access issues (e.g., fishing/oil extraction or navigational rights) between two or more countries.[17] These claims require that one state's official representative (i.e., a challenger) diplomatically contest—for example, by making a public statement—the status quo distribution of maritime disputes in a specific area over which another state (i.e., a target) exercises de facto control.[18] Law enforcement actions, such as the seizure of vessels operating illegally, consequently do not qualify as maritime claims, unless they occur within the context of a larger entitlement dispute.

Focusing on UNCLOS to investigate the shadow effects of judicialization offers four key advantages over studying these effects in other issue areas of international law. First, states

as states under the COW Project criteria. We therefore exclude these actors from our analyses, even though they, too, have made commitments to UNCLOS.

[14] Our dataset captures both peaceful and militarized attempts to settle (or address) interstate maritime disputes. These data allow for non-binding, peaceful attempts (e.g., negotiation), as well as militarization (or the use of force), to occur simultaneously with binding, peaceful attempts (e.g., adjudication or arbitration).

[15] We use "last resort" in a psychological, as opposed to temporal sense. States admittedly do not always use force temporally last among the various management tools available. Rather, our point is that, because force costs more than the alternatives, states will prefer to use the alternative, less costly tools first—but only if they perceive a chance of obtaining their goals through such tools. A state will often use force to bolster its bargaining position. Courts, however, discourage this use of force too because they do not permit such behavior to prejudice court judgments.

[16] Karen J. Alter, Emilie M. Hafner-Burton & Laurence Helfer, *Theorizing the Judicialization of International Relations*, 63 INT'L STUD. Q. 449 (2019); Paul R. Hensel, Sara McLaughlin Mitchell, Thomas E. Sowers II & Clayton L. Thyne, *Bones of Contention: Comparing Territorial, Maritime, and River Issues*, 52 J. CONFLICT RESOL. 117 (2008); Paul. R. Hensel & Sara McLaughlin Mitchell, *From Territorial Claims to Identity Claims: The Issue Correlates of War (ICOW) Project*, 34 CONFLICT MGMT. & PEACE SCI. 126 (2017).

[17] ICOW identifies 270 interstate maritime claims during the period 1900–2010. For a description of these claims, see Sara McLaughlin Mitchell, *Clashes at Sea: Explaining the Onset, Militarization, and Resolution of Diplomatic Maritime Claims*, 29 SEC. STUD. 637 (2020).

[18] This does not mean that the target state holds a valid legal claim to the maritime area in question, only that it exercises status quo control over that area. If it did not, the challenger would have no counterpart to challenge.

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frequently contest maritime areas, and international judicial bodies have a lengthy track record of involvement in these disputes. There are consequently a large number of disputes to analyze. Second, maritime claims are politically salient and carry a significant risk of both militarization and escalation, as recent tensions near the Spratly Islands or Senkaku/Diaoyu Islands illustrate.[19] These issues, in other words, merit global attention. Third, maritime claims concern entitlements to areas that states find valuable because of their sovereignty, resource, or strategic implications (e.g., control of straits). That value often reduces states' willingness to resolve maritime disagreements through courts, making maritime claims an important area in which to examine the effects of potential judicial review on states' out-of-court behavior. Finally, understanding the shadow effects of judicialization requires us to identify and analyze cases that never go to court. These cases prove difficult to locate in many contexts. Data on maritime claims, however—in the form of public statements by state representatives who contest maritime areas—provide us with the universe of potential cases. The data include, for example, clashes over maritime boundaries (e.g., the *Gulf of Maine* case), the legal status of rocks and islands (e.g., Venezuela's claim to Aves Island), historical maritime claims (e.g., the U.S.-Canadian disagreement over the Northwest Passage), fishing and other resources (e.g., the *Fisheries Jurisdiction* case), and navigational rights (e.g., the *Corfu Strait* case).[20] Binding conflict management occurs in only three percent of all peaceful efforts to resolve these potential cases. How the credible threat of going to court influences non-binding settlement attempts is much less understood.[21]

Besides reporting its novel empirical findings and discussing their implications, this Article makes three additional contributions. First, it extends Mnookin and Kornhauser's famous analysis of domestic legal bargaining in the shadow of courts to the international level and finds support for it in that context.[22] When potential litigants gain greater certainty over whether and which court will hear their case, their out-of-court bargaining changes. Many analysts overlook such a possibility. By studying only the cases that come before the courts —largely, but not exclusively, due to data availability—they necessarily miss any effects the courts have on bargaining *outside* the courtroom. Second, our study exploits the issue-based approach to world politics to capture cases that *never* appear in court. This not only offers a more accurate test of judicial bodies' shadow effects, but also demonstrates the wider applicability of the issue-based approach to studies of international law. Finally, the study explores the signaling effect of a specific, optional judicial commitment mechanism (Article 287 declarations) to investigate the effect of judicialization, thereby separating the effects of judicialization from the effects of legalization. As we explain, the subset of UNCLOS states parties that

[19] States involved in a maritime disagreement use military force at some point to manage that disagreement in 29% of diplomatic maritime claims. *See* Mitchell, *supra* note 17. The data we use in this study contain 143 dyadic maritime claims in the Western Hemisphere and Europe from 1900–2001. Of these, 115 (or 80.4%) begin in or after 1945. *See* Hensel & Mitchell, *supra* note 16. Ninety militarized disputes directly relate to these claims.

[20] Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.), 1984 ICJ Rep. 246 (Oct. 12); Fisheries Jurisdiction (UK v. Ice.), Merits, 1974 ICJ Rep. 3 (July 25); Corfu Channel (UK v. Alb.), 1949 ICJ Rep. 4 (Apr. 9). For an in-depth introduction to the ICOW maritime claims dataset, see Mitchell, *supra* note 17.

[21] ICOW identifies 935 peaceful attempts (i.e., negotiations, mediations, conciliations, arbitrations, and adjudications) to settle 270 distinct maritime claims (see Mitchell, *supra* note 17). States use arbitration and adjudication, which we classify together as "binding forms" of peaceful settlement, in twenty-nine of these 270 diplomatic maritime conflicts.

[22] See Mnookin & Kornhauser, *supra* note 2.

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file such declarations indeed bargain differently, and our review of this subset reveals no obvious alternative explanation that accounts for both their declarations and their out-of-court behavior. We therefore conclude that international courts cast a shadow that fundamentally changes how states bargain over maritime issues outside the courtroom.

The remainder of the Article proceeds in five parts. Part II briefly summarizes the expansion of judicialization in world politics, as well as the debate about whether judicialization alters state behavior. Part III advances our theory about how judicialization changes interstate bargaining over maritime issues and derives a series of empirical hypotheses from the theory. Part IV outlines our empirical approach, which Part V subsequently employs to ascertain whether the evidence falsifies the theory's hypotheses. The latter Part also considers both the main potential criticisms of our theory and how the theory generalizes to other international judicial bodies. Finally, Part VI summarizes our main findings.

II. The Judicialization of International Relations: The Role of International Courts

The expanding number and scope of international courts reflects a broader trend toward greater institutionalization in world politics. Since the Napoleonic wars, states have signed thousands of treaties, many of which create informal (e.g., regimes) and formal (i.e., international organizations, or IGOs) institutions across a range of issue areas (e.g., preferential trade agreements, bilateral investment treaties, or military alliances). Many recently created courts are embedded within these treaties as an integral part of the regional or global institutions that the treaties establish. For example, the ICJ is embedded within the United Nations Charter; the Court of Justice of the European Union emerged from and evolves along with various European Union treaties; and ITLOS is an institution of UNCLOS. The presence of these courts not only mirrors and promotes greater *legalization*—that is, the growth of international legal constraints—but also deepens *judicialization*[23]—that is, the proliferation of international courts, the enhanced jurisdictional purview of these courts, and therefore, the increasingly prominent role that they play.[24] Indeed, twenty-four international courts now have jurisdiction to adjudicate[25] interstate disputes.[26]

The trend toward deeper judicialization has garnered attention only recently.[27] Scholars therefore continue to debate its merits, with particular interest in when and why states delegate authority to international courts. Optimists in the debate assert that recognizing the jurisdiction of international courts carries key benefits. Independent courts and tribunals

[23] Alter, Hafner-Burton & Helfer, *supra* note 16.

[24] Karen J. Alter, The New Terrain of International Law: Courts, Politics, Rights (2014).

[25] As Alter notes, a large percentage of the cases that international courts hear involve other judicial activities, such as administrative review, enforcement, and constitutional review. *See id.* at 5.

[26] Karen J. Alter, *The Multiplication of International Courts and Tribunals After the End of the Cold War*, *in* The Oxford Handbook of International Adjudication (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014).

[27] Alter, Hafner-Burton, and Helfer, *supra* note 16, describe four phases of judicialized politics: shadow politics, adjudication politics, compliance politics, and feedback politics. Our theory focuses on the first two phases. Shadow politics "refers to mobilization, bargaining, negotiations, and responses generated by a plausible threat of adjudication" (*id.* at 454), while adjudication politics "encompasses the factors, strategies, and consequences associated with the decision to adjudicate, including which suits are filed, the selection of venue, the gathering of evidence and presentation of arguments, and the decisions of judges, arbitrators, and other adjudicatory bodies" (*id.* at 455).

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can influence states' foreign policy behavior directly (e.g., by resolving a disputed issue) and indirectly (e.g., bargaining in courts' shadows). Although studied less frequently than direct effects, scholars repeatedly uncover indirect effects when studying institutions that establish compulsory jurisdiction for binding settlement, such as the ICJ, the World Trade Organization (WTO), or the International Criminal Court (ICC).[28] States that make optional clause declarations recognizing the jurisdiction of the ICJ, for example, are more likely to strike peaceful agreements to resolve interstate disputes outside the courtroom.[29] Similarly, the WTO's dispute settlement procedures encourage states to resolve their trade disputes without adjudication.[30] And research on the effects of the ICC reveals both that domestic human rights practices improve significantly within states that ratify the ICC (e.g., less torture and fewer extrajudicial killings) and that ICC indictments reduce mass atrocities in civil wars.[31]

For optimists, delegating authority to international courts enhances the credibility of states' institutional commitments, promotes cooperation within multilateral settings, mobilizes compliance constituencies, and helps detect and sanction non-compliance.[32] It can also reduce power asymmetries (occasionally, even giving standing to non-state actors), facilitate domestically unpopular agreements (i.e., absolves leaders of responsibility for concessions), and resolve coordination problems that involve factual or conventional ambiguities (e.g., border disputes)—with the adjudicator's judgment serving as "cheap talk" that clarifies existing conventions.[33] Through the last of these traits, international court case law influences the future behavior of actors in world politics.[34]

[28] *Id.*

[29] Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004); SARA MCLAUGHLIN MITCHELL & EMILIA J. POWELL, DOMESTIC LAW GOES GLOBAL: LEGAL TRADITIONS AND INTERNATIONAL COURTS 217 (2011).

[30] Busch, *supra* note 5; Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L.J. 158 (2000); Marc L. Busch & Eric Reinhardt, *Three's a Crowd: Third Parties and WTO Dispute Settlement*, 58 WORLD POL. 446 (2006); CHRISTINA L. DAVIS, WHY ADJUDICATE?: ENFORCING TRADE RULES IN THE WTO (2012); Christina L. Davis & Sarah Blodgett Bermeo, *Who Files? Developing Country Participation in GATT/WTO Adjudication*, 71 J. POL. 1033 (2009); Julia Gray & Philip Potter, *Diplomacy and the Settlement of International Trade Disputes*, 64 J. CONFLICT RESOL. 1358 (2020); Eric Reinhardt, *Adjudication Without Enforcement in GATT Disputes*, 45 J. CONFLICT RESOL. 174 (2001); Gregory C. Shaffer, Michell Ratton Sanchez & Barbara Rosenberg, *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002). See also research on international investment arbitration, such as Emilie M. Hafner-Burton, Sergio Puig & David G. Victor, *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 YALE J. INT'L L. 279 (2017); Emilie M. Hafner-Burton, Zachary C. Steinert-Threlkeld & David G. Victor, *Predictability Versus Flexibility: Secrecy in International Investment Arbitration*, 68 WORLD. POL. 413 (2016).

[31] MITCHELL & POWELL, *supra* note 29; Benjamin J. Appel, *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?*, 62 J. CONFLICT RESOL. 3 (2018); Courtney Hillebrecht, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, 42 INT'L INTERACTIONS 616 (2016); KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011); Jacqueline R. McAllister, *Deterring Wartime Atrocities: Hard Lesson from the Yugoslav Tribunal*, 44 INT'L SEC. 84 (2020).

[32] Karen J. Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN & PAC. STUD. 51 (2003); Laurence R. Helfer, *Why States Create Independent Tribunals: A Theory of Constrained Independence*, 23 CONF. NEW POL. ECON. 253 (2006).

[33] *See* Ginsburg & McAdams, *supra* note 29.

[34] *See* Bilder, *supra* note 8; Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547 (2014).

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The debate's pessimists, on the other hand, offer four reasons to be skeptical of international courts. First, powerful states only cede authority to international courts reluctantly, instead preferring bilateral negotiations or arbitral tribunals that give them greater control. Second, states deliberately restrict courts' jurisdiction. They often elect either not to endorse optional compulsory jurisdiction clauses[35] or to place reservations on such clauses to preclude courts from hearing cases over highly salient issues. Third, international courts handle a small caseload, and these cases are costly to litigate.[36] Their effect will therefore be minimal and less efficient than other dispute settlement options. Finally, a multitude of courts with overlapping jurisdictions creates forum shopping behavior and (potentially) inconsistent legal decisions; mindful of this, states search for the forum in which they have the best chance of prevailing.[37]

Both sides of the above debate share a central problem: they evaluate the efficacy of international judicial bodies through their *direct* actions. Such an approach sidelines potential selection effects, even though scholars know those selection effects exist. Posner and Yoo, for example, note that "states might settle their disputes in the shadow of an effective court because they can anticipate its judgment and compliance by the loser."[38] Courts, in other words, exert not only direct effects but *indirect* effects as well. To fully comprehend judicialization, we must consider the shadow that courts cast and how this shadow influences interstate bargaining. If, as we argue, the commitments that states make under UNCLOS generally—or under Article 287 specifically—alter how they bargain over maritime issues, then we must theorize about how these commitments, and the judicial actors they reference, influence the bargaining process. That, in turn, demands that we consider the various alternatives available to states, including bilateral negotiations and non-binding third-party processes (such as mediation), *alongside* the judicial ones (e.g., arbitration or adjudication).[39]

III. A Theory of UNCLOS Commitments and Interstate Bargaining

This Part begins with an overview of the dispute settlement provisions of UNCLOS. It next considers how states manage maritime claims in the absence of judicialization. Finally, it explains how the commitments that states parties make under UNCLOS, including their optional declarations under Article 287, influence the settlement of maritime disputes—both in and out of court.

[35] As an illustration, only 37% of state members to the United Nations recognize the ICJ's optional clause for compulsory jurisdiction. Fewer than 25% of states parties to UNCLOS recognize ITLOS's jurisdiction under an optional Article 287 declaration (see Tables A4–5, online appendix).

[36] *See* Davis & Bermeo, *supra* note 30; Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Cal. L. Rev. 1 (2005); Áslaug Ásgeirsdóttir & Martin C. Steinwand, *Dispute Settlement Mechanisms and Maritime Boundary Settlements*, 10 Rev. Int'l Org. 119 (2015).

[37] Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)possible Solutions*, 42 Cornell Int'l L.J. 77 (2009).

[38] *See* Posner & Yoo, *supra* note 36, at 28.

[39] This is best done via a single issue area—in our case, the law of the sea. For a similar approach, see Mitchell & Powell, *supra* note 29; Busch & Reinhardt, *supra* note 30; Gray & Potter, *supra* note 30; Appel, *supra* note 31.

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A. An Overview of UNCLOS Dispute Settlement

States have engaged in maritime disputes for centuries. These claims initially hugged coastal states' shorelines.[40] As technology advanced, however, states asserted more numerous and expansive maritime entitlements.[41] Amidst the multiplying, diverging claims, states worked toward an international consensus on the rights and obligations of both coastal and non-coastal states within various maritime zones. These efforts culminated in UNCLOS in 1982.[42] UNCLOS achieved much. Most importantly for this study, it set sharp limits to the territorial (12nm), contiguous (24nm), and exclusive economic zones (200nm); developed coastal and non-coastal states' rights in these various zones; and established unique and comprehensive compulsory dispute settlement procedures.[43]

Part XV of UNCLOS sets forth the dispute settlement procedures that interest us here.[44] Article 279 reaffirms states' obligations under Articles 2(3), 33(1), and 51 of the UN Charter—namely, to resolve (maritime) disputes peacefully[45]—while Article 283 calls for an exchange of views among UNCLOS states parties involved in a maritime dispute.[46] Article 280 permits flexibility in the peaceful procedures states parties use to pursue a settlement.[47] Compulsory procedures, as Article 281 notes, kick in if states are unable to reach a settlement using non-compulsory methods.[48] Articles 281 and 282 recognize that the compulsory

[40] Ian Brownlie, Principles of Public International Law 180 (6th ed. 2003); Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 59 (2005).

[41] Although the three-mile limit was customary law, Scandinavia, Spain and Portugal, and Russia pursued four-, six-, and up to 100-mile limits. *Id. at* 60.

[42] Earlier conventions laid the groundwork for UNCLOS, but left many noteworthy ambiguities. For example, the Convention on the Territorial Sea and the Contiguous Zone (1958) sets no limit on the territorial sea—other than that it must logically be less than twelve miles (Article 24). Similarly, the Convention on the High Seas overlaps the high seas with the contiguous zone, something that UNCLOS later corrected (Article 86). Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 UNTS 205; Convention on the High Seas, Apr. 29, 1958, 450 UNTS 11; Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 UNTS 285; Convention on the Continental Shelf, Apr. 29, 1958, 499 UNTS 311; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 UNTS 397; *see also* Jane's Exclusive Economic Zones (Martin Pratt & Clive Schofield eds., 2d ed. 2000).

[43] *See* Klein, *supra* note 12, at 33; Donald R. Rothwell & Tim Stephens, The International Law of the Sea 439 (2010).

[44] *See* Klein, *supra* note 12; Rothwell & Stephens, *supra* note 43.

[45] "States Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1, of the Charter." United Nations Convention on the Law of the Sea, *supra* note 42, Art. 279.

[46] "1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement." *Id.* Art. 283.

[47] "Nothing in this Part impairs the right of any States Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice." *Id.* Art. 280.

[48] "1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure. 2. If the parties have also agreed on a time-limit, paragraph 1 applies only upon the expiration of that time-limit." *Id.* Art. 281.

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settlement process(es) envisioned under UNCLOS may arise through the obligations of states parties codified in other treaties;[49] it also clarifies that these non-UNCLOS obligations can take precedence over UNCLOS obligations.[50] Articles 284 to 286 then expand on the various conflict management tools available to states parties. Article 284, for example, discusses the use of conciliation,[51] and Article 286 explains the conditions under which the compulsory procedure applies.[52]

Article 287 describes the compulsory dispute settlement procedure in greater detail. It provides states with the option to specify one or more of four mechanisms for deciding their future maritime disputes: (1) ITLOS;[53] (2) the ICJ; (3) Annex VII arbitration; or (4) Annex VIII arbitration.[54] If a state does not make a declaration under Article 287, or if two disputing states label different settlement forums acceptable, then the compulsory settlement procedure defaults to arbitration under Annex VII of UNCLOS.[55] If a state party does make such a declaration, it must do so before a maritime dispute arises. That declaration can indicate both which compulsory forum(s) it finds acceptable for deciding its future disputes, and should it find more than one forum acceptable, rank ordering its preferences over those acceptable forums. States may list a preference for more than one forum at each rank order. Nicaragua, for example, finds the ICJ acceptable, but no other forums; Canada ranks two distinct forums as an acceptable first preference, ITLOS and Annex VII arbitration; and

[49] "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." *Id.* Art. 282.

[50] See the discussion of the *Southern Bluefin Tuna* and *Mox Plant* cases in KLEIN, *supra* note 12, which illustrates how dispute settlement under Part XV of UNCLOS intersects both with states parties' commitments under other treaties and their obligations with respect to Article 282.

[51] "1. 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. 2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure. 3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated. 4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure." United Nations Convention on the Law of the Sea, *supra* note 42, Art. 284.

[52] "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." *Id.* Art. 286. *See also* ROTHWELL & STEPHENS, *supra* note 43, at 445–46.

[53] Twenty-one judges comprise ITLOS, which has broader *ratione personae* jurisdiction than the ICJ because it recognizes the standing of international organizations. *See* Hugo Caminos, *The International Tribunal for the Law of the Sea: An Overview of Its Jurisdictional Procedure*, 5 L. & PRAC. INT'L CTS. & TRIBS. 13 (2006).

[54] Klein notes that "the appeal of arbitration may be found in the possibility of secrecy, party control over the composition of the tribunal and the questions addressed to the tribunal as well as the ability to avoid a third State's intervention in the proceedings." KLEIN, *supra* note 12, at 56. A precursor to the UNCLOS compulsory dispute settlement process appears in the Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes. That protocol, however, privileged the ICJ (as a default judicial body), remained underdeveloped, and as its title would suggest, was optional. Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, Apr. 29, 1958, 450 UNTS 169.

[55] *See* KLEIN, *supra* note 12, at 57.

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Chile and Argentina both prefer ITLOS to operate first and Annex VIII arbitration to operate second.[56]

Figure 1 summarizes the number and timing of states parties' Article 287 declarations, both in the aggregate and across the four possible forums. ITLOS receives the strongest endorsement among states making such declarations; 24 percent of states parties (or thirty-nine) have filed Article 287 declarations designating a preference for this tribunal.[57] The ICJ proves only slightly less popular, particularly as a first preference (for preference orderings, see Tables A4–5, online appendix). Unlike with ITLOS, however, some states parties prefer ICJ involvement as a second or third best option. Finally, a select few states parties have filed Article 287 declarations in favor of arbitration under Annex VII (ten) or Annex VIII (eleven). The number of declarations has increased over time, especially since UNCLOS entered into force in 1994 (see Figure 1).

The various compulsory dispute settlement bodies acquire jurisdiction in three ways. The first originates through UNCLOS itself:

> The ICJ, ITLOS, and Annex VII tribunals are all given broad jurisdiction under Article 288 to address (1) any dispute concerning the application or interpretation of the LOSC [Law of the Sea Convention] submitted consistently with Part XV and (2) any dispute concerning the interpretation or application of an international agreement related to the purposes of the LOSC submitted consistent with that agreement. . . . The jurisdiction of Annex VIII Special Arbitration . . . [deals] with disputes relating to (1) fisheries, (2) the protection and preservation of the marine environment, (3) marine scientific research, and (4) navigation, including pollution from vessels and by dumping.[58]

In addition to UNCLOS, several other treaties have compromissory clauses that recognize the jurisdiction of ITLOS or the compulsory procedures in Part XV of the UNCLOS treaty—for example, the 1995 Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, or the 2001 UN Educational, Scientific and Cultural Organization Convention on the Protection of the Underwater Cultural Heritage.[59] Finally, ITLOS and the ICJ can obtain jurisdiction via a special agreement among disputing states.[60]

[56] For the optional declarations under UNCLOS, see the specific website for the United Nations Convention on the Law of the Sea (1982), *at* https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

[57] We gather these data from the declarations that states parties to UNCLOS have made as of December 31, 2020. *Id.*

[58] *See* ROTHWELL & STEPHENS, *supra* note 43, at 449.

[59] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Art. 30, Aug. 4, 1995, 2167 UNTS 3, *at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&clang=_en; United Nations Educational, Scientific, and Cultural Organization, Records of the General Conference, Sess. 31, Vol. I: Resolutions, 50, 56 (2001), *at* https://unesdoc.unesco.org/ark:/48223/pf0000124687.page=56; *see also* Helmut Tuerk, *The Contribution of the International Tribunal for the Law of the Sea to International Law*, *in* MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 253 (2009).

[60] Caminos, *supra* note 53, at 19.

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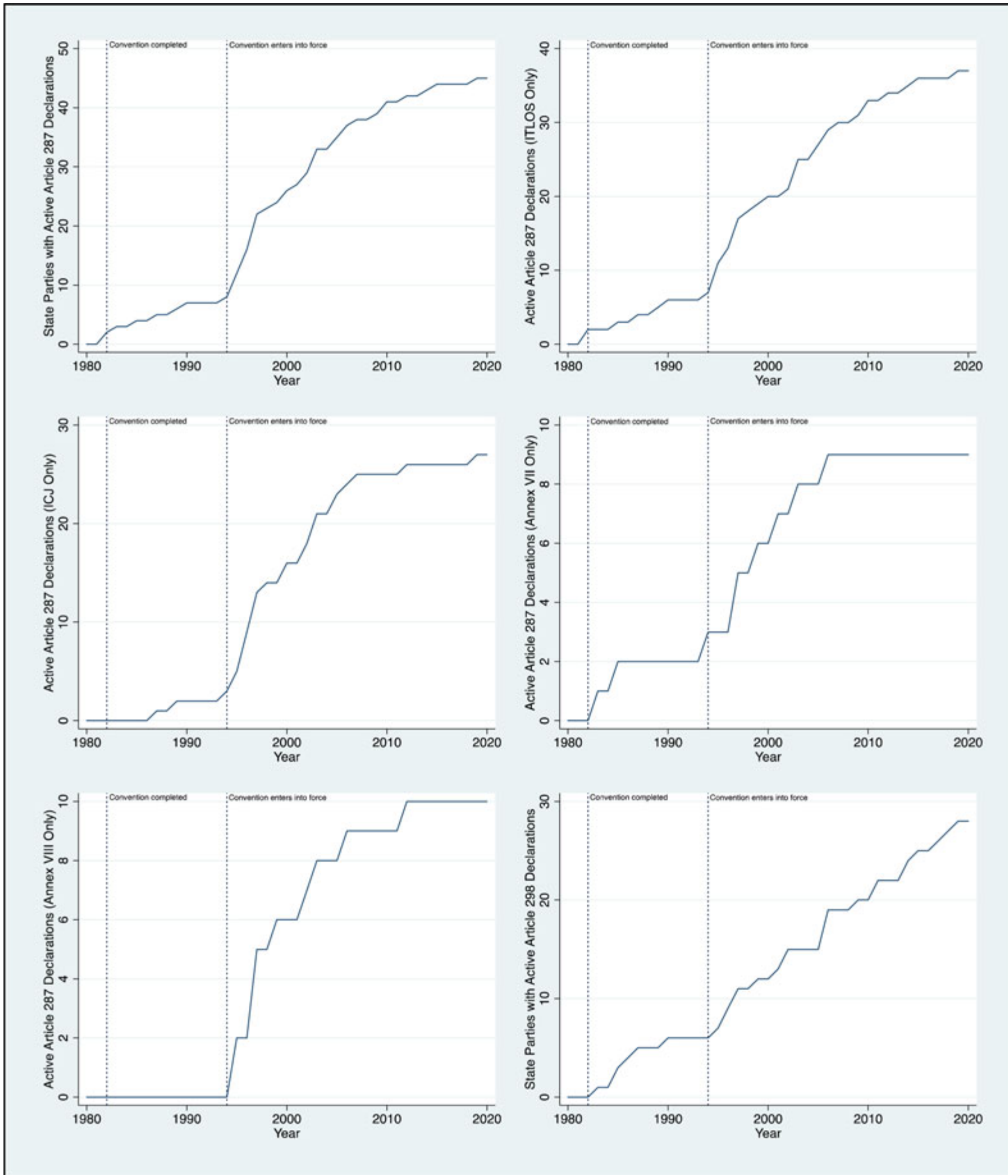

FIGURE 1. States Parties and Their Declarations Under UNCLOS

Notes: (1) The *Y*-axis varies in each panel to highlight trends. (2) "Annex VII Only" refers to the frequency count we present, not declarations' content. When states declare a preference for Annex VII (i.e., the default), they generally do so alongside other forums.

Article 297 of UNCLOS circumscribes the types of disputes that the tribunals can hear.[61] Article 298 takes these exemptions one step further. It permits states parties the option to carve out three types of disputes from these compulsory jurisdiction

[61] United Nations Convention on the Law of the Sea, *supra* note 42, Art. 297.

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procedures.[62] The first concerns maritime boundary cases—e.g., the delimitation of the territorial sea, EEZ, or continental shelf—as well as disputes involving historic bays and titles. Because delimitation disagreements frequently arise and, as with territorial disputes, states cede decision-making control over them reluctantly, such an exclusion is noteworthy. A second optional exemption covers disputes involving military activities. The South China Sea Arbitration tribunal, a dispute between the Philippines and China, referred to this exception, even though China did not specifically invoke it under Article 298(1)(b).[63] The third optional exemption provides that disputes being actively managed through the United Nations Security Council (UNSC) need not enter the compulsory process under UNCLOS, unless the UNSC stops managing them or funnels them into that process. Where a dispute is exempt from compulsory jurisdiction, UNCLOS encourages states to employ conciliation instead,[64] although Article 298 establishes a *ratione temporis* limitation to disputes that arise after UNCLOS enters into force.[65]

The last panel of Figure 1 displays the number of states parties that have registered Article 298 declarations during the period 1982 to 2020. The number of these declarations has steadily climbed over time; roughly forty states parties have active Article 298 declarations as of December 31, 2020.[66] Their declarations most commonly exempt boundaries and historic bays (73 percent), followed by military activities (59 percent) and disputes with active UNSC involvement (46 percent).

B. *Maritime Bargaining Without International Courts*

This Section considers how states would negotiate maritime disputes in the absence of UNCLOS and its judicial processes. We envision a dyadic bargaining situation, in which two states consider challenging the status quo distribution of maritime entitlements within a specific geographic area. Many states, especially neighboring countries, delimit overlapping maritime areas through consensual agreements. Argentina and Uruguay, for example, do so through the Treaty of the Río de la Plata and its Maritime Limit, adopted in 1973.[67] Our

[62] *Id.* Art. 298; Ted L. McDorman, *An Overview of International Fisheries Disputes and the International Tribunal for the Law of the Sea,* 40 Can. Y.B. Int'l L. 119 (2002); *see also* Klein, *supra* note 12, at 227.

[63] Lori Fisler Damrosch, *Military Activities in the UNCLOS Compulsory Dispute Settlement System: Implications of the South China Sea Arbitration for U.S. Ratification of UNCLOS*, 110 AJIL Unbound 273 (2016–2017).

[64] A single state party can initiate conciliation with another state party under Article 298, but only with regards to the first category of exceptions (para. 1(a); boundary delimitations maritime boundaries, or historic bays or titles). *See* United Nations Convention on the Law of the Sea, *supra* note 42, Art. 298, para. 1(a); Klein, *supra* note 12, at 257. This has occurred once to date, in the 2018 East Timor/Australia Timor Sea Conciliation (see Table A1, online appendix).

[65] Anne Sheehan, *Dispute Settlement Under UNCLOS: The Exclusion of Maritime Delimitation Disputes*, 24 U. Queensland L.J. 165, 183 (2005).

[66] Figure 1 suggests that fewer states parties make Article 298 declarations than we claim here. The time series data presented in the figure rely on the Correlates of War (COW) Project's State System Membership dataset, *supra* note 13. The COW Project's criteria for such membership causes it to omit micro-states (e.g., smaller Pacific or Caribbean islands). This explains the apparent discrepancy between the figure and text (see also Tables A4–5, online appendix).

[67] See Mitchell, *supra* note 17, at 645; Treaty Between Uruguay and Argentina Concerning the Rio de la Plata and the Corresponding Maritime Boundary (1973), *available at* https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/URY-ARG1973MB.PDF.

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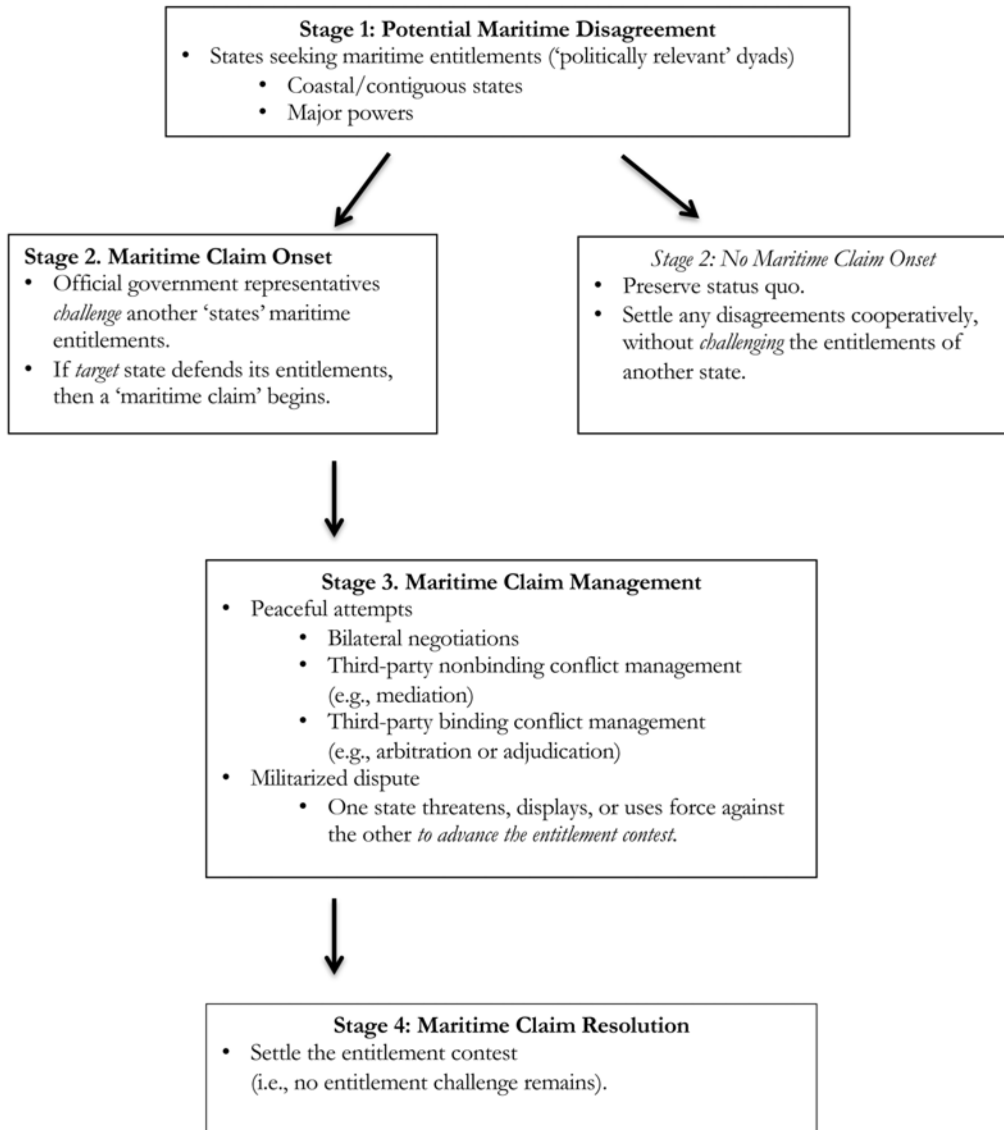

FIGURE 2. The Maritime Claim Process

analyses do not include these cases, but rather focus on bargaining situations in which one state diplomatically challenges the maritime claim that another state advances.[68]

Figure 2 illustrates the ICOW Project's process for identifying and coding these competing maritime claims. This process has four stages. Stage 1 identifies the potential universe of cases

[68] Our approach builds on the idea that we can learn more about disputes by studying the "naming," "blaming," and "claiming" processes, as well as how conflicts arise and progress through each stage. As we note earlier, our data focuses on interstate disputes; it does not consider non-controversial, law enforcement actions that states take against private citizens within or beyond their territorial seas. On the dispute origination process, see William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . ., 15 L. & SOC'Y REV. 631 (1980–81).

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in which a maritime dispute could theoretically and empirically arise—that is, instances in which a non-negligible *possibility* of a maritime dispute exists, even if the *probability* that such a dispute arises remains low. That universe relies on a list of dyads (or state-state pairs) that either (1) possess potentially overlapping maritime zones or (2) contain a major power[69] paired with a coastal state.[70]

In Stage 2, official representatives of one state (i.e., the challenger) explicitly challenge another state's (i.e., the target's) maritime entitlements; ICOW labels this behavior as a "maritime claim." If two states resolve their competing claims *without* issuing an official challenge to one another's entitlements (e.g., see the Argentina-Uruguay treaty, mentioned above), then no maritime claim exists. Only around 5 percent of all possible cases where a maritime diplomatic conflict could occur experience an actual maritime claim; the remainder do not. The maritime claims interest us here.

The competing jurisdictional claims of Canada and the United States over the Hecate Strait and the Dixon Entrance illustrate the onset of a maritime claim.[71] In 1903, the Alaska Boundary Tribunal established the "A-B line" that settled the Alaska-Canada boundary; yet differences remained about how to interpret the A-B line, specifically with respect to the maritime boundary.[72] Canada asserted that the A-B line constituted the international maritime boundary. The United States, in contrast, argued the boundary instead relied on the equidistance method, which would favor the United States by moving the boundary twelve miles south of the A-B line along most of its length.[73] Once Canada's official representatives explicitly challenged the status quo, and representatives of the United States affirmed their disagreement, an ICOW maritime claim began.[74]

[69] International relations researchers generally consider the major states in the post-World War II period to be the United States (1945–present), the United Kingdom (1945–present), France (1945–present), the Soviet Union/Russia (1945–present), China (1949–present), Germany (1990–present), and Japan (1949–present). See COW State System Membership dataset, *supra* note 13.

[70] Following the standard approach in quantitative international conflict studies, our unit of analysis is the dyad-year. A dyad-year consists of two states paired with a year—for example, United States-Canada 1970, United States-Canada 1971, and so on. The first criteria generates 93,047 dyad-years, while the second (contains major power) adds another 32,944 dyad-years. As Mitchell notes, *supra* note 17, ICOW researchers begin with state-state pairs that could have overlapping maritime zones, as identified through JANE'S EXCLUSIVE ECONOMIC ZONES, *supra* note 43. They then use various documents (e.g., newspapers, history books, journal articles, and government documents) to discover the cases in which diplomatic conflicts (or in the ICOW Project's terminology, "maritime claims") occurred. These cases include competing claims over maritime boundary delimitation, the legal bases for coastal states' claims (e.g., the status of rocks vs. islands, or historical rights), access to marine resources, and navigational issues.

[71] The Hecate Strait lies between the Canadian Queen Charlotte Islands and the British Columbia mainland. The Dixon Entrance lies between Queen Charlotte Island and the Alaskan Prince of Wales Island. For claim dates using the criteria in the discussion that follows, see Hensel, Mitchell, Sowers & Thyne, *supra* note 16.

[72] David Nowell, *The Canada-United States Dispute in Dixon Entrance: History, Current Issues and Prospects for Conflict Resolution*, INTERNATIONAL BOUNDARIES AND BOUNDARY CONFLICT RESOLUTION: PROCEEDINGS OF THE 1989 IBRU CONFERENCE (Carl Grundy-Warr ed., 1990).

[73] *See* McDorman, *supra* note 62, at 373.

[74] We do not develop a theory of maritime claim onset here, but rather examine how legalization and judicialization influence bargaining over existing maritime claims. Daniels and Mitchell, using a dataset with broader spatial coverage, directly examine the question of maritime claim onset. The authors show that diplomatic conflicts over maritime areas are more likely to occur between more powerful, more democratic, and more economically advanced states, as well as those with a history of militarized conflict. Dyads containing UNCLOS states parties are also less likely to experience the onset of a new maritime claim, a finding we confirm below. *See* Kelly Daniels & Sara McLaughlin Mitchell, *Bones of Democratic Contention: Maritime Disputes*, 20 INT'L AREA STUD. REV. 293, 296 (2017).

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Once a maritime claim begins, states can employ myriad peaceful and militarized tools to manage—and hopefully, settle—the claim (Stage 3). They most often negotiate bilaterally, but also regularly seek third-party assistance via mediation or adjudication. Canada and the United States, for example, took a separate maritime claim case to the ICJ (e.g., the Gulf of Maine).[75] Finally, states occasionally use military force to pursue a maritime claim. In the disagreement over the Hecate Strait and Dixon Entrance, for example, militarization occurred in 1991 when a U.S. Coast Guard vessel boarded and seized a Canadian fishing boat in disputed waters.[76]

Previous studies indicate that numerous factors determine the conditions under which states select among the various management options: the disputed issue's salience, the management history (e.g., whether and how often the involved states used militarized or peaceful tools to manage the issue previously), the relative capabilities (i.e., power) of the involved states, and whether states share membership in intergovernmental organizations.[77] A claim can stay in the management stage for an extended period; it leaves this stage only when the involved states conclusively resolve their diplomatic conflict over the maritime entitlements, whether through a peaceful agreement, the use of force, or one or both sides no longer pursuing a challenge (Stage 4).

In the absence of international courts or arbitral bodies, states use the various bargaining tools available on an ad hoc basis. Treaties and historical practices guide decision making, and customary law shapes the reasonableness of the claims advanced (e.g., Canada's claims about how to extend the A-B line).[78] Ad hoc bargaining has advantages, such as greater flexibility and control over the dispute's management and outcome; yet it can also be inefficient and produce inconsistent outcomes—problems that grow as the number of affected states rises.

The maritime regime displays such a trend. The post-World War II expansion of fishing fleets, trawling technology, and naval activities, along with ambiguities in the law of the sea, increased both the frequency and variability in states' maritime claims (e.g., the limits beyond the customary, three-mile territorial sea). When faced with such complexities, states often institutionalize conflict management, agreeing to common rules and dispute resolution processes. The standardization required for institutionalization reduces the onset of new disagreements; common guidelines and parameters set focal points, thereby discouraging other proposals from arising. The dispute resolution process then funnels any disagreements that arise into a predetermined process, the outcome of which reinforces standardization.

Negotiations over maritime areas change significantly after institutionalization. In its absence, powerful states hold strong advantages in dispute management; they can strongarm adversaries when negotiating bilaterally, selecting a mediator, or determining the composition and rules of ad hoc arbitration panels.[79] For this reason, powerful states reluctantly agree to the judicial settlement of maritime claims when facing weaker opponents; courts promise to

[75] *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, *supra* note 20.

[76] Facts on File, 8/1/1991. This is not a non-controversial law enforcement action because the incident occurs in disputed waters.

[77] *See* Hensel, Mitchell, Sowers & Thyne, *supra* note 16; Hensel & Mitchell, *supra* note 16.

[78] *See* Goldsmith & Posner, *supra* note 40, at 23.

[79] *See* Posner & Yoo, *supra* note 36.

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level the playing field between the strong and the weak.[80] Nevertheless, strong states see advantages in institutionalization, despite the possibility that it erodes their bargaining advantage. Customary international law evolves slowly. To lock in their preferences, major powers benefit from embedding those preferences in institutions like UNCLOS. They accept weaker positions in individual cases in exchange for the prospect of achieving longer-term foreign policy goals.

C. Legalization: UNCLOS Commitments and Maritime Claim Management

At the time UNCLOS negotiations began, coastal states had advanced incongruous claims to maritime areas, and the international community lacked a strong consensus about states' rights and obligations regarding these entitlements. Two states negotiating a maritime boundary, for example, found little guidance in customary law about how to establish a baseline from which to measure the boundary or what general principles acceptably divide maritime areas. Earlier UN Conferences addressed some of the ambiguities and laid the groundwork for UNCLOS, which codifies a far-reaching, legalized bargain—one that encompasses numerous issues related to the world's oceans, and sets forth a balance of rights and obligations for both states parties and third parties.

Legalization of maritime law affects interstate bargaining in three potential ways.[81] First, it reduces the likelihood that maritime claims arise (Hypothesis 1). When a state ratifies UNCLOS, it accepts the convention's delimitation standards, definitions, rights, and obligations.[82] This coordination, around a limited set of focal points, reduces the likelihood that a state will raise new maritime claims. The likelihood of such claims will be especially low if it questions entitlements vis-à-vis another state party to UNCLOS, since both of the involved states will then be constrained by the convention's rules.[83]

Figure 3 illustrates this expected pattern. The average number of maritime claims per state increased from 1900 to 1982, dropped somewhat between 1982 and 1994—after UNCLOS opened for signature, but had not yet entered into force—and then declined rapidly after 1994, when the convention entered into force.[84] Because states parties broadly agree about one another's rights and obligations, as well as how to define them, they have less need to

[80] *See* Bilder, *supra* note 8.

[81] For a foundational treatment of legalization, see Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

[82] Although the obligation, strictly speaking, only becomes legal after ratification (i.e., once a state party), signing a convention indicates a non-negligible acceptance of the standards a convention contains. For this reason, we explore the effects of both signing and becoming a state party to (i.e., ratifying) UNCLOS. If signing UNCLOS does not alter state behavior, then the empirical analysis will indicate that.

[83] A focal point solves a coordination problem because it allows bargaining actors' expectations to converge; it often takes the form of a conspicuous option among many alternatives (e.g., a convention) and "can defend itself with the argument 'If not here, where?'" *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 70 (1960). Through its ability to act as a focal point, the UNCLOS regime's existence may also affect states not parties, especially given the large number of states parties to UNCLOS (see Table A4, online appendix). Our empirical models consider this possibility by including a systemic measure of UNCLOS (i.e., whether UNCLOS exists or has entered into force).

[84] In our empirical analyses, however, we find that signing (but not yet ratifying) UNCLOS influences the onset and management of dyadic claims more so than ratifying UNCLOS. In other words, the existence of the treaty—at a systemic level—changed most states' dyadic diplomatic behavior even before the treaty legally entered into force.

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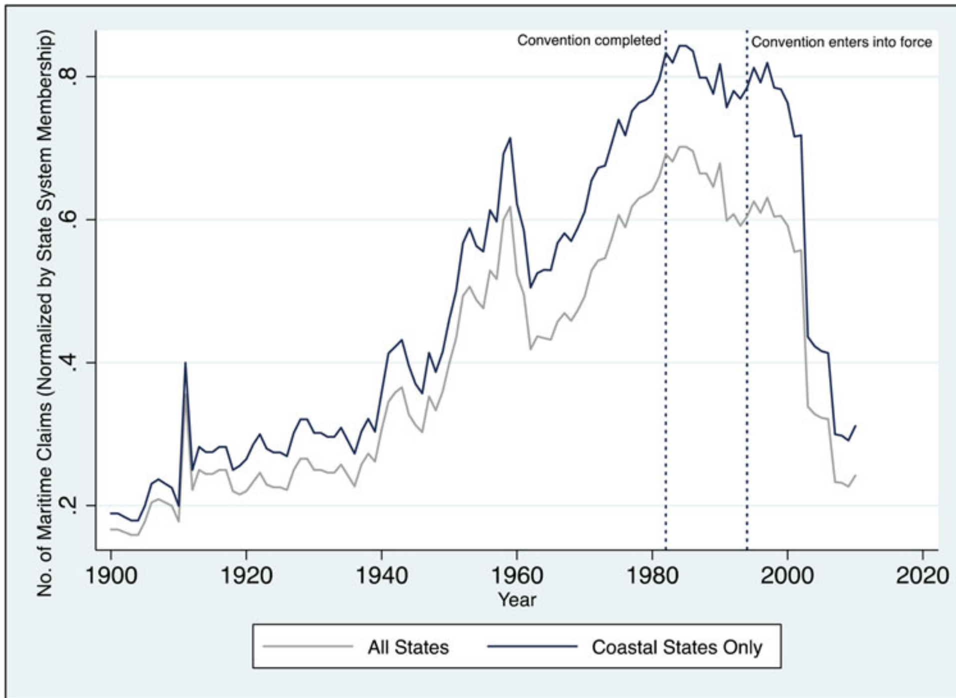

FIGURE 3. Issue Correlates of War (ICOW) Maritime Claims, 1900–2010

challenge the status quo. Claims therefore begin to fall once consensus emerges and continue to fall as that consensus gains strength.[85]

Second, legalization through UNCLOS reduces the likelihood that states use force (Hypothesis 2). Articles 279 and 280, along with state commitments under the UN Charter, create an obligation to manage disagreements peacefully. Moreover, with respect to maritime claims, UNCLOS facilitates interstate coordination, aligns state expectations, generates information about the competing claims (including viable alternatives), lengthens the shadow of the future, and increases the reputation costs for acting contrary to the consensus it embodies. Through these various mechanisms, we expect a state party to UNCLOS to eschew the use of military force, particularly when managing its maritime claims. The aversion to force will be strongest in claims involving two states parties, since both face the incentives noted above (i.e., decreased benefits and increased costs to using force). In this way, UNCLOS exerts an indirect effect on interstate bargaining, similar to international institutions generally or the other instruments of peaceful dispute management found in multilateral treaties.[86]

[85] For additional evidence supporting this argument, see Stephen C. Nemeth, Sara McLaughlin Mitchell, Elizabeth A. Nyman & Paul R. Hensel, *Ruling the Sea: Managing Maritime Conflicts Through UNCLOS and Exclusive Economic Zones*, 40 INT'L INTERACTIONS 711 (2014).

[86] On institutions, see KEOHANE, *supra* note 9. On organizations, see Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998); Sara McLaughlin Mitchell & Paul R. Hensel, *International Institutions and Compliance with Agreements*, 51 AM. J. POL. SCI. 721 (2007).

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Finally, legalization encourages states parties to employ binding dispute settlement mechanisms to manage their maritime disputes if other methods fail (Hypothesis 3). Articles 281 to 287 supply these commitments. The logic underlying this hypothesis mirrors that discussed above: when preferences diverge and UNCLOS cannot immediately converge them (i.e., a maritime claim exists, perhaps over a matter of lingering ambiguity), states parties have clearer expectations about how to proceed. Above all, they plan to use peaceful techniques and anticipate the other will do the same. If they fail to resolve the divergence on their own (i.e., through negotiations), a community of actors and institutions stands ready to assist them.[87] That community includes mediators, as well as judicial and arbitral bodies—the latter being especially valuable if the claimants seek to set a legal precedent for the wider international community.

D. Judicialization: International Courts and Maritime Conflict Management

The *judicialization* of the law of the sea—i.e., the delegation of authority to international courts and arbitral bodies to define the meaning of UNCLOS[88]—also influences state behavior within the maritime regime. States parties to UNCLOS agree to compulsory judicial processes if other peaceful tools do not resolve their maritime claim. Beyond this general commitment, and the default procedures that accompany it (i.e., arbitration under Annex VII of the convention), states parties can make optional declarations about the judicial bodies they prefer to hear cases involving their future maritime claims. The vast majority of these declarations select ITLOS or the ICJ as the preferred body (see Figure 1).

Article 287 declarations function as signals that can influence bargaining. Under UNCLOS, Article 287 declarations provide a mechanism through which a state party signals its consent to use one or more judicial or arbitral forums to manage its maritime claims. When two states parties make identical declarations—for example, both indicate a preference only for ITLOS —the likelihood rises that the specified body will address their future disputes. As the "threat to go to court" gains credibility, bargaining behavior changes.

Before outlining the theoretical mechanism in greater detail, we digress briefly to discuss how judicialization under UNCLOS advances—both through case law and the prioritization of binding settlement in the convention's overall approach to maritime claim management. Case law offers one pathway through which judicialization deepens. Through case law, courts clarify legal ambiguities, demonstrate their authority, and build a record of how they decide the disputes that come before them. Several such rulings appeared well before states even contemplated UNCLOS. A 1909 Permanent Court of Arbitration (PCA) judgment, for example, fixed the disputed maritime boundary between Norway and Sweden (the *Grisbådarna* case), relying on Sweden's historical claims and lobster fishing activity in the disputed area.[89] In 1951, the ICJ likewise resolved a dispute between the United Kingdom and Norway over

[87] Evidence supports this position. For example, as two states each belong to a greater number of "peace brokering intergovernmental organizations," the likelihood rises that they experience peaceful conflict management in their territorial dispute, particularly management that involves a third party. *See* Megan Shannon, *Preventing War and Providing the Peace International Organizations and the Management of Territorial Disputes*, 26 CONFLICT MGMT. & PEACE SCI. 144 (2009).

[88] *See* Alter, *supra* note 24, at 64.

[89] The Grisbådarna Case (Nor. v. Swe.), Award of the Tribunal (Perm Ct. Arb. Oct. 23, 1909), *available at* http://www.worldcourts.com/pca/eng/decisions/1909.10.23_Norway_v_Sweden.pdf.

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the latter's earlier claims to fishing zones that the British considered to be inconsistent with international law.[90] Similar judgments continued after the United Nations Conference(s) on the Law of the Sea began in 1958—and accelerated after UNCLOS opened for signature in 1982. To date, international judicial bodies have heard over seventy cases related to maritime issues (Tables A1–3, online Appendix), creating a rich body of case law on the law of the sea.

Case law casts a shadow over states' out-of-court behavior in two distinct ways. First, it reduces uncertainty so that states bargain more efficiently and effectively.[91] Prior to UNCLOS, a broad range of bargaining outcomes existed and seemed plausible (i.e., competing focal points existed). Indeed, states claimed a wide range of entitlement limits (three to two hundred nautical miles) precisely because no obvious focal point existed without further interstate coordination.[92] Such a situation heightens uncertainty. As greater uncertainty infuses the bargaining process, the transaction costs of negotiation and litigation rise, advantaging those actors better able to bear the costs, such as major powers, or those whose positions more closely align with customary international law. Uncertainty also increases the likelihood that states will misestimate their respective legal positions, thereby prolonging or prematurely ending disagreements, altering the number of litigated cases, or changing the incentives for out-of-court settlement.

International courts confront uncertainty by hearing cases and generating case law that establishes or clarifies definitions, principles, rights, and obligations.[93] Courts facilitate, in other words, a common understanding of the facts (e.g., what constitutes an island) and how to choose among the multiple available focal points.[94] Indeed, when legal focal points emerge through a judicialized process, states use them to press for a peaceful resolution to their dispute, especially if those focal points legally advantage their substantive interests.[95]

Courts also identify the party that violated the law and explain how and why the behavior constitutes a violation. Reducing uncertainty about what constitutes an illegal action increases the reputational costs for reneging on judgments and deters states that might behave similarly in the future. In so doing, ITLOS and the ICJ not only uphold the legal rules that comprise

[90] Fisheries Case (UK v. Nor.), 1951 ICJ Rep. 116 (Dec. 18), *available at* http://www.icj-cij.org/docket/files/5/1811.pdf.

[91] As Schultz notes, unresolved territorial disputes create other types of uncertainty, such as a lack of clear guidance about property rights for businesses and investors. This uncertainty curtails business dealings, including foreign direct investment. Many unresolved maritime claims have a similar effect, especially when they involve the extraction of natural resources (e.g., disputes in the South China Sea and Gulf of Tonkin). In such cases, ambiguities concerning sovereignty complicate negotiations between the disputing states and private companies (e.g., Suriname-Guyana), thereby stalling economic development. *See* Kenneth A. Schultz, *Borders, Conflict, and Trade*, 18 ANN. REV. POL. SCI. 125 (2015); Beth A. Simmons, *Trade and Territorial Conflict in Latin America: International Borders as Institutions*, *in* TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION 251 (Miles Kahler & Barbara Walter eds., 2006); Hoon Lee & Sara McLaughlin Mitchell, *Foreign Direct Investment and Territorial Disputes*, 56 J. CONFLICT RESOL. 675 (2012).

[92] *See* GOLDSMITH & POSNER, *supra* note 40.

[93] International courts like the ICJ do not follow the doctrine of *stare decisis.* Judges may consider previous rulings when hearing cases, but they are not legally bound by their (or other) court's decisions. Nevertheless, most international courts consider previous judgments and rarely contradict the logic of their (or other) court's rulings. A norm of common law adjudication consequently exists in the international system. *See* CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007).

[94] *See* Mnookin & Kornhauser, *supra* note 2; Ginsburg & McAdams, *supra* note 29.

[95] Paul K. Huth, Sarah E. Croco & Benjamin J. Appel, *Bringing Law to the Table: Legal Claims, Focal Points, and the Settlement of Territorial Disputes Since 1945*, 57 AM. J. POL. SCI. 90 (2013).

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UNCLOS (i.e., legalization), but also create additional focal points on which future disputants' expectations can converge (i.e., judicialization).[96] Importantly, these gaps are not trivial, as the case law on the law of the sea demonstrates.

Case law also has a second consequence for out-of-court bargaining: it enhances states' ability to predict how a court will likely decide a future dispute. "States will prefer to submit matters to a tribunal or court when they can reasonably predict how a matter will be handled based on previous decisions."[97] Through a court's decisions, (would-be) litigants peer into that court's reasoning—to understand not only the outcome (i.e., judgment), but also how the court reached it. This helps the (would-be) litigants bargain more successfully *outside* the courtroom, whether before filing a case or as a court considers it. Such an effect only exists, however, if the potential litigants know the court that will hear their case—a more likely circumstance within the maritime regime when each of the involved states has declared a preference for the same judicial forum through an Article 287 declaration. We develop this argument further below.

The *North Sea Continental Shelf* cases highlight case law's benefits.[98] The dispute arose between West Germany, Denmark, and the Netherlands after the discovery of oil in the North Sea in the 1960s. The Convention on the Continental Shelf, negotiated during the first United Nations Convention on the Law of the Sea, could not prevent such a disagreement, as it left uncertainty about how delimitation occurs in overlapping zones with concave coastlines.[99] Germany—a non-party to the convention—pushed for equity, rather than the convention's standard of equidistance from the shoreline, because it would receive little of the continental shelf under an equidistance rule. The ICJ determined that the equity principle applied. That decision paved the way for both a negotiated settlement between the involved states, additional interstate negotiations on the topic, and further articulation of delimitation rules in the case decisions that followed. It also informed (would-be) litigants about how the ICJ would reason in and decide similar, future cases.

UNCLOS goes beyond the ad hoc judicialization of specific cases, by placing adjudication and arbitration at the center of maritime dispute management. States admittedly have a wide range of non-peaceful (i.e., military) and peaceful tools available when managing maritime disputes, but the threat of court looms in the background. We use the term "threat"

[96] Gilligan, et al. argue that strong courts could reduce states' incentives to negotiate and to reveal information in the pre-trial stage, thereby deleteriously affecting bargaining. Given the highly legalized character of UNCLOS, we believe judicialization further strengthens the regime by clarifying ambiguities that the treaty did not initially address. A typical maritime dispute case adjudicated through the ICJ, for example, reconciles (a) competing focal point(s) on matters that UNCLOS left unclear (up to the time of the case). The setting of or selecting among these focal points (i.e., case law) then benefits both states parties and non-parties alike. Michael Gilligan, Leslie Johns & B. Peter Rosendorff, *Strengthening International Courts and the Early Settlement of Disputes*, 54 J. CONFLICT RESOL. 5 (2010).

[97] *See* KLEIN, *supra* note 12, at 59.

[98] *See* Ginsburg & McAdams, *supra* note 29, at 1319–22; *see also* North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 ICJ Rep. 3 (Feb. 20), *available at* https://www.icj-cij.org/public/files/case-related/52/052-19690220-JUD-01-00-EN.pdf.

[99] *See* Convention on the Continental Shelf, *supra* note 42, Art. 6. To complicate matters, Article 12 of the convention allows states parties to make reservations on, *inter alia*, Article 6, thereby exempting them from its provisions. Nevertheless, Germany was not a state party, so the legal question engaged whether the equidistance principle contained in Article 6 was part of customary international law. The court determined it was not. For further discussion, see L. D. M. Nelson, *The* North Sea Continental Shelf Cases *and Law-Making Conventions*, 35 MOD. L. REV. 52 (1972); *North Sea Continental Shelf Cases*, *supra* note 98.

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purposively here; although states frequently find court involvement beneficial, as when a state leader relies on a court for political cover against a domestically unpopular decision, judicial processes carry relatively greater costs than the alternative, peaceful tools available.[100] To go to court, states invest significant resources—in researching claims, writing legal documents, making arguments before the court, and maintaining the status quo (i.e., not prejudicing the case before the court); indeed, most court cases continue for multiple years. These costs incentivize rational states generally, as well as key subsets of particular states (e.g., weaker states, who might not be able to bear the costs), to avoid the courts if they can.[101]

Even if states can afford to bear the transaction costs associated with litigation, they still often prefer to avoid it. States hold little influence over the judges involved in deciding a case, the established rules and procedures for hearing a case, the existing case law, and—as a result—the outcomes of judicial proceedings. Political leaders therefore seriously consider whether the state can obtain a better outcome without the court's involvement. Without invoking a binding process, the involved states need not accept a settlement against their individual wills (i.e., comply with an unpopular or undesirable judgment[102]); without legal principles and precedent bounding the settlement terms they consider, they gain flexibility in settlement design; and without a legal procedure to govern the settlement process, it moves at their desired pace—no slower, no faster.[103]

Two additional conditions enhance the desire to avoid a binding settlement. First, as an issue's salience rises, states increasingly hesitate to permit court involvement. States expect a court to decide an issue with finality. For relatively more salient issues—e.g., maritime claims, which touch on issues of sovereignty, state security, and economic livelihood—concessions carry greater costs, whether material or psychological. States may therefore prefer no settlement to one they find suboptimal, especially if the latter might be forced upon them. Second, as the power disparity between the disputing states grows, the more powerful state will forestall court involvement. A more powerful state holds a bargaining advantage outside the courtroom. It also faces audience costs (i.e., domestic backlash) if it loses to a weaker adversary. After the ICJ awarded the Bakassi Peninsula to Cameroon, for example, Nigerians in the area protested against the judgment. The Nigerian government repressed the protesters to bring the situation back under control. Meanwhile, multilateral pressure pushed Nigeria—the stronger state—to comply with the court's judgment.[104]

[100] Mnookin & Kornhauser, *supra* note 2, refer to these as transaction costs; they can be financial, emotional, or psychological. For a deeper comparison among conflict management tools, see Greig, Owsiak & Diehl, *supra* note 3. On judicial processes as political cover, see Todd L. Allee & Paul K. Huth, *Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover*, 100 Am. Pol. Sci. Rev. 219 (2006).

[101] According to Mitchell & Owsiak, the average ICJ case—from initial application to judgment—unfolds over approximately four years. *See* Sara McLaughlin Mitchell & Andrew P. Owsiak, *The International Court of Justice*, *in* The Routledge Handbook of Judicial Behavior 445, 452 (Robert M. Howard & Kirk A. Randazzo eds., 2017). Davis & Bermeo, *supra* note 30, similarly demonstrate that high start-up costs prevent less powerful states from using the GATT/WTO judicial process. On international legal traditions and international courts, see Mitchell & Powell, *supra* note 29.

[102] Compliance rates with international courts are high, and multilateral pressures often enforce such compliance. States should therefore expect to comply with a court judgment they receive, or incur significant reputation costs from non-compliance. See Mitchell & Hensel, *supra* note 86.

[103] Stephen E. Gent & Megan Shannon, *Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind*, 55 J. Conflict Resol. 710 (2011).

[104] Leslie Johns, *Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication*, 56 J. Conflict Resol. 257 (2012).

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To minimize the various litigation costs outlined above, states prefer to reach agreement outside the courtroom.[105] Judicial and arbitral bodies under UNCLOS consequently influence the management of maritime claims in several ways. First, they offer a relatively costly tool as a method of last resort. That, in turn, encourages potential litigants to pursue other forms of peaceful, non-binding conflict management that allow them to retain greater control over the management of highly salient foreign policy issues and to avoid the costs of litigation. Potential litigants eschew violence, not only because UNCLOS discourages it, but also because they no longer need to use force as the method of last resort. The courts play that role.[106]

A further judicialization mechanism arises through the signals that states can send via the process that UNCLOS creates. Besides establishing a new court to hear maritime disputes, Article 287 allows states to make optional declarations about the judicial bodies they prefer to hear any of their future maritime cases. These declarations represent an additional commitment to judicial processes under UNCLOS. We note though that only a minority of states parties (29 percent) to UNCLOS make such declarations.. This raises a puzzle. If sending signals about preferred judicial forums improves the chances for peaceful resolution, why do all states parties not make a declaration?

We argue that states use Article 287 declarations to signal their commitment to judicial processes—at least with respect to their maritime claims. Militarized interstate conflict has high costs (e.g., armaments, personnel, resources, deployments, or fatalities), so states have an incentive to use less costly, peaceful methods to manage their disputes instead. At the same time, they must avoid being unprepared for a military campaign that an adversary launches. This leads to parallel policies: a desire for diplomacy and a preparation for military conflict. In an anarchic system, adversaries find these latter preparations suspicious—not only for the policy dissonance, but also because they worry the other side holds a hidden intention to launch a surprise attack that will victimize them. Leaders consequently face a challenge—namely, how to convince others that their state desires peaceful conflict management, regardless of any ongoing military preparations or the incentive to use the military if the opportunity presents itself.

Ratification of UNCLOS offers a way to signal more benign intentions. Ratification indicates that a state generally accepts the peaceful management of maritime claims. Optional declarations under Article 287, however, act as an additional signaling device. Rather than simply accept the default compulsory procedure (i.e., Annex VII arbitration), declaring states commit to (a) particular, additional judicial forum(s) and push the default into the background. These additional forums typically give the declaring state *less* control over its dispute's management. In arbitration (e.g., the default process, under Annex VII), disputing states retain the ability to appoint (or agree upon) arbiters (e.g., at the PCA), determine logistics (e.g., where arbitration occurs), and (perhaps) limit the scope of the arbiters' decision. The arbiters, in turn, control the process once set in motion. Thus, through appointing the arbiters, disputing states exercise some indirect control over their dispute's management. Adjudication removes that control. When, therefore, a state declares ITLOS or the ICJ as an acceptable forum to decide its maritime claims (under Article 287), a circumstance that covers the majority of declarations, it also indicates a willingness to cede greater control to judicial bodies than required under UNCLOS.

[105] Songying Fang, *The Strategic Use of International Institutions in Dispute Settlement*, 5 Q. J. Pol. Sci. 107 (2010).

[106] On the term "last resort," see comments at note 15 *supra*.

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Declaring states also signal *which* judicial body will likely manage a dispute that arises. From a case law perspective, that signal perhaps carries less weight; the maritime regime, including its various judicial bodies, likely integrates case law across disparate judicial bodies. Nevertheless, uncertainty declines in the face of such a signal. An adversary involved in a maritime claim knows exactly which judicial forum a declaring state will try to use. If two states each declare a preference for the same judicial forum, the threat of that court's involvement rises. Being better able to anticipate the forum's involvement—as well as read the potential effects of that forum's composition, rules, procedures, and judgments, alongside case law generally—states anticipate how the court will rule. That anticipation incentivizes and guides bargaining outside the courtroom (i.e., a judicialization effect), above and behind what a general commitment to UNCLOS provides (i.e., a legalization effect).[107]

We expect that Article 287 declarations alter interstate bargaining in three ways. First, they reduce the likelihood that two states experience maritime claims (Hypothesis 4). Identifying judicial bodies as "acceptable" necessarily implies that one embraces their involvement, reasoning, and case law. That case law clarifies ambiguities in maritime law, causing many (potential) sources of dispute to disappear—not merely for the litigants involved, but for future, potential litigants as well.

Second, Article 287 declarations decrease the use of military force (Hypothesis 5). In the international system, states often use military force as a measure of last resort, when other, less costly options prove insufficient. An Article 287 declaration not only reinforces (alongside joining UNCLOS) a general desire to use judicial bodies for this purpose instead, but also demonstrates a greater willingness to cede control over dispute management (e.g., swapping Annex VII arbitration for adjudication via ITLOS or the ICJ). This does not mean that states *never* use military force; rather, its use declines because a state has greater information about its adversary's type—namely, how strongly it prefers peaceful conflict management to force.

Finally, these optional declarations increase the use of non-binding conflict management tools (e.g., negotiation and mediation; Hypothesis 6). As we note above, because Article 287 declarations more credibly threaten the involvement of a specific judicial body—and one that requires them to cede greater control over their dispute's management—they provide a state with greater information about the adversary's type. At one level, this information concerns a preference for military versus peaceful management tools (see above). At another level, though, it concerns preferences over specific peaceful management tools.[108] A declaring state demonstrates a willingness to cede greater control to the courts and to invoke a specific court for that purpose. The threat of that court's involvement therefore rises, transforming a vaguer commitment with greater control into a more concrete commitment with less control. To avoid that possibility and the costs that accompany it, the involved states more frequently employ negotiation and mediation in the courts' shadows—much as prosecutors and defense attorneys reach plea bargains in domestic courts, given the credible threat of a jury trial.

[107] Research on the ICJ uncovers a similar dynamic to the one argued here. If two states have each made an optional declaration that recognizes the ICJ's jurisdiction, they are more likely to strike and comply with agreements to resolve their ongoing diplomatic conflicts. *See* MITCHELL & POWELL, *supra* note 29.

[108] This implies that states who make Article 287 declarations should (try to) use the forums specified in their declarations, if they go to court. For this reason, we do not find the growing use of Annex VII arbitration worrisome for our argument—unless alternate judicial bodies were acceptable and preferable to the default procedure for both disputants. Future research might explore this further as the ICOW maritime claims dataset expands.

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We expect the signal—and therefore, the above effects—to appear most prominently in situations where two states have made an *ex ante* Article 287 declaration in support of the same judicial body (e.g., both find the ICJ acceptable and prefer its involvement most). If two declaring states instead recognize different forums (i.e., a weaker judicialization signal)—or one or more state in the pair makes no Article 287 declaration (i.e., a weaker judicialization signal still)—then the default arbitration procedure applies (under Annex VII of UNCLOS). That default procedure signals a commitment to the compulsory settlement of maritime claims, too, meaning that states parties that make no Article 287 declaration should behave differently than states that have not ratified UNCLOS. Because the signal is weaker in such cases, however, we expect such states to bargain in the shadow of the courts less often than those with Article 287 declarations.

Data on maritime claim management supplies prima facie evidence consistent with our argument about the signaling effect of Article 287 declarations (see Table B12, online Appendix). In a given year, the probability that states use bilateral negotiations to address a maritime claim is 78 percent higher for states parties to UNCLOS with Article 287 declarations (probability = 0.16) than those without Article 287 declarations (probability = 0.09). No obvious alternative explains why the subset of declaring states would behave in such a way. We therefore conclude that it is plausible for Article 287 declarations to send signals that alter out-of-court bargaining behavior.

IV. Research Design

We test our theoretical argument empirically through three distinct logistic regression analyses, which examine the effects of UNCLOS legalization and judicialization from numerous angles. These analyses retain the key independent variables of interest, but vary with respect to the dependent variable, unit of analysis, and temporal domain.

The first analysis studies the effect of UNCLOS on *ICOW maritime claims* within politically relevant dyad-years during the period 1970–2001 ($n = 23{,}737$ dyad-years). A dyad-year takes snapshots of state-state pairings during each year of their joint existence (e.g., United States-Canada 1920, United States-Canada 1921, and so on). Politically relevant dyads capture only the state-state pairings in which members are (1) land contiguous, (2) separated by up to 250 miles of water, or (3) include at least one major state.[109] A *maritime claim* occurs when official representatives of two governments diplomatically contest the sovereignty or usage of a given maritime space.[110] As noted earlier, these claims constitute the population of maritime cases that *could* go to court. Our analyses employ the ICOW dataset on maritime claims in the Western Hemisphere, Europe, and the Middle East from 1900–2001, which records 143 dyadic maritime claims.[111]

[109] This definition of politically relevant dyads has a long history in quantitative research on international conflict. *See* Douglas Lemke & William Reed, *The Relevance of Politically Relevant Dyads*, 45 J. Conflict Resol. 126 (2001). On major states, see note 69 *supra*. *See also* COW State System Membership dataset, *supra* note 13.

[110] *See* Hensel, Mitchell, Sowers & Thyne, *supra* note 16.

[111] Although not yet available, preliminary estimates from the remaining regions suggest that 270 total dyadic maritime claims existed globally from 1900–2001. *See* Hensel & Mitchell, *supra* note 16; Mitchell, *supra* note 17. UNCLOS provisions articulate coastal states' rights more clearly than the guidelines for delimiting overlapping zones. In previous work, we argue that states manage the delimitation of overlapping maritime boundary cases in ways similar to traditional territorial (i.e., boundary) issues, and that states therefore find EEZ maritime claims,

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The second analysis examines the effect of UNCLOS on dyadic interstate conflict. It uses the politically relevant dyad-year during the period 1920–2001 as the unit of analysis ($n =$ 70,511 dyad-years). We measure interstate conflict through the Correlates of War (COW) Project's Militarized Interstate Dispute (MID) dataset.[112] A MID occurs when one state threatens, displays, or uses force against another state. "Onset" dichotomously captures the dyad-year in which a MID begins (2.4 percent of the dyad-years).

The final analysis considers the effect of UNCLOS on the management of ICOW maritime claims. The unit of analysis here shifts to the ICOW claim-dyad-year during the period 1900–2001. For example, the U.S.-Canada claim involving the Hecate Strait and Dixon Entrance extends from 1920–2001 in the dataset (and remains unresolved as of the last year of the dataset). Thus, this claim adds eighty-two claim-dyad-years to the analysis. As noted earlier, claimants can use many peaceful techniques to manage their claim. A dichotomous variable first captures whether dyad members use any *peaceful settlement attempt* toward this goal in a given claim-dyad-year, including *binding* third-party assistance (e.g., adjudication or arbitration), *non-binding* third-party assistance (e.g., mediation, good offices, or conciliation), and *bilateral negotiations*. After this initial, aggregate analysis, we then study each technique subcomponent separately to understand the potential judicialization effects of UNCLOS better. Finally, because states can also use *military force* to manage their claim, we consider this possibility as well.[113] The second analysis (MID onset; see above) examines militarized disputes between politically relevant dyads, while the third analysis investigates only whether states use force to resolve their specific, diplomatic claims to maritime areas.

A. *Independent Variables*

Three sets of independent variables capture the legalization and judicialization characteristics of UNCLOS. The first set denotes dichotomously whether *one* or *both dyad members signed UNCLOS* (two distinct variables), and whether *one* or *both dyad members ratified UNCLOS* (another two distinct variables).[114] A second set entertains any broader systemic effects through two dichotomous variables that indicate whether the *UNCLOS regime exists* (1983 onward) and whether the *UNCLOS regime is in force* (1995 onward). The third set focuses on state declarations under Article 287 of UNCLOS. Dichotomous variables measure whether *both (joint)* states declare a preference that any disputes involving them be

on average, more salient than non-EEZ maritime claims. The empirical evidence in that earlier study is consistent with such an argument; states attempt settlement—via both peaceful and non-peaceful (i.e., military) mechanisms—more often in their EEZ, as opposed to non-EEZ, maritime claims, placing the former on par with the management of their more salient territorial disputes. The creation of optional exceptions for maritime boundaries further demonstrates the salience of delimitation issues (Article 298). Andrew P. Owsiak & Sara McLaughlin Mitchell, *Conflict Management in Land, River, and Maritime Claims*, 7 POL. SCI. RES. & METHODS 43 (2019).

[112] Faten Ghosn, Glenn Palmer & Stuart A. Bremer, *The MID3 Data Set, 1993–2001: Procedures, Coding Rules, and Description*, 21 CONFLICT MGMT. & PEACE SCI. 133 (2004).

[113] Twenty-eight percent of ICOW maritime claims experience at least one MID. More generally, 2.4% of politically relevant dyads experience at least one MID. The discrepancy occurs because (1) not all politically relevant dyads historically have maritime claims, and (2) not all MIDs in politically relevant dyads map onto a specific diplomatic maritime claim. *See* Hensel and Mitchell, *supra* note 16.

[114] Strictly speaking, signatories are not "states parties" to UNCLOS—meaning that the signature carries a potential signaling function, but no true legalization or judicialization. Whether signing UNCLOS (i.e., the signal) affects bargaining behavior remains an empirical question, one that we investigate.

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addressed by the International Court of Justice (*ICJ 287 declaration*), the International Tribunal for the Law of the Sea (*ITLOS 287 declaration*), or *Annex VIII* (three distinct variables). These declarations, we argue, signal concrete commitments to judicial processes and provide more information about which judicial forum will hear (potential) future cases. States making *multiple 287 declarations* (*one/both* [*states*]) potentially send stronger signals of their commitment to judicial processes—a possibility we also consider (another distinct variable). Chile and Argentina, for example, recognize multiple acceptable forums under Article 287 during their claim to the Beagle Channel, and the data capture that characteristic. Finally, states that declare *no* preference(s) under Article 287 trigger the Annex VII default procedure; we consequently combine them with those making specific Annex VII declarations in a separate dichotomous measure: *Annex VII default*.[115]

B. Control Variables

Each of our logistic regression models extends analyses presented in earlier published work. We build upon the models of claim onset, MID onset, and issue management that Lee and Mitchell, Mitchell and Powell, and Hensel, et al. respectively report.[116] Control variables for our models derive directly from these earlier studies and offer guidance about how our control variables should behave—an important consideration, since we wish to study unexplored shadow effects. Table B1 (online appendix) identifies each control variable, the form it takes, a brief description of its coding, and the source(s) from which it derives. Inclusion of these variables accounts for other factors that might influence the dependent variables of interest, such as military and economic power, relative capabilities, regime type (e.g., democracy), economic/security ties (e.g., alliances), and past conflicts/negotiations, Variation in temporal domain across our models derives from differences in the earlier studies.

V. Empirical Results

Does legalization through UNCLOS improve interstate cooperation over maritime issues? If so, we would expect—first and foremost—that UNCLOS reduces the likelihood that a dyad has maritime claims (see Figure 2 for the maritime claim process). Figures 4–5 consider this possibility and reveal strong evidence consistent with Hypothesis 1. Dyads containing at least one UNCLOS signatory or ratifying state are significantly less likely to have a maritime claim—compared to dyads where neither state belongs to UNCLOS (see the top four rows of Figure 4; both the plotted regression coefficient and its confidence interval lie fully to the left of the zero line in Figure 4, indicating a statistically significant, negative effect). Substantively, the probability of a maritime claim decreases from 0.081 to 0.067 when one state in a politically relevant dyad has signed UNCLOS (-21 percent), from 0.093 to 0.060 when both states have signed (-55 percent), from 0.085 to 0.051 when one state has ratified UNCLOS (-67 percent), and from 0.083 to 0.027 when both states have ratified the treaty (-207 percent; see the four upper-

[115] Alternative versions of the empirical models accounted for Article 298 declarations as well. The Article 298 declarations did not affect the peaceful or militarized management of maritime claims. We therefore present models in this study that exclude Article 298 declarations—a decision that simplifies the theoretical and empirical discussion greatly.

[116] *See* Lee & Mitchell, *supra* note 91; Mitchell & Powell, *supra* note 29, at 113; Hensel, Mitchell, Sowers & Thyne, *supra* note 16.

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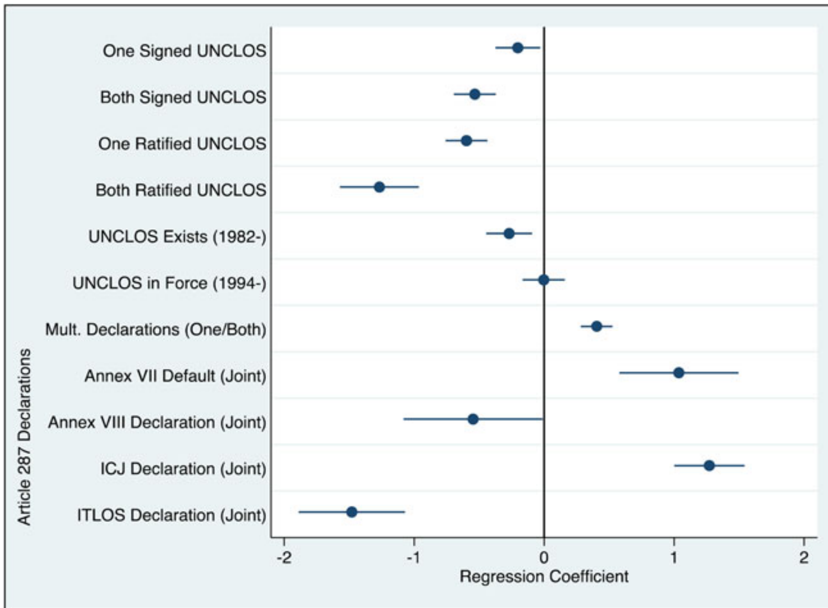

FIGURE 4. The Effects of UNCLOS on ICOW Maritime Claims, 1970–2001

Notes: (a) See Table B2 (online appendix) for full regression results. (b) See Figure B1 (online appendix) for a coefficient plot of control variables' behavior. (c) Sample uses directed, politically relevant dyads, as defined by the Correlates of War Project's State System Membership data, *supra* note 13. (d) Time period ends in 2001 due to data availability. (e) Baseline model: Lee & Mitchell, note 91 *infra*.

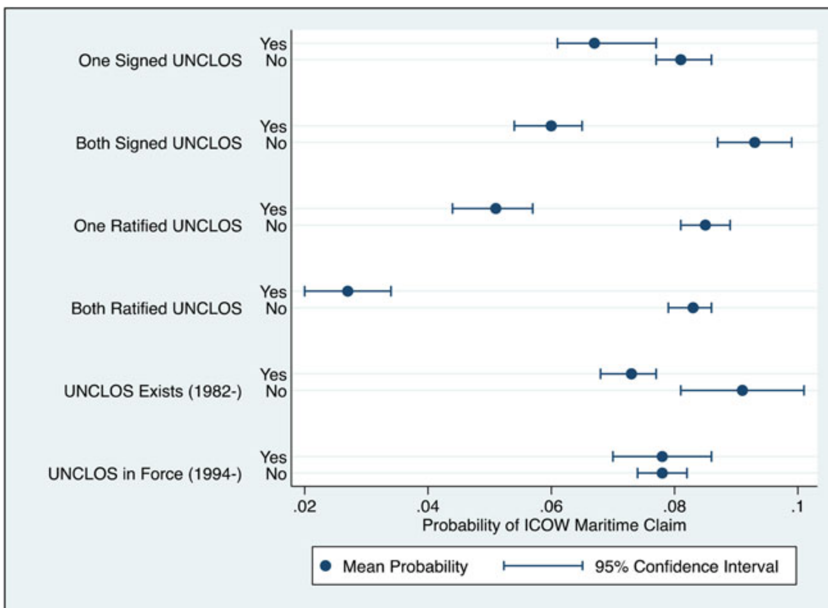

FIGURE 5. The Substantive Effects of UNCLOS on ICOW Maritime Claims

Notes: (a) See Table B2, Models 1-4 (online appendix) for the underlying regression results (see also Figure 4). (b) The exact calculations underlying the plot appear in Table B6 (online appendix). These calculations alter the value of one variable of interest at a time, with the remaining variables held at their mean values.

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most row clusters in Figure 5). This is consistent with our argument that UNCLOS reduces new diplomatic conflicts by clarifying legal standards for maritime claims; in general, legalization improves interstate cooperation over maritime issues.

The mere existence of UNCLOS (1983 onward) also brings a wider, systemic effect (row five, Figure 4); the likelihood of maritime claims is 25 percent lower when the UNCLOS regime exists (fifth row cluster, Figure 5).[117] These legalization effects—which admittedly vary in strength from weak (i.e., one state signing UNCLOS) to strong (i.e., two states ratifying UNCLOS)—result from UNCLOS decreasing uncertainty about distributive bargaining options (e.g., clarifying definitions and principles). If that argument has merit, then any systemic effects derive largely from the existence of UNCLOS, not necessarily whether it is in force (i.e., the number of states parties). Although the latter admittedly tracks the strength of consensus about UNCLOS provisions, the clarity that UNCLOS brings will reside largely with the document itself. Our results confirm this supposition. Once UNCLOS exists, the probability of maritime claims declines, but whether it is in force (1995 onward) carries no discernible effect (row six, Figure 4; sixth row cluster, Figure 5). Nevertheless, the results suggest that interstate behavior changes because of the legalization that accompanies UNCLOS; states experience fewer diplomatic maritime conflicts with neighboring states and major powers (i.e., politically relevant "others"), especially if both states are parties to UNCLOS.

We next consider whether UNCLOS influences general, dyadic conflict behavior to determine if states parties heed the calls for peaceful settlement found within the convention. Figures 6–7 investigate whether dyads with UNCLOS states parties engage in fewer militarized disputes than their non-state-party counterparts (Hypothesis 2). Consistent with our theory, the probability that a MID occurs is significantly lower in a politically relevant dyad if at least one dyad member has signed or ratified UNCLOS (see the top four rows of Figure 6). The probability of MID onset drops by 20 percent (0.024 to 0.020) if one state has ratified UNCLOS and by 50 percent (0.024 to 0.016) if both states have ratified UNCLOS (see the four upper-most row clusters in Figure 7). A broader, systemic effect exists here as well (see the fifth and sixth rows of Figure 6). The likelihood of MID onset significantly declines after UNCLOS both emerges (-9 percent) and enters into force (-14 percent; see the fifth and sixth row clusters of Figure 7). One might propose that these latter findings result from the waning of interstate conflict over time, Our statistical models, however, control for such a possibility, and we still observe this effect.[118] We therefore conclude that the observed effect attributes more to UNCLOS than any general, underlying temporal conflict trends.

Our next analysis investigates whether UNCLOS changes how states manage their maritime claims. In particular, we test whether UNCLOS encourages the use of peaceful conflict management in maritime claims, such as bilateral negotiations, mediation, or adjudication (Hypothesis 3). Figures 8–9 suggest that it does.[119] Dyads with an ongoing diplomatic maritime claim are 37 percent more likely to use peaceful conflict management in a given claim-year if at least one dyad member has signed UNCLOS, and 23 percent more likely to use peaceful settlement

[117] *See also* Nemeth, Mitchell, Nyman & Hensel, *supra* note 85.

[118] More specifically, we control for "peace years." Conflict scholars propose that the longer a dyad remains at peace (i.e., has no MID), the less likely it is at any given time to start one. For a detailed discussion of this variable's coding and source, see Table B1 (online appendix).

[119] For similar results, see Nemeth, Mitchell, Nyman & Hensel, *supra* note 85.

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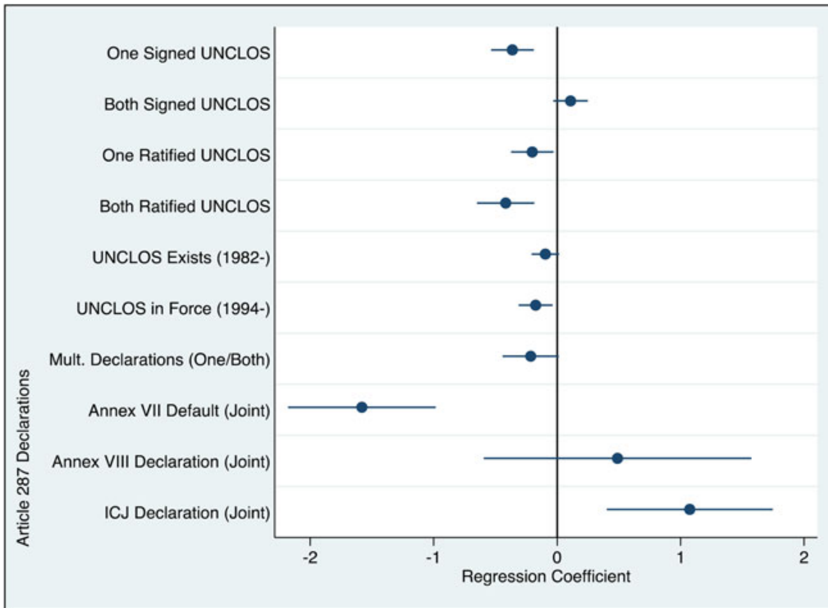

FIGURE 6. The Effects of UNCLOS on Militarized Dispute Onset, 1920–2001

Notes: (a) See Table B3 (online appendix) for full regression results. (b) See Figure B2 (online appendix) for a coefficient plot of control variables' behavior. (c) Sample uses politically relevant dyads, as defined by the Correlates of War Project's State System Membership data, *supra* note 13. (d) Time period ends in 2001 due to data availability. (e) Baseline model: Mitchell & Powell, *supra* note 29. (f) Because ITLOS joint declarations perfectly predict no militarized disputes, this characteristic does not appear in the model or the presented results.

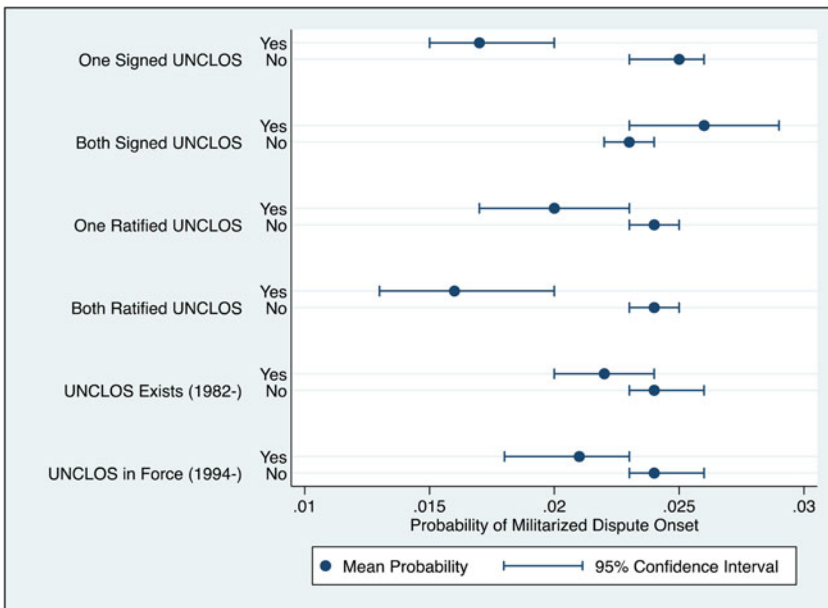

FIGURE 7. The Substantive Effects of UNCLOS on Militarized Dispute Onset

Notes: (a) See Table B3, Models 1–4 (online appendix) for the underlying regression results (see also Figure 5). (b) The exact calculations underlying the plot appear in Table B7 (online appendix). These calculations alter the value of one variable of interest at a time, with the remaining variables held at their mean values.

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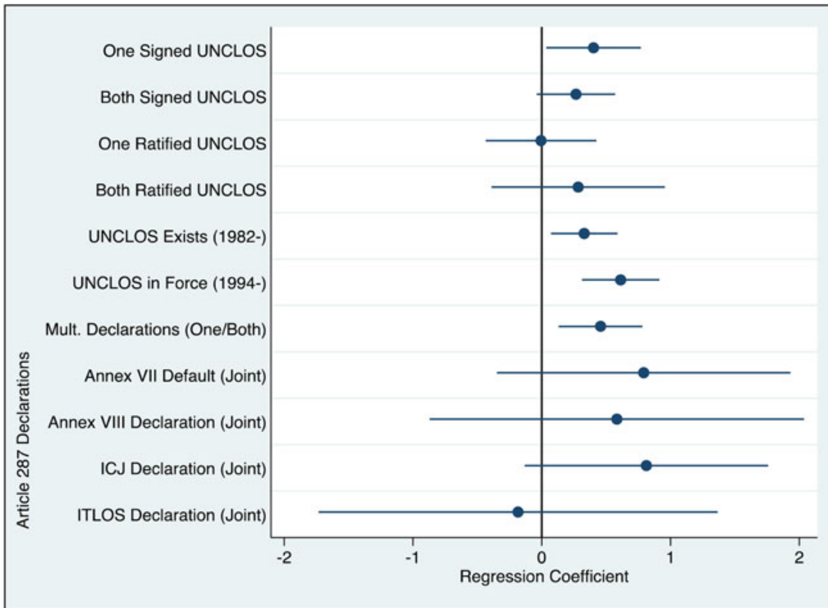

FIGURE 8. The Effects of UNCLOS on Peaceful Attempts to Settle ICOW Maritime Claims, 1900–2001

Notes: (a) See Table B4 (online appendix) for full regression results. (b) See Figure B3 (online appendix) for a coefficient plot of control variables' behavior. (c) Sample uses maritime claim dyad-years, as defined by the Issue Correlates of War Project. These analyses include the Americas and Europe. (d) Time period ends in 2001 due to data availability. (e) Baseline model: Hensel, et al., *supra* note 16.

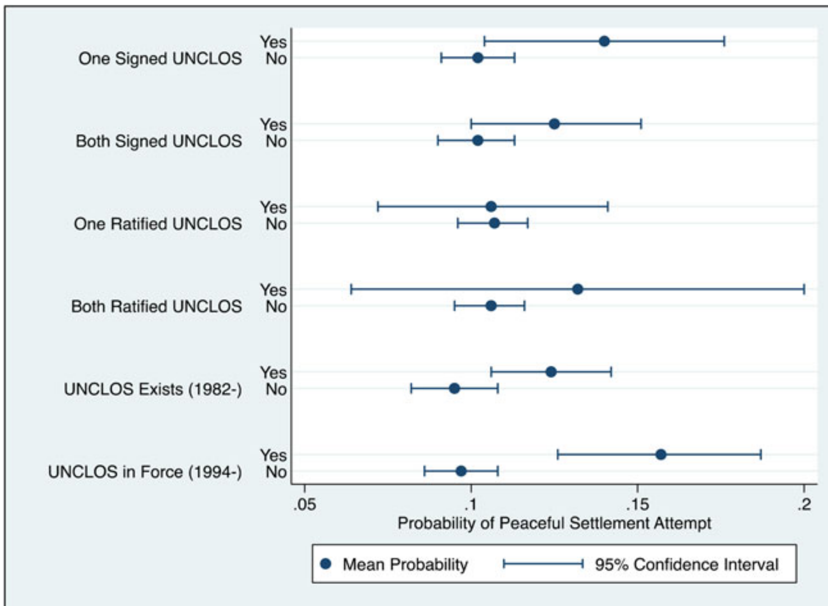

FIGURE 9. The Substantive Effects of UNCLOS on Peaceful Attempts to Settle ICOW Maritime Claims

Notes: (a) See Table B4, Models 1–4 (online appendix) for the underlying regression results (see also Figure 6). (b) The exact calculations underlying the plot appear in Table B8 (online appendix). These calculations alter the value of one variable of interest at a time, with the remaining variables held at their mean values.

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attempts if both dyad members have signed the convention (see the two upper-most row clusters in Figure 9; see also the top two rows of Figure 8). Whether dyad members ratify UNCLOS, in contrast, does not affect their maritime claim management (see rows three and four of Figure 8, in which the confidence interval crosses the zero line; see also the third and fourth row clusters of Figure 9). And, as elsewhere, systemic effects appear too. Peaceful conflict management increases 31 percent after UNCLOS opens for signature in 1982 and 62 percent after it enters into force in 1994 (see the fifth and sixth row clusters of Figure 9; see also the fifth and sixth rows of Figure 8). This suggests, once again, that UNCLOS casts a wide shadow over bargaining between states parties and not parties alike—a shadow that discourages maritime claims and militarized behavior, while encouraging peaceful conflict management.[120]

Beyond these legalization effects, does judicialization under UNCLOS influence interstate bargaining as well? We propose that such effects arise through (1) case law, (2) using courts later in the dispute management process (i.e., after some—but not necessarily all—other, peaceful conflict management strategies fail), and (3) Article 287 declarations. Prima facie evidence supports such a proposal. Case law in the maritime regime is rich and accelerates after UNCLOS. Appendices A1–A3 provide a complete listing of law of the sea court cases for the PCA, ICJ, and ITLOS; these judicial bodies have heard eighty-two (some pending) cases.[121] Moreover, the threat of binding settlement is real, particularly for states with Article 287 declarations. Since UNCLOS entered into force, six of the eight (or 75 percent of) PCA law of the sea cases arose through Annex VII; at least one state possessed an *ex ante* Article 287 declaration in six (75 percent) of these cases. Similarly, the ICJ heard nine law of the sea cases during this period, with another five pending. Eight of the cases it ruled on (89 percent) involved at least one party with an Article 287 declaration, while four of the five ongoing cases also do (80 percent). Finally, we note that states almost always comply with ICJ judgments in maritime cases.[122] All of this not only reflects the successful judicialization of the UNCLOS treaty, but also suggests the plausibility of the mechanisms we propose.

[120] One anonymous reviewer noted that (1) discussion of EEZs entered into the third United Nations Conference on the Law of the Sea (1977–1978; before UNCLOS), and (2) UNCLOS reflects customary law, implying that UNCLOS may not exert the empirical effects we attribute to it. In response, we first note that states did not finalize their consensus on EEZs until UNCLOS. In addition, UNCLOS *necessarily* reflects customary law. Indeed, UNCLOS codifies that customary international law, which suggests that it represents a behavioral indictor that the community reached a broad consensus. Given this symbiotic relationship, it is extremely difficult (if not impossible) to separate UNCLOS from customary law. For more on this long-standing debate about the empirical effects of treaties, see George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996). As argued in note 129 *supra*, though, we find that the effects of UNCLOS on peaceful negotiations of maritime issues strengthen over time, which demonstrates that institutionalization of customary law generates stronger effects on state behavior.

[121] Although we highlight arbitration cases heard through the PCA in Table A1 (online appendix), maritime issues need not be arbitrated through the PCA under UNCLOS. We therefore intend Table A1 to be illustrative, rather than exhaustive. The ICOW dataset—and therefore our analysis—captures all cases of arbitration over maritime claims, including non-PCA arbitration cases (e.g., British arbitration in the Beagle Channel dispute between Argentina and Chile).

[122] *See* Mitchell and Hensel, *supra* note 86. A full investigation into the effects of UNCLOS on compliance with maritime awards lies beyond the scope of this study. To our knowledge, these compliance rates have yet to be gathered for ITLOS and the PCA. We note compliance rates for the ICJ here, however, not only because we have these data, but also to highlight that states should generally expect to comply with the terms of an ICJ judgment if the ICJ issues a ruling in their case. We assume that expectation would carry over to other binding forums and motivate out-of-court bargaining there. Whether that assumption holds requires further empirical investigation.

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Our main interest lies with the third of these mechanisms, which signals a commitment to use specific judicial forums should a maritime claim arise. Theoretically, we expect pairs of countries with joint Article 287 declarations to have fewer maritime claims (Hypothesis 4), fewer militarized disputes (Hypothesis 5), and more frequent peaceful negotiations as they bargain in the shadow of the court (Hypothesis 6). Analysis of these expectations yields three broad conclusions. First, the prevalence of maritime claims varies by declaration type (see the final five rows of Figure 4). Maritime claims are 39 percent more likely when dyad members make multiple Article 287 declarations (0.072 to 0.100), 121 percent more likely when Annex VII applies (0.077 to 0.170), and 159 percent more likely when both state find the ICJ acceptable (0.076 to 0.197; see Figure 10). At first blush, this seems incongruous with our argument, which expects maritime claims to be *rarer* when Article 287 declarations exist (Hypothesis 4). Some Article 287 declarations correspond with that anticipated effect. Dyad members that both accept ITLOS see the likelihood of a new maritime claim fall 264 percent (0.080 to 0.22), while those accepting Annex VIII arbitration experience a 59 percent decline (0.078 to 0.049). These latter effects are heartening, since UNCLOS intended ITLOS to handle law of the sea disputes. But what then explains the positive effects? One potential answer involves uncertainty. As the default procedure, Annex VII sends a weak(er) signal, since states do not have to make an optional declaration

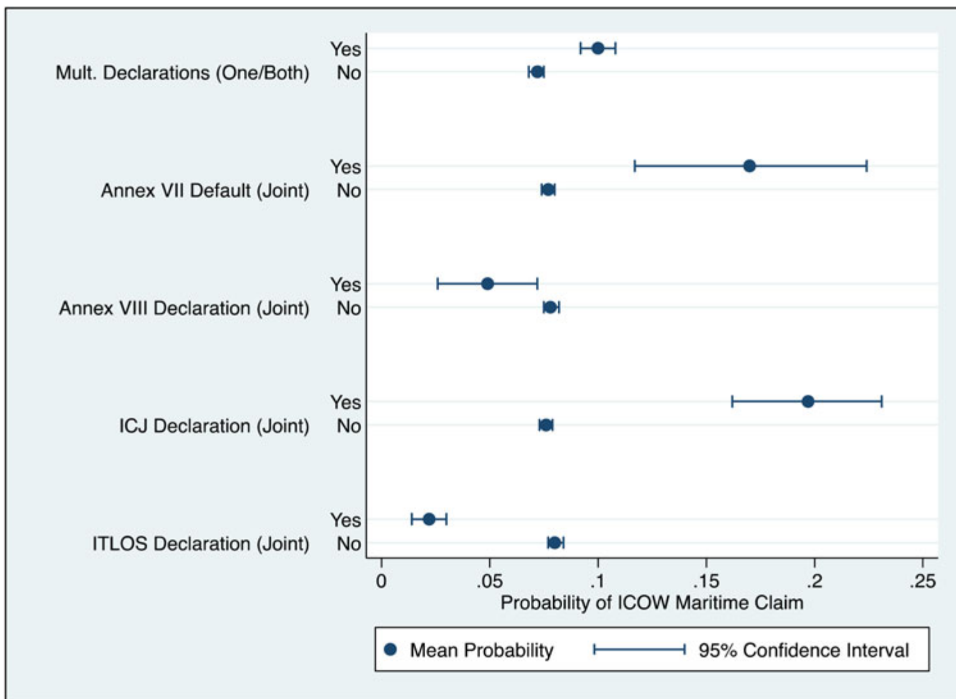

FIGURE 10. The Substantive Effects of UNCLOS Declarations on ICOW Maritime Claims

Notes: (a) See Table B2, Model 5 (online appendix) for the underlying regression results (see also Figure 4). (b) The exact calculations underlying the plot appear in Table B9 (online appendix). These calculations alter the value of one variable of interest at a time, with the remaining variables held at their mean values.

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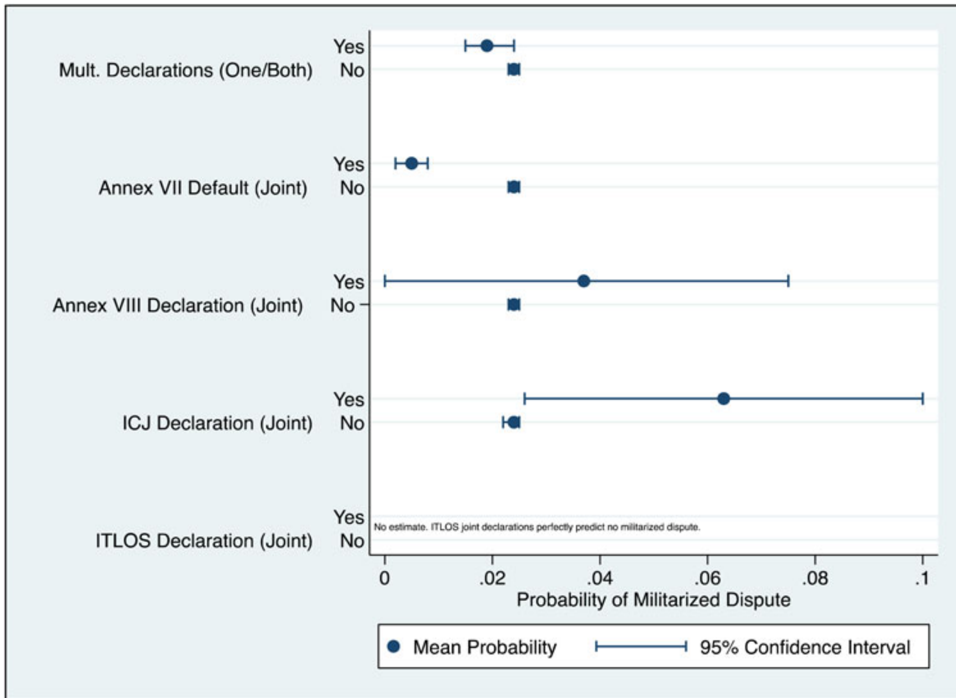

FIGURE 11. The Substantive Effects of UNCLOS Declarations on Militarized Dispute Onset

Notes: (a) See Table B3, Model 5 (online appendix) for the underlying regression results (see also Figure 5). (b) The exact calculations underlying the plot appear in Table B9 (online appendix). These calculations alter the value of one variable of interest at a time, with the remaining variables held at their mean values.

to select it.[123] Multiple 287 declarations might likewise demonstrate a greater commitment to use judicial processes, but decrease certainty about which court will hear a (potential) case, thereby undermining the threat to go to court. Both, in other words, carry greater uncertainty than other declarations, and that uncertainty might theoretically erode any signaling mechanism—and therefore, any shadow effects that courts cast.

Our second finding is that Article 287 declarations often reduce dyadic conflict consistent with Hypothesis 5 (see the final five rows of Figure 6). Dyads with multiple declarations are 26 percent (0.024 to 0.019) less likely to begin militarized disputes (see Figure 11); those to which Annex VII applies are 380 percent (0.024 to 0.005) less likely to do so; and those whose members jointly accept ITLOS *never* experience a MID, which explains why the variable drops completely from the analysis. Recognition of ITLOS, in other words—a tribunal that UNCLOS established—impedes diplomatic maritime claims and reduces the odds that a militarized engagement erupts between states parties.

While these results support our hypothesis, we also see some surprising findings as well. Annex VIII declarations do not alter MID behavior, while joint acceptance of the ICJ

[123] Of the ten states parties that have active Article 287 declarations in favor of Annex VII arbitration (as of December 2020), only two rank order the default procedure behind another forum (i.e., as *not* their first preference). Six list both the default *and* (an)other forum(s) as a first-order preference. The final two, Egypt and Slovenia, list a first-order preference for Annex VII arbitration, but no preference for any other forum. *See* United Nations Convention on the Law of the Sea, *supra* note 56.

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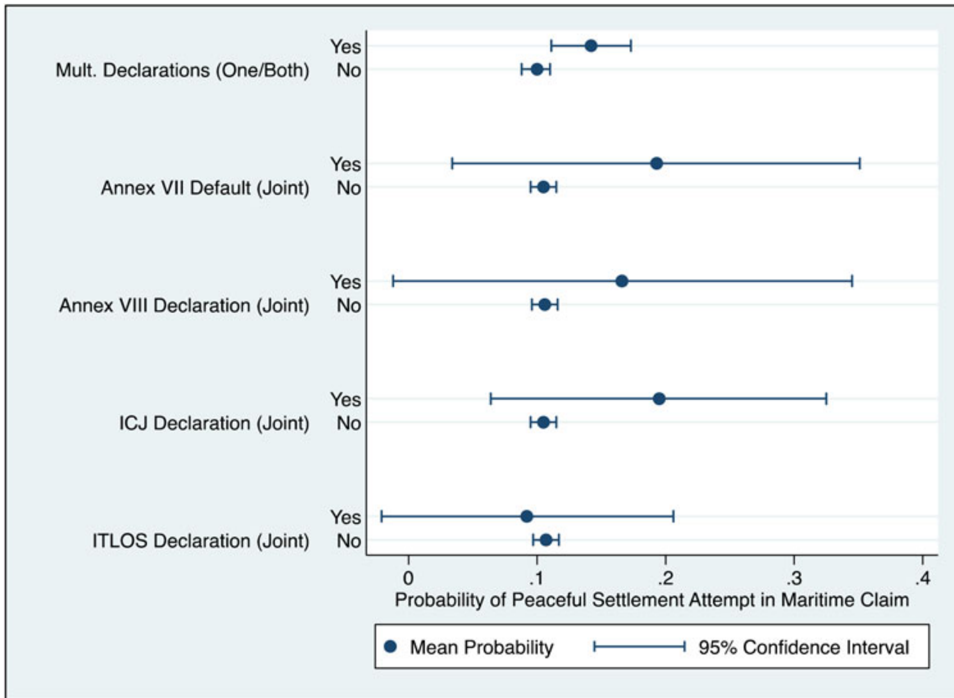

FIGURE 12. The Substantive Effects of UNCLOS Declarations on Peaceful Attempts to Settle ICOW Maritime Claims

Notes: (a) See Table B4, Model 5 (online appendix) for the underlying regression results (see also Figure 6). (b) The exact calculations underlying the plot appear in Table B9 (online appendix). These calculations alter the value of one variable of interest at a time, with the remaining variables held at their mean values.

significantly *increases* dyadic conflict by 163 percent (0.024 to 0.063). As with maritime claims, those making ICJ declarations behave uniquely—and contrary to our expectations.[124] Future research might investigate why this occurs in greater detail. Is it, for example, that variance around ICJ judgments—either in their terms or reasoning—is larger than that around ITLOS awards? If so, the shadow effects may be weaker around the ICJ (i.e., greater uncertainty exists) than around other bodies (e.g., ITLOS).

The third broad finding concerns the use of peaceful bargaining techniques. Article 287 declarations fundamentally alter interstate bargaining over maritime claims (see the final five rows of Figure 8). The likelihood that a dyad uses peaceful conflict management to address its maritime claims rises 86 percent (0.105 to 0.195) when both dyads members accept the ICJ through an Article 287 declaration (see Figure 12). If members make an Article 287 declaration that endorses more than one judicial body, that same likelihood rises 42 percent (0.100 to 0.142). In Figures 13–16, we unpack these aggregate results to investigate exactly what conflict management tools states use: binding third-party conflict management (i.e., the

[124] MITCHELL & POWELL, *supra* note 29, find that dyads (i.e., pairs of countries) that accept the compulsory jurisdiction of the ICJ are significantly more likely to experience militarized disputes, consistent with our findings. States in the Western Hemisphere drive these results. European dyads that accept the ICJ's compulsory jurisdiction experience a *reduced* risk of interstate conflict. This makes intuitive sense, since European states created the precursor to the ICJ, the Permanent Court of International Justice.

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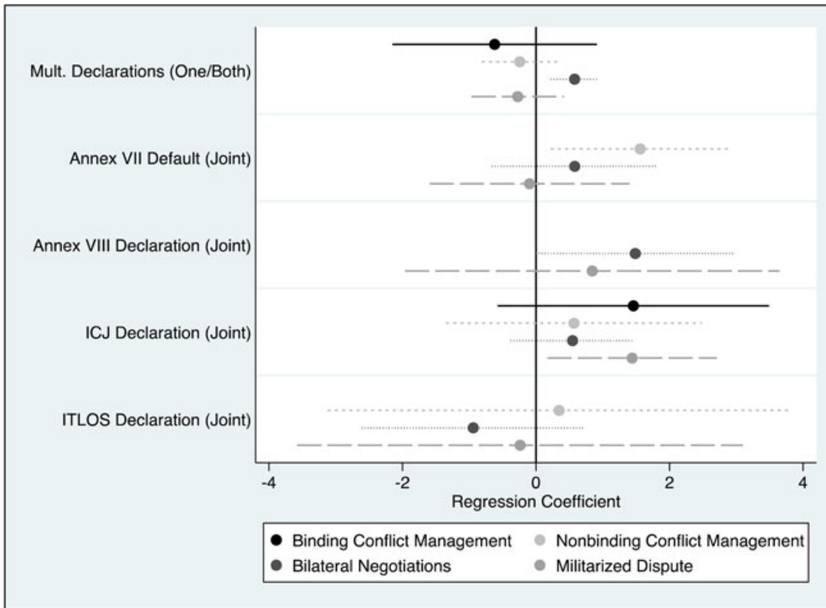

FIGURE 13. The Effects of UNCLOS on the Use of Specific Conflict Management Strategies within ICOW Maritime Claims, 1900–2001

Notes: (a) See Table B5 (online appendix) for full regression results. (b) See Figure B4 (online appendix) for a coefficient plot of control variables' behavior. (c) Sample uses maritime claim dyad-years, as defined by the Issue Correlates of War Project. These analyses include the Americas and Europe. (d) Time period ends in 2001 due to data availability. (e) Baseline model: Hensel, et al., *supra* note 16.

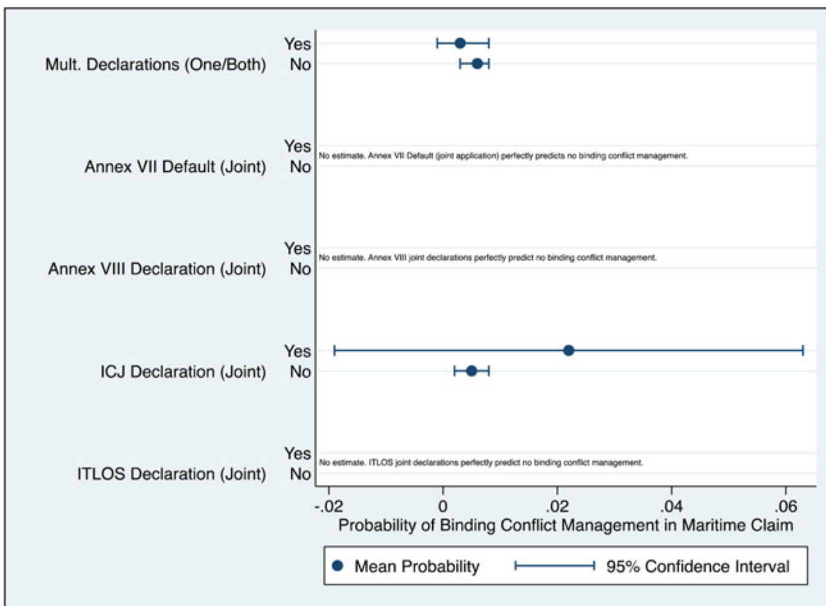

FIGURE 14. The Substantive Effects of UNCLOS Declarations on the Use of Third-Party Binding Conflict Management within ICOW Maritime Claims

Notes: (a) See Table B5, Model 1 (online appendix) for the underlying regression results (see also Figure 7). (b) The exact calculations underlying the plot appear in Table B9 (online appendix). These calculations alter the value of one variable of interest at a time, with the remaining variables held at their mean values.

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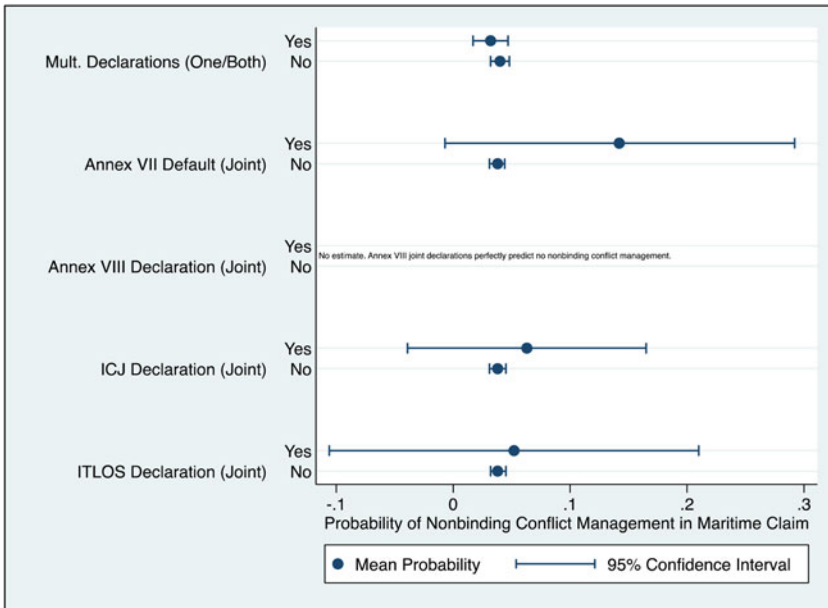

FIGURE 15. The Substantive Effects of UNCLOS Declarations on the Use of Third-Party Non-binding Conflict Management within ICOW Maritime Claims

Notes: (a) See Table B5, Model 2 (online appendix) for the underlying regression results (see also Figure 7). (b) The exact calculations underlying the plot appear in Table B9 (online appendix). These calculations alter the value of one variable of interest at a time, with the remaining variables held at their mean values.

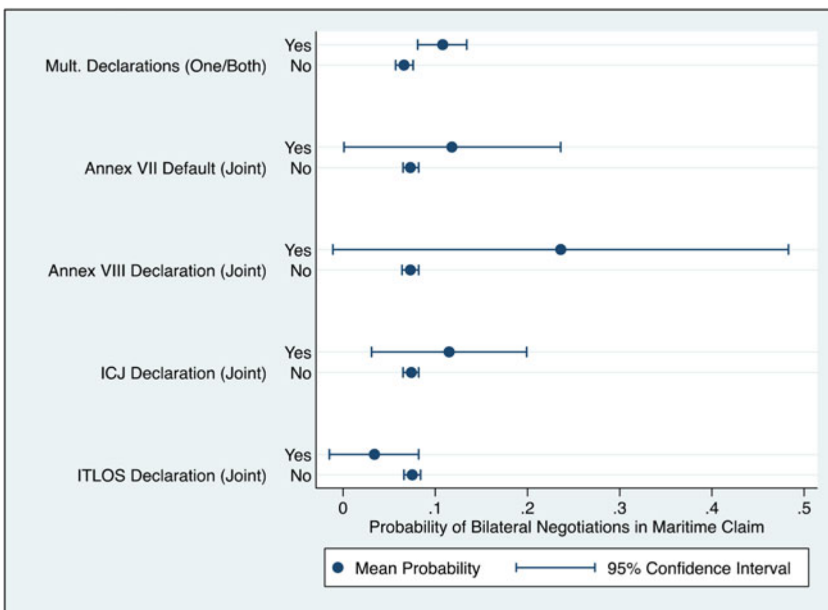

FIGURE 16. The Substantive Effects of UNCLOS Declarations on the Use of Bilateral Negotiations within ICOW Maritime Claims

Notes: (a) See Table B5, Model 3 (online appendix) for the underlying regression results (see also Figure 7). (b) The exact calculations underlying the plot appear in Table B9 (online appendix). These calculations alter the value of one variable of interest at a time, with the remaining variables held at their mean values.

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courts), non-binding third-party conflict management (e.g., mediation), or bilateral negotiations. This exercise yields strong evidence consistent with our sixth hypothesis—namely, that states parties to UNCLOS that make similar Article 287 declarations are more likely to use peaceful settlement tools to resolve their diplomatic maritime conflicts. Once two states have jointly made declarations accepting Annex VII, Annex VIII, or ITLOS—or if Annex VII (default) applies—they *never use binding, compulsory processes* to manage their maritime claims (Figure 14).[125] Instead, they shift strategies to reach an agreement outside of court. Those to which the Annex VII default procedure applies prefer non-binding third-party conflict management; they employ mediation 274 percent (0.038 to 0.142) more often than their counterparts (Figure 15). In contrast, those with multiple declarations or that favor Annex VII pursue bilateral negotiations; the frequency of such negotiations rises 64 percent (0.066 to 0.108) and 22 percent (0.073 to 0.236) for these dyads respectively (Figure 16). Dyads with joint declarations accepting ITLOS or the ICJ produce a distinct result that favors no single, specific conflict management strategy. Yet, this need not be entirely inconsistent with our general argument. Those accepting the ICJ, for example, do not favor a *specific* conflict management tool, but simply employ more peaceful conflict management tools overall (see Figures 8 and 12).[126] Similarly, states parties accepting ITLOS avoid the courts, but do not prefer one of the remaining tools. Such behaviors—for example, seeking to avoid court-based outcomes, or increasing the use of alternative, peaceful strategies—are consistent with dyads preferring to bargain in the shadow of the courts.[127]

In the end, we find significant evidence that UNCLOS alters out-of-court, interstate bargaining. Whether via legalization (i.e., accepting the legal provisions that UNCLOS contains, which reduces uncertainty over distributional bargaining outcomes), judicialization (i.e., recognizing the role of courts in bounding interstate behavior, which incorporates case law and threatens court involvement generally), or signaling an intention to use binding conflict management through Article 287 declarations, UNCLOS fundamentally changes interstate behavior in three ways. First, it generally reduces the likelihood that maritime claims exist and that interstate conflict occurs. Second, it encourages the use of peaceful strategies for managing maritime claims. And finally, it incentivizes states to *avoid* the very courts whose jurisdiction they accept (i.e., the threat to go to court gains credibility, thereby hastening bargaining in the shadow of the court). This illustrates why an examination of the cases that courts hear fails to capture the full extent of judicial bodies' effect.

Importantly, our latter two broad findings are not indicative of states parties' or declarers' general dispute management preferences (e.g., to cooperate internationally, or to use international organizations or courts). Were that true, we might expect such preferences to reveal themselves in the management of another, closely related issue: territorial claims. Owsiak and Mitchell argue that territorial and certain maritime claims—namely, disagreements

[125] On the spatial and temporal limitations to our study, see Part IV.

[126] Because other instruments reference the courts we study (e.g., the ICJ), one could argue that the effects we observe derive from one or more instruments other than UNCLOS. Although plausible, such commitments would struggle to explain the constellation of findings we uncover and attribute to UNCLOS here.

[127] The control variables in our models behave as the studies from which they derive anticipate. Space constraints, as well as a desire to simplify the discussion, preclude us from discussing these results in detail. It is nevertheless worth noting that we obtain no unexpected results. The full statistical models, as well as coefficient plots for the control variables associated with each model, appear in Appendix B (online).

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over exclusive economic zones—share a key characteristic: the division of sovereign jurisdictions. Their empirical analysis subsequently demonstrates that states manage these two claim types in similar ways. If, therefore, state commitments under UNCLOS merely reflect general preferences that favor the use of judicial bodies, we might expect the management of their territorial claims to mirror our main results. This would be especially noteworthy because territorial claims do not fall under UNCLOS. States also make neither explicit commitments to manage territorial claims through judicial bodies nor list preferences over existing judicial bodies that might hear their territorial claims cases. Finding, then, that states manage their territorial and maritime claims similarly would undercut our ability to attribute our results to the judicialization mechanisms we have advanced.[128]

The ICOW Project identifies 618 territorial claims—or diplomatic contests over the ownership of mainland or island territories—from 1900 to 2001. An analysis of these claims' management reveals starkly different patterns than those found in our main analysis (see Table D1, online appendix). For example, signaling a preference for binding conflict management via Article 287 of UNCLOS does *not* significantly increase the likelihood that a dyad uses non-binding or bilateral procedures for managing its territorial claims. Such findings give us greater confidence that our main conclusions result from the commitments states make under UNCLOS, rather than any general, underlying policy preferences. Indeed, we conclude that what we observe in the main analysis applies specifically to maritime claims—the very issue over which UNCLOS should reduce uncertainty and cast a judicial shadow.[129]

A. *Potential Criticisms*

One might criticize our findings on three grounds. The first argues that states enter UNCLOS, or make Article 287 declarations, only after they resolve all their maritime claims. This, however, is not empirically true. Data from Ásgeirsdóttir and Steinwand track whether a dyad has settled all of its maritime boundaries.[130] We cross-reference these data against our information on states signing, ratifying, and issuing declarations under UNCLOS; the evidence strongly contradicts the criticism's logic. Maritime boundaries remain unsettled in 74 percent of dyad-years in which at least one dyad member has previously signed UNCLOS. A similar figure obtains for ratification (73 percent). Moreover, maritime boundaries are unsettled in 59–78 percent of dyad-years in which states have made an Article 287

[128] States may have good reason to manage territorial claims differently than maritime claims—for example, a lack of institutions to address territorial issues, or the ICJ itself, which plays a prominent role in territorial claim management. Future research might investigate these possibilities further. *See* Owsiak & Mitchell, *supra* note 111; Hensel & Mitchell, *supra* note 16.

[129] To evaluate whether the effects of UNCLOS change over time, Appendix D (online) re-estimates our models for two sub-periods: (1) UNCLOS exists, but is not in force (1982–1993); and (2) UNCLOS has entered into force (1994–2001). We find some evidence that the effects of UNCLOS strengthen over time (e.g., the effect of Article 287 declarations on bilateral negotiations is stronger in the latter, as opposed to former, period; see Table B12, online appendix). Because these periods are short, however, we hesitate to draw strong conclusions from them and prefer the models we present in the main text. In addition, we ran versions of our models that included an interaction between our variables of interest and time—another means through which to account for dynamic temporal effects. We uncover no temporal effects through these models. Given, however, the low number of states that make joint Article 287 declarations *and* have maritime claims, we might expect such findings when parsing the data more finely, as would be necessary with such an interaction.

[130] Áslaug Ásgeirsdóttir & Martin C. Steinwand, *Distributive Outcomes in Contested Maritime Areas: The Role of Inside Options in Settling Competing Claims*, 62 J. CONFLICT RESOL. 1284 (2018).

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declaration—with the precise declaration type driving the range. Declarations that preference Annex VIII arbitration appear least often in the presence of unsettled borders, while the default Annex VII procedure appears most.[131] Declarations supporting the ICJ or ITLOS occupy middle ground between these extremes. In short, states signing, ratifying, and making Article 287 declarations under UNCLOS possess ample opportunity for maritime claims to arise. That they do not indicates more of an UNCLOS effect rather than a selection effect.

The second criticism is that our models are mis-specified, either because (1) unaccounted-for factors produce the effects that we attribute to UNCLOS, or (2) states making declarations differ systematically from those that do not. The first is unlikely. Only 27 percent of ratifying UNCLOS states have made Article 287 declarations, and it is not obvious what alternative, common factor would explain both their willingness to make such declarations and their bargaining behavior across our myriad analyses. We nevertheless investigated three of the most likely alternatives: that (1) powerful states and (2) non-democracies differ from their counterparts, or (3) that states parties resolve their most salient maritime claims before joining UNCLOS or making an Article 287 declaration that would give greater power over their maritime claim's management to the courts.

Our analysis suggests that these alternatives lack merit (see Table B11, online appendix). More and less powerful states join UNCLOS and issue Article 287 declarations at indistinguishable rates. More democratic states, in contrast, *do* join UNCLOS and make Article 287 declarations at significantly higher rates than non-democratic states. Yet these same democracies engage in *more*, not fewer, maritime claims with one another—a fact that would weaken the findings we report in Figures 4, 5, and 10 (see Table B2, online appendix).[132] Moreover, it is not clear that regime type alone changes how states manage maritime claims (e.g., see Table B4, online appendix, which shows that democracies do not use peaceful settlement attempts more often than non-democracies to manage their maritime claims). Finally, the salience or importance of maritime claims—as measured through the ICOW data—does not differ meaningfully between non-state and states parties to UNCLOS or between those states parties who make and do not make Article 287 declarations.

Our use of earlier models as a foundation for our analysis also combats this second critique directly. It ensures proper, or at least well-accepted, model specification for the outcomes we examine. Throughout our analyses, these models behave congruent with their corresponding, earlier studies. We therefore gain confidence that our results show how commitments to and under UNCLOS influence how states bargain over maritime issues.

On the differences between states making and not making Article 287 declarations, additional analysis reveals some diverging behavior. Civil law countries make more declarations

[131] The design of UNCLOS drives the endpoints of the range. Annex VII serves as the default compulsory procedure. Annex VIII pertains not to delimitation issues, but rather to fisheries, the preservation of natural resources, marine research, navigation, and pollution.

[132] Because our empirical models control for military capabilities, this finding does not attribute simply to major-state democracies (e.g., the United States, United Kingdom, or France) holding a more global territorial portfolio (i.e., having more maritime boundaries throughout the world). *See also* Daniels & Mitchell, *supra* note 76, who obtain a similar result with a more direct control of major state status. For a deeper discussion of democracies and their maritime conflicts, see Sara McLaughlin Mitchell & Brandon C. Prins, *Beyond Territorial Contiguity: Issues at Stake in Democratic Militarized Interstate Disputes*, 43 INT'L STUD. Q. 169 (1999).

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than common law or Islamic law states—and prefer the ICJ to other courts.[133] This coincides with existing research, which shows civil law states' affinity for accepting the ICJ's compulsory jurisdiction.[134] Democratic countries also prefer the ICJ or ITLOS more often than non-democracies, while powerful military states select arbitration procedures—if they make a declaration at all. Future research can employ more sophisticated methodological tools to examine these characteristics more thoroughly.

A third critique of our findings focuses on potential selection effects. It argues that the failure to control for states' willingness to join UNCLOS or make Article 287 declarations in the first place might inflate the effect of UNCLOS on interstate bargaining. In Tables C1–C5 (online appendix), we replicate each of our models using an alternative method that addresses the selection effect critique directly: a seemingly unrelated bivariate probit regression. These models estimate dyad members' joint commitments to UNCLOS (e.g., both signed, both ratified, and both make Article 287 declarations) using variables such as whether the dyad members have an ongoing maritime claim, are landlocked, share domestic legal traditions, differ in their military capabilities, and are democratic. With few exceptions, we find that controlling for the processes by which states make UNCLOS commitments does not alter the key findings we report above.[135]

B. *Extensions*

Two questions of model extension may arise. First, do Article 287 declarations exert a monadic—that is, state-level, rather than dyadic—effect? Several ITLOS cases, after all, involve only one litigant with such a declaration. A series of models (not shown) preliminarily investigates this. We find that monadic Annex VII and ICJ declarations reduce the likelihood of maritime claims; Annex VII decreases MID onset and increases bilateral negotiations; and ICJ declarations facilitate the use of binding conflict management. Although a full analysis lies beyond this study's scope, such results further support our argument. The judicial shadow of UNCLOS changes bargaining behavior, even at the monadic level.

A second extension would ask: do the efforts that UNCLOS promotes *succeed*—that is, produce agreements, enhance compliance, or resolve the disputed maritime issues? Separate analyses (available from the authors) reveal that (1) joint ITLOS declarations improve the chances for agreement in settlement attempts, and (2) bilateral negotiations increase significantly when UNCLOS is in force. Data limitations prevent us from teasing out these patterns; as ICOW releases additional data, however, this question will merit further study. Nevertheless, the results collectively show that ITLOS, a key dispute settlement forum created through UNCLOS, plays an important role by reducing new maritime claims and helping those that jointly accept its involvement to reach agreement outside of court.

[133] "Islamic law state" refers to a state whose domestic legal system follows Islamic law—one of the three major legal traditions that have both substantial geographic reach and long-lasting influence. The other two traditions are civil law and common law. *See* Gamal Moursi Badr, *Islamic Law: Its Relation to Other Legal Systems*, 26 Am. J. Comp. L. 187 (1978).

[134] *See* Mitchell & Powell, *supra* note 29.

[135] The negative effect of Annex VII on maritime claims flips from negative to positive in some models, while the effect of joint ICJ commitments is weaker in most peaceful settlement attempt models.

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C. *Generalizing the Findings*

To what extent do our findings regarding judicialization extend to other international courts? Existing empirical studies find that courts with compulsory jurisdiction—such as the CJEU, WTO, and the ICC—create stronger shadow effects. States that ratify the Rome Statute, for example, show significant improvement in their domestic human rights practices and commit fewer mass atrocities in civil wars.[136] The WTO's adjudication procedure likewise encourages the settlement of trade disputes outside that procedure.[137]

International courts with optional clause declarations, such as the ICJ, likely exert a more varied effect on interstate bargaining. Our theory suggests that disputing states that both recognize the compulsory jurisdiction of the ICJ *a priori* (e.g., through Article 36(2)) should settle out of court more often than when at least one dyad member does not recognize the court's jurisdiction. Mitchell and Powell find empirical support for this proposition; dyads in which both members accept the ICJ's jurisdiction are more likely to reach peaceful settlements that resolve contentious territorial, maritime, or river conflicts.[138] The higher frequency of ICJ cases with special agreement (ad hoc) jurisdiction, relative to compulsory or compromissory clause jurisdiction, is consistent with this effect.[139]

More active courts can also reduce the need for future adjudication. Our results suggest that when judicial decisions clarify focal points in international law by converging expectations on one of many available solutions, future uncertainty in interstate bargaining declines.[140] Much like the CJEU's role in creating the rule of mutual recognition, or the ICJ's role in reinforcing the principle of *uti possedetis juris*,[141] the decisions of courts and arbitration panels in maritime cases clarify ambiguities about baselines, equity issues, coastal states' rights, and so on. The willingness of international judges to hear cases that address legal ambiguities therefore can alleviate their future workload. Perhaps paradoxically, then, the full realization of judicialization may ultimately reduce the demands on international courts.

As noted earlier, our theory draws on Mnookin and Kornhauser's logic of negotiating settlements for divorces outside of court.[142] Like divorces, maritime claims often involve property rights and fairness in the division of resources. The facts in maritime cases are also relatively straightforward and available to all claimants. These characteristics qualitatively differentiate maritime cases from many disputes in international and regional economic organizations (such as the WTO and EU), as well as those heard by human rights courts. In the latter cases, the relevant factual evidence might not be fully accessible to one or both claimants (or

[136] *See* MITCHELL & POWELL, *supra* note 29; Appel, *supra* note 31; Hillebrecht, *supra* note 31; Hyeran Jo & Beth Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443 (2016). Rome Statute of the International Criminal Court, July 17, 1998, *at* https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en#:~:text=In%20accordance%20with%20its%20article,Italy%20until%2017%20October%201998.

[137] *See, e.g.*, Busch & Reinhardt, *supra* note 30; Gray & Potter, *supra* note 30.

[138] *See* MITCHELL & POWELL, *supra* note 29, *at* 212–18.

[139] *See* Posner & Yoo, *supra* note 36. The idea is that if *a priori* forms of compulsory jurisdiction (Article 36(2) declarations) improve the chances for out of court bargaining, then the percentage of cases that the PCIJ/ICJ would hear that come through such forms of compulsory jurisdiction should be smaller because fewer of those cases end up on the court's docket.

[140] *See* Ginsburg & McAdams, *supra* note 29.

[141] *See* MITCHELL & POWELL, *supra* note 29, at 72.

[142] Mnookin & Kornhauser, *supra* note 2.

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the court), which complicates any threat to litigate; individuals may have standing, which may introduce power disparities; and domestic politics and local actors may interfere more significantly with non-compliance.[143] Moreover, international prosecutors—for example, at the ICC—and domestic judges and courts—for example, before the CJEU—also often play a more prominent role in the onset of litigation in these, as opposed to maritime, disputes. This need not imply that judicialization's shadow effects do not occur in these other issue areas, as Alter's empirical analyses shows.[144] Rather, the path by which out of court negotiations occur may be more complex in these cases, compared to maritime disputes. UNCLOS, in other words, may sit closer to the logic of a divorce model than other courts that adjudicate claims in other international law contexts.

VI. Conclusion

As international judicial bodies increase in number, scope, and power, it is important to investigate the effect they have, if any, on the behavior of states. Scholars who study these bodies typically reach pessimistic conclusions, particularly with respect to interstate conflicts. Their pessimism results from analyzing court dockets and judgments, which reveal only a portion of judicial bodies' effectiveness. As domestic legal scholars have long known, however, when a binding settlement option looms in the background—and the threat to use it has credibility—bargaining behavior changes in anticipation of that option, not only during any judicial proceedings, but also before potential litigants apply to a judicial body for redress. Our study extends this argument to the international level, with a focus on interstate maritime disputes.

Our empirical findings demonstrate that legalization through UNCLOS is effective. States parties are less likely to contest maritime claims diplomatically, less likely to experience militarized conflicts, and more likely to employ peaceful strategies for resolving maritime disputes that do arise. These effects appear at the dyadic and systemic levels. Judicialization further influences interstate bargaining. Pairs of countries where both states make Article 287 declarations *never* use judicial bodies to manage their maritime claims, behavior that is quite distinct compared to dyads that make no Article 287 declarations. In fact—except for the ICJ—when dyad members declare acceptance of and a preference for the same court, they *never* litigate. Instead, they negotiate bilaterally, turn to non-binding third-party conflict management, or use some combination of the two to resolve their maritime claims. These effects are unique to the maritime context. An analysis of a different, but related, issue area —territorial claims—shows that commitments under UNCLOS have little effect on how states negotiate over non-maritime issues, giving us confidence in our theoretical argument that states use Article 287 declarations as signals to other states about their willingness to resolve maritime disputes peacefully. In the aggregate, these findings suggest that the effects of the UNCLOS dispute settlement regime are not seen primarily in the courtroom, but rather in the bargaining that takes place in the shadow of courts.

[143] See Alter's transnational politics model, *supra* note 24.
[144] *Id.*

SUPPLEMENTARY MATERIAL: The supplementary material for this article can be found at https://doi.org/10.1017/ajil.2021.26.

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