

Forum Shopping for the Best Adjudicator:  
Conflict Management and the United Nations Convention on the Law of the Sea

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Abstract: This paper analyzes states' selection of dispute settlement procedures in the 1982 United Nations Convention on the Law of the Sea. Article 287 of the UNCLOS treaty stipulates that states may choose one of four compulsory procedures: 1) the International Tribunal for the Law of the Sea (ITLOS), 2) the International Court of Justice (ICJ), 3) arbitration under Annex VII of the UNCLOS treaty or 4) arbitration under Annex VIII of the UNCLOS treaty. The authors argue that the dispute resolution procedures of the UNCLOS regime incorporate common law countries' desire for flexibility in conflict management. Common law countries prefer the multiplicity of options and the default procedure of arbitration, especially given their resistance to the use of the ICJ as the primary adjudicator for resolving maritime conflicts. This flexibility in the UNCLOS dispute settlement procedures results in a higher level of ratification (or accession) of the UNCLOS treaty by common law states relative to civil law, Islamic law, and mixed law states. On the other hand, civil law countries ratifying the treaty are most likely to select the ICJ court as their preferred conflict management forum because the ICJ's design is similar to civil law. Civil law countries are also more likely to select the ITLOS court and the Annex VII/VIII arbitration mechanisms than states with other domestic legal traditions.

Many international organizations, such as the United Nations Convention on the Law of the Sea (UNCLOS), call for the peaceful settlement of disputes in their charters. These provisions influence states' conflict management strategies, as states who belong to peace-promoting international organizations turn to third party conflict management more frequently.<sup>1</sup> States have numerous peaceful dispute settlement procedures at their disposal for resolving competitive interstate issues, ranging from bilateral negotiations, to non-binding third party settlement such as good offices, conciliation, or mediation, to binding settlement through an arbitration panel or an international court.<sup>2</sup>

Existing scholarship demonstrates that states' willingness to work through international courts or other conflict management forums depends on a variety of factors such as regime type, capabilities, issue salience, ties to potential mediators, and state age.<sup>3</sup> Similarities between domestic legal traditions and the legal design of international courts also influence states' willingness to work through binding forums. Civil law countries are more likely to recognize the compulsory jurisdiction of the International Court of Justice (ICJ) than common law or Islamic law countries, which results in more effective conflict management in the shadow of the ICJ for civil law dyads in conflict.<sup>4</sup>

In this paper, we analyze states' forum selection for dispute settlement procedures in the 1982 United Nations Convention on the Law of the Sea. UNCLOS has taken on increasing importance in the past several decades as the number of new competitive claims to

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<sup>1</sup> See Author; and Gent and Shannon (2011).

<sup>2</sup> In good offices, a third party is asked to assist the disputing states in negotiating a peaceful settlement. During the process of conciliation, a third party takes into consideration all elements of the dispute and formally offers terms of a settlement. In mediation, the disputing states ask a third party to influence their perceptions or behavior in the context of the dispute, providing a more active role for the third party in the negotiating process (Bercovitch and Rubin 1992; Shaw 2003).

<sup>3</sup> See Author; Scott and Carr (1987); and Simmons (1999).

<sup>4</sup> See Author; in this paper, we argue that it is not only possible, but also conceptually useful to classify legal traditions into categories that share important characteristics. As most scholars agree, this process of classification should be based on identifying fundamental elements of a legal system, through which "the rules to be applied are themselves discovered, interpreted and elaborated" (David and Brierley 1985, 20). However, all legal scholars agree that legal traditions are internally intricate and complex. For discussion of different categorizations of domestic legal systems, and issues of increasing cross-fertilization between them, see Author.

maritime zones has increased rapidly and as militarization of maritime conflicts is a distinct possibility<sup>5</sup>, as recent clashes over the Spratly Islands and Yellow Sea demonstrate.<sup>6</sup> Article 287 of the UNCLOS treaty stipulates that states have a procedural choice for peaceful settlement if a dispute dealing with interpretation or application of the Convention arises. If a state party does not make a declaration under Article 287, the default dispute settlement procedure is arbitration through Annex VII of the UNCLOS treaty. In other words, an Annex VIII arbitral tribunal constitutes the norm unless states have agreed to resort to another peaceful resolution forum. State parties can choose one of four compulsory procedures *a priori* and they can specify their rank order of these procedures. The four dispute settlement forums include: 1) the International Tribunal for the Law of the Sea (ITLOS), 2) the International Court of Justice (ICJ), 3) arbitration under Annex VII of the UNCLOS treaty or 4) arbitration under Annex VIII of the UNCLOS treaty.<sup>7</sup> These various third party conflict management options are utilized if states cannot come to agreement through other peaceful conflict management strategies, such as bilateral negotiations.<sup>8</sup> The use of a binding forum of arbitration as the default conflict management strategy acts as a form of self-binding delegation for UNCLOS members (Alter 2008).

The wide choice of settlement procedures within the UNCLOS framework is truly unprecedented in both general international law and also more specifically within the law of the sea. Generally, international agreements either do not provide for the mandatory

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<sup>5</sup> See Hensel et al. (2008).

<sup>6</sup> Analyzing data from the Issue Correlates of War (ICOW) Project on diplomatic issue conflicts, Hensel et al (2008) find that 44.3% of territorial claims, 41.4% of maritime claims, and 19.4% of river claims have experienced one or more militarized disputes over the issue in question. Thus diplomatic disagreements over maritime zones result in militarized conflict at a similar frequency to disputes over land borders, although the average dispute severity levels are lower for disputes involving maritime issues.

<sup>7</sup> For Annex VII arbitration, the members of the arbitral tribunal do not need any specific legal qualifications, while under Annex VIII arbitration, a list of experts is drawn up in several areas such as fisheries, navigation, and marine scientific research. The tribunal must have at least four of five members coming from this expert list (Klein 2005, 56-57).

<sup>8</sup> Our data demonstrate that 78% of countries who have ratified or acceded to the UNCLOS treaty do not choose any specific dispute settlement mechanisms, thus most countries accept Annex VII arbitration as the default settlement procedure if the issue cannot be resolved through negotiations. Among the 22% of countries selecting a forum, the most popular forum is the ITLOS court, followed by settlement through the International Court of Justice.

resolution of disputes<sup>9</sup> or they include reference to only one peaceful resolution venue, such as treaties with compromissory clauses recognizing the jurisdiction of the ICJ.<sup>10</sup> In the context of the law of the sea specifically, the corresponding rules of the 1958 Geneva Conventions on the Law of the Sea constituted “merely an optional protocol”.<sup>11</sup> UNCLOS dispute resolution provisions, referred to as a “cafeteria” approach to compulsory settlement, contrasts sharply with any other treaty within the substantive area of law of the sea.<sup>12</sup> Adede suggests the UNCLOS system for peaceful settlement should be considered as “one of the pillars of the new world order in the ocean space itself.”<sup>13</sup>

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

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<sup>9</sup> See Guzman (2002).

<sup>10</sup> See Author; according to a survey conducted by Guzman (2002, 304), out of 100 treaties registered with the United Nations Treaty Series, 80 treaties had no mandatory dispute settlement mechanism. The binding nature of the UNCLOS dispute settlement procedure as well as its flexibility makes it unique relative to many other international treaties.

<sup>11</sup> See Merrills (2011, 169).

<sup>12</sup> See Boyle (1997, 40-41).

<sup>13</sup> See Adede (1975, 798).

through the UNCLOS dispute resolution regime.

We show that the dispute resolution procedures of the UNCLOS regime incorporate common law countries' desire for flexibility in conflict management. Common law countries prefer the multiplicity of options and the default procedure of arbitration, especially given their resistance to the use of the International Court of Justice as the primary adjudicator for resolving maritime conflicts.<sup>14</sup> This flexibility in the UNCLOS dispute settlement procedures results in a higher level of ratification or accession of the UNCLOS treaty by common law states relative to civil law, Islamic law, and mixed law states. On the other hand, civil law countries ratifying the treaty are most likely to select the ICJ court as their preferred conflict management forum. This follows from our theory of strategic forum shopping, as the similarities between legal rules of the ICJ and the civil law tradition enhance civil law states' comfort levels in working with the World Court. We also find that civil law countries are amenable to specifying the ITLOS court as an acceptable binding forum for the management of maritime disputes. Our theory and analyses show the important linkage between domestic law and international legal forums for dispute settlement.

## FORUM SHOPPING IN THE UNCLOS REGIME

Nine years of negotiations that led to the 1982 United Nations Law of the Sea Convention were extremely complex, as over 150 states representing different cultural, geographical, and legal traditions tried to come to a bargaining outcome acceptable to most sides.<sup>15</sup> UNCLOS negotiations were conducted by three main committees.<sup>16</sup> The First Committee dealt with the

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<sup>14</sup> The United States was the key negotiating common law state in the mid-1970s arguing in favor of establishing a new court for UNCLOS. The Montreux formula that emerged in the 1975 Geneva sessions was a compromise proposed by a civil law state (Netherlands), which suggested a choice between three forums for dispute settlement: the ICJ, ITLOS, or an arbitration panel (Adede 1987).

<sup>15</sup> The UNCLOS negotiations occurred in three stages. UNCLOS I began in 1958 and led to agreements on the territorial sea and contiguous zone, the continental shelf, the high seas, and fishing and conservation. UNCLOS II convened for a month in 1960, but produced no significant agreements. UNCLOS III began in 1973 and was voted on in 1982, with 130 states voting in favor, 4 against, and 17 abstaining (Klein 2005).

<sup>16</sup> See Stevenson and Oxman (1975, 3).

“Area” and how resources in the open sea and deep sea beds would be handled. The Second Committee dealt with states’ rights on a variety of issues including the territorial sea limit, the size of exclusive economic zones (EEZs), the continental shelf, access to the sea, and coastal states’ rights. The Third Committee focused on environmental issues such as marine preservation, scientific research, and pollution. The dispute settlement aspects of the treaty were negotiated by a large number of states from 1974 onward and were seen as crucial for reaching agreement on the other terms of the UNCLOS treaty.<sup>17</sup>

Some states including the United States, have publicly stated that agreement on compulsory dispute settlement is an essential element of an overall ‘package’....There is simply too much room in the treaty for misunderstanding, abuse of power, and interference with rights on the basis of unilateral interpretation.<sup>18</sup>

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

Dispute settlement procedures will be the pivot upon which the delicate equilibrium of the compromise must be balanced. Otherwise the compromise will disintegrate rapidly and permanently...Effective dispute settlement would also be the guarantee that the substance and intention within the legislative language of the Convention will be interpreted both consistently and equitably.<sup>19</sup>

Within the UNCLOS regime, states have been given a very interesting choice of different settlement venues in the event of a dispute dealing with interpretation or application of the Convention: ITLOS, the ICJ, or an arbitral tribunal. The unprecedented flexibility in Article 287, the “choice of procedure” article, is the result of “states’ inability, during UNCLOS III, to agree on a single third-party forum to which recourse should be had when informal mechanisms failed to resolve a dispute”.<sup>20</sup> It is important, however, to place Article 287 in the overall context of the Convention’s general rules on peaceful settlement, especially a preceding Article 279 that obliges State Parties to “settle any dispute between them

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<sup>17</sup> See Adede (1987) for a detailed analysis of the UNCLOS dispute settlement negotiations including the 1974 Caracas session, the 1975 Geneva session, the 1976-1977 New York sessions, and the 1978 Geneva session.

<sup>18</sup> See Stevenson and Oxman (1975, 795).

<sup>19</sup> See Adede (1987, 89).

<sup>20</sup> See Noyes (1998, 119).

concerning the interpretation or application of the Convention by peaceful means” in accordance with the UN Charter’s mandate of peaceful settlement. Additionally, Article 283 of the Convention accords primacy to informal dispute settlement mechanisms, such as bilateral negotiations, or other diplomatic means.<sup>21</sup>

During negotiations, a large group of states including several civil law countries such as Denmark, Switzerland and Sweden, pressed for the full involvement of the International Court of Justice as a long-standing, “experienced” international adjudicator. States representing the civil legal tradition argued that conflicting jurisdiction in the international adjudication sphere could occur if too many forums for settlement were created under UNCLOS. According to these states, the ICJ “should not be deprived the opportunity to increase its jurisdiction over such an important area as the law of the sea”.<sup>22</sup> This negotiation tactic can be understood when we consider the legal similarity between the ICJ and civil law rules and procedures. The civil legal tradition, rooted in the laws of the Roman Empire, largely relies on the written letter of law (codes), which meticulously regulate each substantive and procedural area of law.<sup>23</sup> During the UNCLOS negotiations, some civil law states’ representatives pushed for a stipulation that would allow states a freedom of choice of the settlement venue. The Dutch representative, Professor Riphagen, proposed that each party to the UNCLOS Convention be given the ability to “select the court or tribunal it prefers”.<sup>24</sup> Unsurprisingly, however, it was civil law states who argued for a strong position of the ICJ in the UNCLOS settlement regime. While negotiating the order of settlement venues in article 287, Netherlands and Switzerland proposed that the ICJ, as the main judicial organ of the UN, be given the first place – the place of honor. This procedure was challenged by some states such as Argentina on the grounds that the ICJ had optional jurisdiction and thus it would not

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<sup>21</sup> The disputants can at any time abandon the UNCLOS settlement techniques and resort to any peaceful method of their own choice.

<sup>22</sup> See Nordquist, Rosenne and Sohn (1982, 41).

<sup>23</sup> See Glenn (2007).

<sup>24</sup> See Nordquist, Rosenne and Sohn (1982, 43).

be appropriate to give it mandatory jurisdiction.<sup>25</sup>

Other states, including a large number of common law countries such as the United States and Australia, favored establishing a more specialized Law of the Sea Tribunal, which would be better able to handle the technicalities of maritime disputes.<sup>26</sup> Common law, which originated on the British Isles, is based on the *stare decisis* doctrine, whereby judges are bound by precedents established in previous judgments.<sup>27</sup> As a relatively flexible legal system, common law embraces a large degree of judicial creativity.<sup>28</sup> In hopes of creating a more flexible, adjudicative forum with embedded common law features, several common law states also proposed that a special Law of the Sea Tribunal would be “less conservative than the International Court of Justice, would better understand the new law of the sea, and would be more representative of various legal systems and the different regions of the world”.<sup>29</sup> The United States advocated for “a system that will ensure...uniform interpretation and immediate access to dispute settlement machinery in urgent situations, while at the same time preserving the flexibility of states to agree to resolve their disputes by a variety of means. The parties to a dispute should be free to choose by agreement any method of dispute settlement that they consider suitable”.<sup>30</sup> A third group of states, such as the United Kingdom, spoke in favor of even more efficient and flexible international venues for settlement, especially arbitration.<sup>31</sup>

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<sup>25</sup> See Klein (2005, 15).

<sup>26</sup> The United States held informal consultations with more than 35 delegations towards the end of 1974 and proposed a compulsory dispute settlement procedure establishing the Law of the Sea Tribunal (Adede 1987, 13).

<sup>27</sup> See Opolot (1980).

<sup>28</sup> Research in legal history and comparative law shows that legal systems vary in their degree of formalism/flexibility (Merryman 1985; Djankov et al. 2002; Koch 2003; and Author).

Common law is more flexible than civil law. In comparison with civil law, common law is based on a more freely and dynamic interpretation of rules, as common law judges often create law that amends or builds on the preexisting legal structure. Elaborating on the differences between the civil and common law traditions, Jouannet (2006, 309) aptly notes that “Americans [common law] see law as an all-encompassing sociological and political phenomenon, while the French [civil law] see it exclusively as a body of rules and principles.”

<sup>29</sup> See Nordquist, Rosenne and Sohn (1982, 42).

<sup>30</sup> See Adede (1987, 15). The United States also argued that the ICJ was not sufficient for settling maritime disputes because it handled only cases between countries and many maritime issues involved conflicts between private entities and states (Adede 1987, 15).

<sup>31</sup> See Nordquist, Rosenne and Sohn (1982, 41-42). Another argument for establishing ITLOS is that specializing in an area of law, such as the law of the sea, brings benefits. This argument, however, may not be advanced only in regards to common law states. As legal research demonstrates, all domestic legal systems use some degree of

Because most of the negotiations took place during the 1970s, subsequent drafts of the Convention had to “accommodate the views of the socialist States,” who “perceived western international tribunals as bourgeois”.<sup>32</sup> Socialist states questioned the general ideal of binding third-party tribunals of an adjudicative nature. The USSR representative argued that disputes within states’ coastal or EEZ areas should not be subject to third party dispute settlement.<sup>33</sup> The USSR also opposed awarding standing to non-state actors in the UNCLOS court. Instead of supporting ITLOS or the ICJ, representatives of socialist states pressed for highly specialized arbitration, which would enable the disputants to freely choose the arbitrators. Because the final version of UNCLOS provided member states with such a wide choice of settlement venues, the Convention officially became the first general treaty in which the USSR and its allies “agreed to provisions on binding third-party dispute settlement.”<sup>34</sup>

Although several Islamic law states such as Algeria, Iraq, and Lebanon participated in the UNCLOS negotiations process, Islamic legal precepts are largely absent from the Convention and from all formal venues for settlement provided by Article 287. Islamic law, the world’s third major legal tradition, is based primarily on religious sources stipulating principles of human conduct.<sup>35</sup> In contrast to the secular character of international law, all sources of Islamic law, such as the Koran or the Sunna are closely connected to Islamic faith.<sup>36</sup> The disparity between the UNCLOS regime and major tenants of Islamic law became apparent during the Convention negotiation process, as the majority of Islamic law states did not explicitly declare the ICJ or ITLOS as their forum of choice. In that sense, Islamic law

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specialization in courts. Common law states use specialized courts in areas such as small claims, traffic, tax, family issues, and bankruptcy. Civil law states, on the other hand, use specialized courts for ordinary private law matters, such as contract, property, employment law, or administrative law (Hadfield 2008). In the Islamic legal tradition, religious sharia courts are often used to hear matters of private, family law (Author).

<sup>32</sup> See Klein (2005, 56).

<sup>33</sup> See Adede (1987, 83-84).

<sup>34</sup> See Noyes (1998, 116)

<sup>35</sup> See Glenn (2007).

<sup>36</sup> See Vago (2000). The Koran is the sacred book of the Muslims, the Sunna literally means ‘the path taken or trodden’ by the Prophet Muhammad (Glenn 2007, 173-174). Judicial consensus (*ijma*) and analogical reasoning (*qiyas*) constitute subsidiary sources of Islamic law.

states, including several African states, were generally skeptical of obligatory third-party venues that other states advocated for. These states felt uneasy with the concept of binding adjudicative proceedings, since their own legal systems traditionally relied on informal, consensus-building, and community-based dispute settlement.<sup>37</sup> Islamic law states' experience with UNCLOS resembles to a large extent these states' experience with other adjudicative forums. Generally, relations between Islamic law states and international institutions, especially international courts – such as the ICJ, have been on shaky ground due to the inseparable link between Islamic law and the Islamic faith.<sup>38</sup>

The availability of several different venues for settlement within the scope of the Convention raises the possibility of forum shopping. In the context of domestic litigation, forum shopping can be defined as a litigant's attempt "to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict".<sup>39</sup> However, it is important to note that states' search for the best international venue is somewhat different from the domestic version of forum shopping. When specifying their choice of a preferred venue for peaceful resolution in the UNCLOS regime, states can do so *a priori*, that is upon signing, ratifying, or acceding to the Convention (or at a later time). Article 282 of the Convention gives priority to any existing compulsory dispute settlement mechanisms that are binding on the disputants. Thus, if the disputing parties have previously agreed to give jurisdiction to a specified settlement venue that entails a binding decision, such as the ICJ or the International Maritime Organization, then neither party can object to that venue's jurisdictional powers. As such, Article 282 of the Convention is a mechanism that "precludes forum shopping as well as questions of overlapping litispence - questions that

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<sup>37</sup> See Noyes (1998, 115).

<sup>38</sup> See Brower and Sharpe 2003; and Roach 2005.

<sup>39</sup> See Black, Nolan and Connolly (1979).

might follow from conflicting choices made by the disputing parties”.<sup>40</sup>

Forum shopping that states engage in within the UNCLOS regime is also unique since the decision between the ICJ, ITLOS, and arbitration involves fairly comprehensive choices between types of settlement techniques and not choices between specific judges.

Nevertheless, like domestic litigants, states strategically attempt to find a venue for resolution that will be most likely to yield a favorable outcome in a potential future maritime dispute.

There are numerous principles in international law designed to restrict states’ propensity to engage in forum shopping, such as the doctrine of *lis alibi pendens* and the *res judicata* principle. The former prohibits states “to commence another set of competing proceedings concerning the same dispute before another judicial body”. The *res judicata* principle states that “the final judgment of a competent judicial forum is binding upon the parties” and therefore cannot be re-litigated.<sup>41</sup>

We argue that these two rules and the fact that the Convention includes several contingencies designed to curtail forum shopping, are unable to completely curb states’ aptitude to carefully and strategically “pick and choose” from among available UNCLOS venues. As early as the negotiation phase of the UNCLOS treaty, some states appeared to be aware of the potential for forum shopping. Several civil law states, who argued for a strong position of the ICJ, emphasized that allowing the choice of venue under the Article 287 may create a “danger of having too many tribunals which might render conflicting decisions”.<sup>42</sup> The final version of Article 287 endows states with a choice of settlement procedures; this choice just has to be made in advance. As a result, states do forum shop – they just do it *a priori*. Several scholars openly discuss the real possibility of forum shopping among

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<sup>40</sup> See Treves (1999, 811). Article 282 of the Convention states: “If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.”

<sup>41</sup> See Shany (2003, 22-23).

<sup>42</sup> See Nordquist, Rosenne and Sohn (1982, 41).

UNCLOS settlement venues. Seymour describes the ICJ and Annex VII tribunals as ITLOS' "primary competitors."<sup>43</sup> Similarly, Charney pronounces the settlement system provided by the Convention as "a system of free competition" for "business."<sup>44</sup> In general, the main issue with UNCLOS settlement provisions is the availability of several appropriate forums, in which substantive laws may be interpreted and applied.<sup>45</sup> According to Boyle, this fragmentation can leave an "empty shell which can be filled only if the parties agree on consensual submission of the dispute to whatever forum they choose."<sup>46</sup>

Maritime dispute resolution entails a great amount of uncertainty.<sup>47</sup> There is no single international judicial body endowed with the power to create and interpret the international law of the sea. The ICJ, ITLOS, and a host of arbitral ad hoc tribunals have issued many substantively important judgments, yet these tribunals are not always in agreement with each other on maritime principles. States representing different legal traditions often do not view international law the same way, as, "there may be few common reference points among the many international jurists".<sup>48</sup> This state of affairs can lead to legal uncertainty: "One is therefore faced with the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule".<sup>49</sup> This uncertainty is especially acute in the area of the law of the sea, where different adjudicative forums have embraced divergent norms on important issues such as delimitation of the continental shelf.<sup>50</sup>

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<sup>43</sup> See Seymour (2006, 12).

<sup>44</sup> See Charney (1996, 71).

<sup>45</sup> See Rayfuse (2005).

<sup>46</sup> See Boyle (1997, 47).

<sup>47</sup> This was especially evident in the competing positions in dispute settlement negotiations. The functionalist group argued that different dispute settlement techniques may be needed for different types of maritime disputes. These states feared an overarching dispute settlement approach because the law of the sea was still relatively in its infancy (Adede 1987).

<sup>48</sup> See Picker (2008, 1086).

<sup>49</sup> See Shaw (2003, 66).

<sup>50</sup> For example, in the area of maritime disputes, divergence in interpretation occurred in the context of delimitation of the continental shelf between adjacent states. The principle of equidistance establishes that the boundary must be determined "from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured" (Convention on the Continental Shelf of 1958, Article 6). In several judgments (*the North Sea Continental Shelf case*, *the Libya/Malta case*, and *the Gulf of Maine case*), the ICJ rejected the Convention on the Continental Shelf of 1958 to some extent by adopting a "result oriented approach," which

This uncertainty can also be attributed to the fact that international dispute resolution inherently rests on applying and interpreting international legal rules and deciphering inconsistencies between rival norms in the context of specific cases.<sup>51</sup> In this sense, international courts are no different from domestic courts, because all courts have to face interpretation of legal rules: “when seeking to overturn all but the most flagrantly illegal state actions, litigants and courts must inevitably appeal to particular interpretations of such ambiguities [ambiguities between norms]”.<sup>52</sup> Furthermore, by opening themselves up to adjudication, states may lose control over the outcomes of bargaining over highly salient issues, as the costs for renegeing on judgments rendered by international courts are extremely high.<sup>53</sup>

We argue that the lack of certainty about how a forum will adjudicate in specific maritime cases is mitigated if the rules and procedures of a dispute resolution method are familiar.<sup>54</sup> States are more comfortable with an international resolution venue if they share its basic legal rules and principles, as they can feel more confident about the types of decisions the venue will render. Judge Hardy Cross Dillard of the ICJ has directly referred to the issue of familiarity: “[W]hile perhaps regrettable, it does not seem unnatural that those in charge of the foreign affairs of governments should prefer to settle disputes by processes with which they are familiar, that are flexible, and that remain under their control, rather than risk a

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states that there should be no single method of delimitation, which is in all circumstances mandatory; the main goal is to achieve equitable results (Tanaka 2004, 382). Another approach, the “corrective-equity approach,” was first advocated for by the Court of Arbitration in the *Anglo-French Continental Shelf case of 1997* (Tanaka 2004). This method of delimitation proposes that the principle of equidistance should not be rejected in its totality, but modified (Author).

<sup>51</sup> See Abbott and Snidal (1998).

<sup>52</sup> See Keohane, Moravcsik, and Slaughter (2000, 461).

<sup>53</sup> See Bilder (1998); and Author.

<sup>54</sup> When we refer to an international court’s procedures, we are adopting a definition similar to Brown (2007, 8): “‘procedure’ includes not only the conduct of proceedings, including the power of international courts to rule on preliminary objections, the adduction of evidence, and the exercise of incidental powers, during and after the adjudication on the merits, but also the constitution of international tribunals and questions relating to their jurisdiction.”

settlement through processes with which they are less familiar, that appear more rigid, and that entail a loss of control”.<sup>55</sup>

States are able to form expectations about the method of interpretation of legal rules and in-court procedures if the two sets of legal rules, domestic law and the legal design of an international court, align with one another because “when similar legal language is used, similar legal mechanisms are adopted”.<sup>56</sup> The expressive theory of adjudication posits that unbiased adjudicators may be effective at helping parties resolve coordination problems by correlating strategies, creating focal points, and signaling information.<sup>57</sup> Yet not all international courts are viewed as equally unbiased by potential joining states. The originators of new courts embed design principles from their domestic legal traditions in the rules of the court to reduce uncertainty in the future with respect to the types of cases the court will hear, the types of judgments it will render, and the procedures that will be employed in judicial processes.

For example, the Permanent Court of International Justice (PCIJ) was designed around legal principles and rules from the Roman/ civil law tradition by rejecting *stare decisis* and emphasizing *bona fides* and contractual compliance. This design feature was taken into account by later joiners to the court, as civil law countries have been three times more likely to accept compulsory jurisdiction of the World Court than common law or Islamic law countries.<sup>58</sup> On the other hand, the negotiated compromise in Rome that resulted in a hybrid system of legal rules for the International Criminal Court stemming from both common law and civil law, produced nearly equal rates of signature and ratification of the Rome Statute by common law and civil law states.<sup>59</sup> Nonbinding third-party peaceful resolution methods, such

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<sup>55</sup> See Dillard (1978, 228).

<sup>56</sup> See Author.

<sup>57</sup> See Ginsburg and McAdams (2004); and McAdams (2005).

<sup>58</sup> See Author

<sup>59</sup> See Author

as conciliation and mediation, resemble domestic dispute settlement in Islamic law states. Thus, these states are drawn to such methods in resolving their interstate disputes.

Simply put, states use their domestic legal systems as clues about the outcomes of future court cases. In the context of the UNCLOS regime, some scholars have argued that states may have “a deeply rooted attachment to arbitration, or equally deeply rooted reasons for mistrust of the Court and the Tribunal”.<sup>60</sup> We argue that these preferences for different venues for settlement are strongly anchored in states’ attachment to their own domestic legal traditions. Sentiment to rules embedded in domestic legal traditions was apparent during UNCLOS III when states negotiated the availability of several forums under Article 287. Some developing states “considered the ICJ too conservative and unrepresentative of worldwide legal systems”.<sup>61</sup> In the next section, we explore the influence of states’ domestic legal traditions on their preferences for dispute settlement procedures in the UNCLOS treaty.

#### INTERNATIONAL ADJUDICATION IN THE UNCLOS REGIME

The ITLOS and the ICJ constitute two prominent international courts of law. In comparison with other methods of settlement, such as arbitration, adjudication entails the submission of a dispute to a permanent court whose composition is largely fixed. Both courts are independent of the interests of the disputants, which may not necessarily be the case with arbitral tribunals.<sup>62</sup> Whether a dispute goes to a more general adjudicator – the ICJ, or a more specialized judicial body – ITLOS, the parties choose a method that entails fairly strict adherence to international law by the adjudicator, strict regulation of procedure, membership, jurisdiction, and nature of disputes admitted. Both courts are comprised of members that are institutionally separated from the state parties and have salary protection. Most importantly, both adjudicators rely on procedures and legal rules that are for the most part nonnegotiable

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<sup>60</sup> See Treves (1999, 819-820).

<sup>61</sup> See Noyes (1998, 119).

<sup>62</sup> See Rah and Wallrabenstein (2006).

and do not change from dispute to dispute. As a result, the ICJ and ITLOS constitute independent international tribunals.<sup>63</sup> All of these features account for the fact that both of these courts' underlying rules are relatively formal and strict when compared with Annex VII or VIII arbitration offered in the UNCLOS regime.

There are important similarities between the institutional design of ITLOS and the ICJ, stemming from the fact that ITLOS' Rules are largely based on the 1972 revision of the Rules of the International Court of Justice. In the same vein, the ITLOS Statute resembles the Statute of the ICJ. As such, designers of both courts substantially drew on legal concepts originating from the civil legal tradition. Thus, civil legal principles and basic understanding of the role of an adjudicator are embedded in legal documents pertaining to both courts. For example, in the spirit of civil law, both courts embrace the doctrine of good faith (*bona fides*), formally reject the doctrine of the precedent (*stare decisis*), and embrace a high degree of formality.

In practice, ITLOS remains in a close relationship with the ICJ. Although there is no formally regulated relationship between the two institutions, ITLOS refers to the ICJ's treatment of international legal doctrines and rules and often cites its judgments to support its own legal reasoning.<sup>64</sup> In order to facilitate this ongoing relationship, the ICJ has sent all of its publication to ITLOS "as a friendly gesture to a fellow judicial organ".<sup>65</sup> However, despite the close relationship between the ICJ and ITLOS, and despite important similarities between these two institutions, there are also several crucial differences in the design of both courts. Below we elaborate on institutional characteristics of both courts, focusing on the similarities and differences between the two institutions.<sup>66</sup>

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<sup>63</sup> See Posner and Yoo (2005).

<sup>64</sup> See de la Fayette (2000)

<sup>65</sup> See Rao (2002, 296).

<sup>66</sup> In this section we focus only on differences and similarities between ITLOS and the ICJ that pertain to our argument, and thus deal with legal characteristics of the two courts. There are a host of other differences between ITLOS and the ICJ that cannot be linked to features of domestic legal systems – we do not elaborate on these.

### *Lack of Formal Stare Decisis*

Similar to the ICJ, there is no official doctrine of the precedent embedded in ITLOS' structure.<sup>67</sup> Article 124 of the Rules of the Tribunal as amended on 17 March 2009 stipulates that its judgments are "binding on the parties on the day of the reading." Additionally, the Tribunal's Statute directly states that its decision "shall have no binding force except between the parties in respect of that particular dispute" (Article 33). As such, both articles carry the same message as Article 59 of the ICJ Statute, which limits a decision's binding force only to the disputants and to the case in question. In the context of international adjudication, the object of such legal stipulations is simply to prevent legal principles accepted by a court in a particular case from being binding on other states or in other subsequent disputes.<sup>68</sup> The lack of formal judicial precedent in the activity of both courts makes it very similar to civil legal systems where this doctrine is for the most part prohibited.<sup>69</sup>

### *Bona Fides*

Secondly, following the path of the ICJ, ITLOS leans in the civil law direction of favoring the all-encompassing *bona fides* principle.<sup>70</sup> *Bona fides* is one of the general principles and formal sources of international law.<sup>71</sup> The general view of the doctrine of good faith has been recognized by the ICJ in several judgments, including the *Norwegian Fisheries* case (1951), the *North Sea Continental Shelf* cases (1969), and the *Nuclear Test* cases (1973).<sup>72</sup> Following the ICJ, ITLOS has explicitly referred to *bona fides* several times in its

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<sup>67</sup> See Merrills (2011, 183).

<sup>68</sup> See (Brownlie 2003). However, the ICJ referred to "its settled jurisprudence on maritime delimitation" in its most recent ruling (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*), Judgment 3 February 2009, ICJ Reports 2009, p. 61).

<sup>69</sup> See Rosenne (1962). Negotiators of the ICJ agreed that the common law doctrine of *stare decisis* would not be applied in international law. In practice, the Court has referred to its previous judgments and the judgments of its predecessor, the PCIJ. Nevertheless, there is no legal doctrine of the precedent in the ICJ.

<sup>70</sup> The *bona fides* or good faith principle has three constitutive moral elements: honesty, fairness, and reason (Zimmermann and Whittaker 2000).

<sup>71</sup> See O'Connor (1991).

<sup>72</sup> In the *Norwegian Fisheries* case, the ICJ upheld Norway's right to establish maritime baselines, arguing that Britain could not contest them after a long period of inaction (Kolb 2006, 21). In the *North Sea Continental Shelf* cases, the ICJ recognized *estoppel*, an important doctrine derived from good faith (O'Connor 1991). In the

own jurisprudence, often referring to its treatment by the ICJ (The *Volga* case (2002)).<sup>73</sup> ITLOS President P. Chandrasekhara Rao confirmed the Tribunal's commitment to *bona fides* by stating that: "It is equally important that judgments rendered by international courts or tribunals are implemented in good faith and in time by States and other parties to international adjudication."<sup>74</sup>

### *Degree of Formality*

Research in comparative law demonstrates that legal systems vary in the degree of formalism, including rules regulating in-court proceedings.<sup>75</sup> States representing the civil law tradition "generally regulate dispute resolution, including the conduct of the adjudicators, more heavily than do common law countries".<sup>76</sup> As such, civil law states meticulously regulate the behavior of all disputing parties via the means of procedural codes, which address rights and obligations of each disputant, the court, and a host of bureaucratic and technical issues, such as time limits and order of proceedings. The common law tradition is regarded by numerous legal scholars as much more flexible than the civil legal system. Less formalism is required in judicial procedures in common law systems, since the political process has granted its judges a high degree of judicial independence.<sup>77</sup>

Following in the steps of the civil legal tradition, the ICJ and ITLOS procedures have been highly formalized. As expected, however, the founders of the Convention necessarily modified rules and principles pertaining to ITLOS in order to increase its effectiveness and speediness of settling disputes by introducing several features not present in the ICJ. As such, the design of the ITLOS court includes unique attributes like the setting of a fixed date for the opening of the oral proceedings, enabling the judges to exchange views concerning the

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*Nuclear Test* cases, the ICJ argued that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith" (cited in Virally 1983, 130).

<sup>73</sup> Russian Federation v. Australia (23 December 2002, No. 11)

<sup>74</sup> Statement, P. Chandrasekhara Rao, the Plenary of the fifty-fifth session of the United Nations General Assembly, 30 October 2000.

<sup>75</sup> See Merryman (1985); Schlesinger *et al.* (1988); and Djankov *et al.* (2002).

<sup>76</sup> See Djankov *et al.* (2002, 7).

<sup>77</sup> *Ibid*

conduct of the case and written pleadings, introducing a set of rules concerning the Seabed Disputes Chamber, and the use of electronic means of communication.<sup>78</sup> The rules and internal processes of ITLOS are less formalistic and more practical than those of the ICJ. While drafting its underlying procedures, the founders of ITLOS have drawn insights from both the successes and failures of the ICJ. The Rules of ITLOS constitute a much more encompassing legal document that regulates proceedings in front of the court and the rights and obligations of the parties. At the same time, however, the actual rules – designed based on the ICJ’s experience – are informed by international juridical practical and make the Tribunal’s proceedings “efficient, cost-effective and ‘user-friendly’”.<sup>79</sup> Interestingly, the Tribunal’s Rules, comprising 138 Articles, have been designed by the first set of the Tribunal’s members, which to a large extent account for their very practical nature.<sup>80</sup> The Rules stipulate that proceedings before the Tribunal should be conducted without any unnecessary expense or delay. ITLOS’ practical approach to international adjudication seems to be successfully fulfilling the Tribunal’s intention to develop and incorporate ‘user-friendly’ proceedings.<sup>81</sup> Despite the fact that underlying rules and procedures of the ICJ and ITLOS contain numerous features stemming from the civil legal tradition, ITLOS’ practical approach to these rules accounts for the Tribunal’s closer affinity with the common law tradition.

## ANNEX VII AND VIII SPECIAL ARBITRATION

Arbitration offered in the UNCLOS regime constitutes a viable potential for state parties. As a useful alternative to adjudication, arbitration has numerous advantages, such as a shorter duration of the proceedings and the disputants’ ability to have a relatively high degree of

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<sup>78</sup> See Rao (2002, 217).

<sup>79</sup> See Merrills (2011, 188).

<sup>80</sup> In comparison, 109 Articles constitute the Rules of the International Court of Justice.

<sup>81</sup> See Merrills (2011, 188).

control over the composition of the tribunal.<sup>82</sup> In settling their maritime disputes, some states may prefer arbitration “because it allows for a more flexible procedure enabling disputes to be settled more expeditiously”.<sup>83</sup> There are two possible arbitration options under the UNCLOS agreement. First, states may choose the Annex VII arbitration, where a list of arbitrators “experienced in maritime affairs” is submitted by each State Party (Annex VII, Art. 2). In the spirit of flexibility, the Convention lays down no requirements concerning legal qualifications of the arbitrators. Annex VIII arbitration consists of a forum that is highly specialized in a specific genre of dispute, such as fisheries or navigation. This type of arbitral tribunal may be composed of “technical experts from specialized agencies”<sup>84</sup> who may be considered better qualified than general judges to decide upon very specific disputes dealing with highly technical matters. The arbitrators are to be experts in the fields of fisheries, protection of the marine environment, marine scientific research, and navigation (Annex VIII, Art. 2). Interestingly, the proceedings before the Annex VIII arbitral tribunal may be relatively limited as these panels may conduct fact-finding alone that may be sufficient to settle a dispute between the parties.<sup>85</sup>

In addition to explicitly choosing Annex VII or VIII arbitration, the method of arbitration constitutes a default resolution option in the UNCLOS Convention. As we can see in Tables 2 and 3, around 1/5 of countries ratifying or acceding to the UNCLOS treaty have stipulated a specific choice of settlement should peaceful negotiations fail. As such, an overwhelming majority of states parties to UNCLOS have *not* made a specific dispute resolution declaration under Article 287. According to the “residual rule” of Article 287 in paragraph 5, if states have not accepted the same procedure for the settlement of the dispute,

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<sup>82</sup> See Noussia (2010, 80).

<sup>83</sup> See Klein (2005, 56).

<sup>84</sup> See Klein (2005, 57).

<sup>85</sup> UNCLOS, Annex VIII, Art. 5.

the compulsory jurisdiction under the Convention belongs to an arbitral tribunal. Some scholars have argued that because of this stipulation, the Convention is actually biased against adjudication and favors arbitration as an option for states. As Treves describes: “the Court and the Tribunal are in competition, together and not one against the other, with arbitration. Arbitration is the procedure that states parties can declare under Article 287, that they are presumed to prefer in the absence of a declaration, and that applies whenever two parties to a dispute have not expressed the same preference.”<sup>86</sup>

Arbitration exhibits several important characteristics of the common law tradition. Reminiscent of common law’s lesser degree of formality, international arbitration constitutes a much more flexible means of settling disputes when compared with adjudication.<sup>87</sup> Whereas adjudication inherently rests on the submission of a dispute to a permanent court whose composition is for the most part fixed, in arbitration, the disputants may choose the arbitrators.<sup>88</sup> Similar to common law in-court proceedings, an arbitral tribunal is more flexible than a court in the process of reaching a decision. As a general rule, an arbitral panel can base its decision not only on international law, but also on certain principles agreed upon by the parties, equity, and sometimes principles of a domestic legal system.<sup>89</sup>

Arbitration in the UNCLOS regime displays several other features that make it similar to the common law approach to law and courts. When compared with other international adjudicators, UNCLOS arbitral tribunals “cite decisions by other bodies more frequently than both ‘pure’ *ad hoc* tribunals and the ICJ”.<sup>90</sup> UNCLOS arbitration tribunals cite a variety of existing decisions and judgments, including those of the ICJ, *ad hoc* tribunals, and

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<sup>86</sup> See Treves (1999, 817).

<sup>87</sup> See Cassese (2005).

<sup>88</sup> Arbitrators do not have to be international judges. For example, in the ICJ *Argentina – Chile* case of 1966 (38 ILR, p.10), the tribunal consisted of a lawyer and two geographical experts.

<sup>89</sup> See Author

<sup>90</sup> See Bekker (2010, 6).

UNCLOS.<sup>91</sup> For example, the arbitral award in *Barbados-Trinidad and Tobago* contains “43 references to all available ICJ precedents and six references to four of the six ‘pure’ *ad hoc* decisions, while the award in *Guyana-Suriname* refers 39 times to all available ICJ precedents and 11 times to four *ad hoc* awards.”<sup>92</sup> Furthermore, several of these arbitral tribunals have openly embraced the informal doctrine of the precedent by mentioning the importance of established legal norms. For example, the UNCLOS Annex VII tribunal in *Barbados-Trinidad and Tobago* ascribed the following role to jurisprudence: “It is furthermore necessary that the delimitation be *consistent with legal principle as established in decided cases*, in order that States in other disputes be assisted in the negotiations in search of an equitable solution that are required by Articles 74 or 83 of the Convention.”<sup>93</sup>

Based on our theory, we expect that common law states should be most likely to sign onto the UNCLOS Convention. As a legal international document, the Convention allows for an unprecedented degree of flexibility in the choice of peaceful resolution venues. Additionally, the arbitration tribunals provided for in the Convention resemble to a large degree the common law approach to dispute resolution. The fact that arbitration is unequivocally favored by the Convention should encourage common law states to sign and ratify this legal act. The flexibility of arbitration and the repeated use of precedents by the UNCLOS arbitration tribunals make this default option especially attractive for common law states. As such, we expect that common law states will be most likely to sign onto the Convention. At the same time, we anticipate that these states will be unlikely to explicitly commit to either of the adjudicative forums specified in Article 287. International adjudication is much more formal than any form of dispute resolution provided by an arbitral tribunal. Additionally, when compared with Annex VII and VIII special arbitration, both the

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<sup>91</sup> Most importantly, UNCLOS Annex VII tribunals, despite their relatively young age when compared with the ICJ, have referred to ICJ decisions and arbitral awards “even more frequently than the ICJ itself” (Bekker 2010, 6).

<sup>92</sup> See Bekker (2010, 6).

<sup>93</sup> Emphasis added by the authors.

ICJ and ITLOS procedural rules largely stem from the civil legal tradition, which makes these forums less attractive to common law states. However, because ITLOS' structure is much more flexible and amenable to judicial creativity, we expect that common law states should be slightly more amenable to the ITLOS court.

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

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

We also anticipate that civil law states should be most supportive of the ICJ and ITLOS, as both of these forums resemble the civil law's approach to dispute resolution. As noted earlier, civil law states have been very supportive of the ICJ, and its predecessor – the Permanent Court of International Justice. We expect that civil law states' commitment to the ICJ should also be evident within the UNCLOS regime. Because ITLOS' rules and procedures have been largely based on the ICJ' legal underpinnings, civil law states should also be very supportive of both adjudicators. These states do not necessarily look as favorably on the flexibility of the UNCLOS Convention, as do common law states. Used to a very formal structure of law, legal reasoning, and comfortable with relatively formal adjudicators, these states should feel comfortable with the UNCLOS regime only when they choose to sign onto the UNCLOS treaty. We thus expect that among all legal traditions, civil law states will be most likely to choose the ICJ as an acceptable forum within the UNCLOS regime. Due to a high level of similarity between ITLOS and the ICJ, civil law states should also be open to ITLOS as a potential adjudicator.

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

Because of important disparities between public international law and Islamic international law, *siyar*, Islamic law states ratifying the UNCLOS treaty should be hesitant to commit to either the ICJ or ITLOS under Article 287. Having developed primarily from ideas of the Western world, international law embraces the view that a distinction between the law and religion must be strictly observed. Neither the ICJ nor ITLOS explicitly incorporate *sharia* into their jurisprudence.<sup>94</sup> Additionally, their structure is in large disparity with informal dispute resolution techniques present in most Islamic law states. As such, Islamic law states usually resort to less formalized international dispute resolution methods, such as mediation or conciliation. Seventy eight percent of attempts at peaceful resolution in territorial disputes involving Islamic law states included an Islamic third party such as the Arab League, the Islamic Conference Organization, the Gulf Cooperation Council, or presidents from Egypt, Syria, Kuwait, Jordan, Saudi Arabia, and Iran.<sup>95</sup>

We expect that Islamic law states should be drawn towards informal dispute resolution methods while attempting to resolve their maritime disputes. The UNCLOS Convention is very flexible in allowing the disputing states to “seek settlement of the dispute by a peaceful means of their own choice” (Article 281) regardless of the dispute resolution procedures outlined in the Convention (Article 280). As such, we expect that Islamic law states should be more willing to ratify the UNCLOS Treaty relative to other international treaties.<sup>96</sup> At the same time, these states should be unlikely to explicitly commit to ITLOS, the ICJ, or Annex VII or VIII special arbitration. Instead, being supportive of the general idea of the peaceful settlement of disputes – largely promoted by the Koran – Islamic law states will try to resolve their disputes via other, more informal venues.

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<sup>94</sup> However, the ICJ relied on Arab-Islamic elements of legal reasoning in the Western Sahara case (Western Sahara, advisory Opinion, [1975] ICJ Rep. p. 12 (see Merrills 2011)).

<sup>95</sup> See Author.

<sup>96</sup> This is quite distinct from the behavior of Islamic law countries towards other international courts. Only five Islamic law countries have ratified the Rome Statute, whereas only six Islamic law countries have ever recognized the compulsory jurisdiction of the World Court (Author).

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

## ANALYSES

To evaluate our theoretical arguments linking domestic legal traditions and states' preferred dispute resolution forums in the UNCLOS treaty, we first collected data on states' decisions to sign, ratify, or accede to the 1982 UNCLOS treaty. We took as our reference point any country listed on the UNCLOS website page specifying the "Status of the Convention and of the related Agreements, as at 21 July 2011".<sup>97</sup> We also included any state identified as a system member by the Correlates of War dataset from 1982-2008.<sup>98</sup> The total number of states that meet these criteria is 193, with 81.4% signing the UNCLOS treaty. The data for ratification/accession are presented in Table 1. In this time period, 159 (82.4%) of 193 countries in the world ratified or acceded to the UNCLOS treaty.

Table 1 stratifies ratification/accession decisions by states' domestic legal traditions, focusing on the four major legal traditions in the world: civil law, common law, Islamic law, and mixed law.<sup>99</sup> The data fit with our theoretical expectations, showing that common law states have the highest level of support for the UNCLOS treaty. 95.7% of common law countries have ratified the treaty (with only the United States and Bhutan being the only exceptions).<sup>100</sup> This is a much higher rate of treaty ratification in comparison to states with civil law (77.2%), Islamic law (80.8%), or mixed law (78.9%) traditions. The success of common law states in the UNCLOS negotiations to push for a flexible arbitration approach to dispute resolution enhanced these states' willingness to support the institution. Moreover, the fact that arbitration constitutes the default option under the Convention constitutes an

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<sup>97</sup> < [http://www.un.org/depts/los/reference\\_files/status2010.pdf](http://www.un.org/depts/los/reference_files/status2010.pdf)>

<sup>98</sup> < <http://www.correlatesofwar.org/>>

<sup>99</sup> This data is taken from Author, where we provide a detailed description of the histories and characteristics of each major legal tradition. Mixed legal systems combine elements from two or more legal traditions.

<sup>100</sup> We should point out that President George W. Bush also pushed for the United States to finally ratify the UNCLOS treaty, yet the Senate did not agree.

additional incentive for these states. As stipulated above, if a state fails to directly declare a forum, or if the disputing states choose different settlement venues, the residual jurisdiction belongs to an arbitral tribunal. Thus, common law states have been very open to signing onto the Convention. After all, the act of signature/ratification constitutes an important signal of their willingness to peacefully resolve their maritime disputes. What's most important, however, is the fact that they can do so via their favorable flexible venue – an arbitral tribunal.

The overall UNCLOS treaty ratification rate is much higher for common law states when compared to these states' support for other global institutions. Less than half of all common law states have ratified the ICC's Rome Statute, while a mere one-fifth of common law states have ever recognized the compulsory jurisdiction of the World Court (PCIJ/ICJ).<sup>101</sup> Common law states have also repeatedly resorted to the UNCLOS arbitration procedures without explicitly choosing Annex VII or VIII arbitration in their Article 287 declarations. Australia and New Zealand commenced arbitration proceedings against Japan under Annex VII of the UNCLOS Convention in the *Southern Bluefin Tuna Cases* despite the fact that arbitration was not the choice of procedure of either applicant.<sup>102</sup> A similar situation took place in the Barbados and Trinidad and Tobago dispute related to the delimitation of the Exclusive Economic Zone and Continental Shelf between them.<sup>103</sup> Neither of these states chose Annex VII arbitration as their choice of a resolution venue. In fact, Barbados has not to this day made a choice of procedure declaration, and Trinidad and Tobago's first forum of choice is ITLOS, followed by the ICJ as a second option.

The results pertaining to UNCLOS treaty ratification rates of Islamic law states (80.8%) are quite interesting, showing a higher ratification rate than for civil law states

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<sup>101</sup> See Author

<sup>102</sup> New Zealand has not made an Article 287 application; Australia declared ITLOS and then ICJ as its choices of venues. Award on Jurisdiction and Admissibility rendered 08/04/2000, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=7\\_10.pdf](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=7_10.pdf)

<sup>103</sup> Award by the Permanent Court of Arbitration, 04/11/2006.

(77.2%). This level of support for the Law of the Sea Convention is much higher relative to Islamic law states' support for other major international courts; fewer than twenty five percent of Islamic law countries have ratified the Rome Statute or recognized the compulsory jurisdiction of the World Court.<sup>104</sup> Islamic support for UNCLOS accords with our theory because the default arbitration procedures in UNCLOS are much closer to the Islamic law approach to the peaceful resolution of disputes with its emphasis on acknowledgment, apology, and forgiveness.<sup>105</sup> As Tables 2 and 3 demonstrate, however, Islamic law states do not like to commit to formal adjudicative forums such as the ICJ or ITLOS, preferring instead more informal means of settlement. Particularly attractive to these states is conciliation, regulated by Article 284 of the Convention.<sup>106</sup> The Montreux compromise that was struck in the 1975 Geneva sessions created a dispute settlement procedure that was attractive to a much larger swathe of countries given its more flexible approach to dispute settlement, with a selection among the various binding forums.

Our second stage of data collection focuses on states' declarations under Article 287 of the UNCLOS treaty. This information comes from the UNCLOS website on the "Settlement of disputes mechanism".<sup>107</sup> As noted earlier, states can select among four forums (ICJ, ITLOS, Annex VII arbitration, or Annex VIII arbitration), they can rank order their preferences among the forums, and they can opt to leave a particular forum as undesignated. For example, in its 2002 declaration, Australia recognized the ITLOS or ICJ courts as acceptable adjudicators for disputes arising in the context of the UNCLOS treaty, with no rank ordering between them. Austria, on the other hand, ranks three of the forums under

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<sup>104</sup> See Author.

<sup>105</sup> See Irani and Funk (1998).

<sup>106</sup> Article 284 of the Convention states: "A State Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation in accordance with the procedure under Annex V, section 1, or another conciliation procedure."

<sup>107</sup> <[http://www.un.org/depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm](http://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm)>

Article 287 with the ITLOS court first, the Annex VIII arbitration tribunal second, and the ICJ third. Some states, such as Greece, choose only a single acceptable forum (ITLOS).

We created three dummy variables to capture Article 287 declaration information. The first variable for the ITLOS court equals one if a state opts for this forum first and zero otherwise. No state rank ordered ITLOS below the first rank order. The second variable is coded one if a country notes that the ICJ is an acceptable adjudicator under Article 287 and zero otherwise; this includes the rank order of the ICJ in the first, second, or third position.<sup>108</sup> Our final variable captures states' selection of the arbitration procedures under either Annex VII or Annex VIII. Annex VII is the default procedure if no declaration is made, yet nine countries (such as Russia) declare this forum nonetheless. Only 8 countries specify the Annex VIII arbitral tribunal as acceptable. Due to these small frequencies, we combine the arbitration options into a single dummy variable, with 6.7% of countries choosing one of the two arbitration options.

Tables 2 and 3 present the descriptive information for ITLOS and ICJ forum selection by states' domestic legal traditions. As expected, civil law countries have the highest preference for the International Court of Justice, with 26.9% of civil law states recognizing this court in an Article 287 declaration (among those states that have ratified or acceded to the treaty). Only 4.4% of common law states and 4.8% of Islamic law states agree to work with the ICJ to resolve maritime disputes. This meshes well with Author's findings that civil law countries are much more supportive of the World Court than states with other legal traditions due to its civil law design. The ITLOS court finds a higher level of support among common law (11.1%) and Islamic law states (9.5%), yet civil law countries select this forum with the highest percentage (26.9%). This pattern can be explained by the similar legal design of the ITLOS and ICJ courts, as civil law countries could expect similar rules and procedures to be

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<sup>108</sup> 71% of states rank the ICJ first, 19% rank it second, while 10% rank it third. We should note that three countries declared the ICJ to be an unacceptable forum: Cuba, Guinea-Bissau, and Algeria. We code the ICJ variable as zero for these cases.

utilized, even though the ITLOS court is somewhat less formal in its procedures. As expected, common law states prefer ITLOS to the ICJ. More than twice as many common law states recognize ITLOS as an acceptable forum for settlement relative to the ICJ (11.1% versus 4.4%). Although these statistics are much smaller when compared with declarations placed by civil law states (26.9% for both courts), they convey an important message: the flexibility of ITLOS seems to attract common law states, which historically have been reluctant to accept jurisdiction of the civil-law based, more formal ICJ.

In Table 4, we analyze states' selection of dispute settlement procedures under Article 287 using multivariate logit models. We control for two additional factors beyond domestic legal traditions: capabilities and regime type.<sup>109</sup> In their analysis of the ICJ, Author found that powerful states were less supportive of compulsory jurisdiction relative to weaker states, while democratic countries were more likely to support the World Court than autocratic states. The basic results presented in the cross-tabulations in Tables 2 and 3 find confirming support in Table 4. The coefficient for civil law is positive and significant for each type of forum under Article 287, with the largest effect for the ICJ court.<sup>110</sup>

Overall, the ICJ's level of activity stemming from the UNCLOS Convention is much lower than the activity on ITLOS and the Annex VII and VII arbitration. The initial hopes that the ICJ would play a leading role in the settlement of UNCLOS disputes have not yet been realized. However, states that do file their cases with the ICJ are for the most part civil law states. Prominent examples include the *Territorial and Maritime Dispute* between Nicaragua and Colombia, and *Maritime Delimitation between Nicaragua and Honduras in the*

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<sup>109</sup> The capabilities measure is each state's CINC score in 1982 if they signed the original treaty or in the year they acceded to the treaty if they joined later. If a state did not sign the treaty, we code its CINC score in the first year as a COW system member. The CINC score reports a state's percentage of total systemic military, economic, and demographic capabilities; the average for our sample is .005. For regime type, we use the Polity score which subtracts a state's autocracy (0-10) score from its democracy (0-10) score. The average for our sample is 3.4. Inclusion of regime type removes several common law countries from the analysis because many island states do not have Polity scores, but this does not bias results on our other variables of interest.

<sup>110</sup> Common law states are the reference category. Mixed law countries also get removed from the model because none have signed an Article 287 declaration.

*Caribbean Sea*.<sup>111</sup> Interestingly at the time of application, Nicaragua and Honduras had not made an Article 287 declaration. Since then, however, both of these civil law states have demonstrated a clear partiality towards the ICJ by stipulating that the Court is their first choice venue. It is especially evident in the wording of Nicaragua's declaration, which states that Nicaragua "accepts only recourse to the International Court of Justice".<sup>112</sup> Islamic law countries are similar to common law (reference category) and mixed law states (dropped due to perfect collinearity) in their support levels for the ICJ or ITLOS courts.

More powerful states prefer the arbitration procedures under Annex VII or Annex VIII, which is consistent with Posner and Yoo's claim that powerful actors prefer the flexibility and design specific nature of arbitration tribunals.<sup>113</sup> Less powerful states, on the other hand, value more legalized, binding third-party methods as they provide legal venues where the disputants are treated evenly, regardless of their capabilities. The divergence of views regarding UNCLOS dispute settlement between the two types of states, more and less powerful, became apparent during the UNCLOS III negotiations. Delegates from developing states believed that embedding third party dispute settlement provisions into the Convention "would counterbalance political, economic, and military pressures from powerful states".<sup>114</sup> Stronger states, like the US, argued in favor of more flexible provisions, which would "deter new unilateral state claims that had questionable legal support".<sup>115</sup>

Democratic countries show more affinity for dispute resolution through international courts (either the ICJ or ITLOS) in comparison to less democratic states. This fits with Authors' findings that democracies are more likely to sign onto international courts like the

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<sup>111</sup> ICJ Judgments 12/13/2007, 05/04/2011 (*Nicaragua v. Colombia*), and 10/08/2007 (*Nicaragua v. Honduras*), available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3>. However, because of the timing of UNCLOS ratification by the disputing parties, Seymour (2006, 13) argues that 'it is not clear that they [these cases] necessarily demonstrate a general preference for the ICJ.'

<sup>112</sup> See ITLOS (2011). *Declarations of States Parties Relating to Settlement of Disputes in Accordance with Article 287 (Choice of Procedure)*, available at: [http://www.itlos.org/fileadmin/itlos/documents/basic\\_texts/287\\_declarations\\_June\\_2011\\_english.pdf](http://www.itlos.org/fileadmin/itlos/documents/basic_texts/287_declarations_June_2011_english.pdf)

<sup>113</sup> See Posner and Yoo (2005).

<sup>114</sup> See Noyes (1998, 115).

<sup>115</sup> *Ibid.*

ICJ and ICC and that they have more durable commitments to those courts. Our results also support the arguments advanced by the democratic legalistic perspective that links the democratic commitment to the principle of rule of law to democracies' support for more legalized methods of peaceful resolution.<sup>116</sup> In the context of territorial disputes, Allee and Huth find that leaders of states in democratic dyads become more interested in third party legal methods when the domestic audience costs of a bilateral negotiated settlement are expected to be high.<sup>117</sup>

Ultimately, we need more in-depth analysis of the influence of these conflict management choices on states' behavior in interstate maritime disputes. Other studies have examined the influence of UNCLOS ratification on peaceful and militarized settlement attempts to resolve diplomatic disagreements over maritime areas (Author). Authors' empirical results suggest that states belonging to UNCLOS experience slightly more militarized disputes over maritime claims than states outside of UNCLOS (although the difference is not statistically significant). On the other hand, UNCLOS members are more likely to resort to third party conflict management strategies and less likely to start new diplomatic claims over maritime spaces. In re-examining the Nemeth et al data set, we discovered an interesting pattern. Only two militarized disputes have ever occurred over maritime claims involving two UNCLOS members who have made Article 287 declarations, and both of these cases occurred in 1982, the year of treaty signature: Argentina-United Kingdom over the Falklands and Greece-Turkey over the Aegean Sea. Since that time, no militarized conflicts have occurred between states with maritime claims and Article 287 declarations. This suggests that states can reach peaceful agreements more effectively in the shadow of the UNCLOS treaty when they have more effectively signaled their preferences for binding settlement procedures.

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<sup>116</sup> See Dixon (1994), and Simmons (1999).

<sup>117</sup> See Allee and Huth (2006).

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

## CONCLUSION

The recent proliferation of international courts in different substantive areas of international law gives states many incentives to forum shop for the best court when attempting to settle interstate disputes. In the arena of conflicts over maritime zones, countries have multiple choices for dispute settlement procedures. The current structure of the United Nations Law of the Sea Convention (UNCLOS) regime fosters states' ability to choose peaceful settlement venues that are best suited to fulfill their expectations concerning dispute resolution. This treaty is unique as it is "one of an extremely small number of global treaties that prescribe mandatory jurisdiction for disputes arising from the interpretation and application of its terms".<sup>118</sup> States have numerous grounds for preferring one tribunal or adjudicator over another in what Noyes calls "a system of open competition" created by the UNCLOS

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<sup>118</sup> See (Klein 2005, 2).

Convention.<sup>119</sup> The UNCLOS treaty offers a variety of binding conflict forums (Article 287), including the International Tribunal for the Law of the Sea, the International Court of Justice, and two arbitration mechanisms (Annex VII & VIII). The flexible dispute settlement procedures in the UNCLOS regime and the default arbitration procedures make the treaty appealing to common law countries, with close to universal ratification among all common law countries in the world. On the other hand, civil law countries have more reluctant to join UNCLOS in part because the regime did not elevate the International Court of Justice to the preferred forum for maritime dispute settlement. The civil law design of the ICJ makes this an attractive forum for civil law countries. Islamic law countries have provided a higher level of support for UNCLOS than other courts like the ICJ because the flexibility of the dispute settlement procedure mimics the less formalized procedures for resolving disputes in the Islamic legal system. In short, our paper demonstrates that countries' legal traditions influence their preferred forums for managing maritime disputes.

These results support other research linking domestic legal traditions and international courts such as the International Court of Justice and the International Criminal Court. States push for legal design principles that are based on their domestic legal traditions when negotiating new international treaties. These design elements influence the behavior of later joiners to the court, such as states who came into existence following the 1982 signature of the UNCLOS treaty. The shadow of the court operates most effectively for countries who share its legal principles, thus the next stage of our research entails an examination of interstate bargaining in the context of the UNCLOS agreement. Indeed, the fact that compulsory binding settlement venues exist within a regime matters. As Charney suggests, "their very availability encourages settlement by holding the promise of being invoked if voluntary methods fail."<sup>120</sup> According to our argument, pairs of common law states should be

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<sup>119</sup> See Noyes (1998, 175)

<sup>120</sup> See Charney (1996, 71).

able to reach agreements and comply with them more readily than dyads with civil law, mixed law, or Islamic law states or dyads where states have different legal systems, as the acceptability of the binding arbitration default mechanism makes it a plausible option. The fact that multiplicity of forums exists within the UNCLOS regime intensifies the “out of court effects”.<sup>121</sup>

Our paper examines the *a priori* declarations states can make under Article 287 of the UNCLOS treaty. Yet we could also take our research one step farther and examine the selection of forums once disputes arise. Future research will compare cases that go to the ITLOS, ICJ, or arbitration panels to see if states’ preferences for conflict management forums carry over to their selection of courts/panels for specific disputes. We could also tap into data collected by the Issue Correlates of War (ICOW) project (Hensel et al 2008) which records data on diplomatic conflicts over maritime areas, which would also allow for an analysis of whether states opt for the forums they pre-designate in the UNCLOS treaty. We might determine if common law states are more successful in maritime disputes given their strong support for the UNCLOS regime. Taking our research forward will help us understand more fully the process by which countries select distinct forums for managing interstate issues and how their domestic legal traditions influence those choices.

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<sup>121</sup> See Bilder (1998).

## REFERENCES

- Abbott, Kenneth W., and Duncan Snidal. 1998. "Why States Act Through Formal International Organizations." *Journal of Conflict Resolution* 42(1): 3-32.
- Adede, A.O. 1975. "Settlement of Disputes Arising Under the Law of the Sea Convention." *American Journal of International Law* 69(4): 798-818.
- Adede, A.O. 1987. *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea*. Boston, MA: Martinus Nijhoff.
- Allee, Todd L., and Paul K. Huth. 2006. "The Pursuit of Legal Settlements to Territorial Disputes." *Conflict Management and Peace Science* 23 (4): 285-307.
- Alter, Karen J. 2008. Delegating to International Courts: Self-Binding Versus Other-Binding Delegation. *Law and Contemporary Problems* 71: 37-76.
- Bekker, Pieter H.F. 2010. "Taking Stock Before ITLOS Takes Off: A Citation Analysis and Overview of the Maritime Delimitation Case Law." Paper presented at Sixth ABLOS Conference, Monaco, 27 October 2010. Available at: <http://www.gmat.unsw.edu.au/ablos/ABLOS10Folder/S6P1-Pres.pdf>
- Bercovitch, Jacob and Jeffrey Z. Rubin. 1992. *Mediation in International Relations: Multiple Approaches to Conflict Management*. New York: St. Martin's Press.
- Bilder, Richard B. 1998. "International Dispute Settlement and the Role of International Adjudication." Pp. 233-256 in Charlotte Ku and Paul F. Diehl (eds.), *International Law: Classic and Contemporary Readings*, Boulder, CO: Lynne Rienner.
- Black, Henry Campbell, Joseph R. Nolan, and Michael J. Connolly. 1979. *Black's Law Dictionary*. Eagan, MN: West Publishing Company.
- Boyle, Alan E. 1997. "Dispute Settlement and the of the Sea Convention: Problems of Fragmentation and Jurisdiction." *International and Comparative Law Quarterly* 46(1): 37-54.
- Brower, Charles N. and Jeremy K. Sharpe. 2003. "International Arbitration and the Islamic World: the Third Phase." *The American Journal of International Law* 97(3): 643-656.
- Brown, Chester. 2007. *A Common Law of International Adjudication*. Oxford, UK: Oxford University Press.
- Brownlie, Ian. 2003. *Principles of Public International Law*. Oxford University Press.
- Cassese, Antonio. 2005. *International Law*, 2<sup>nd</sup> ed. Oxford, UK: Oxford University Press.
- De La Fayette, Louise. 2000. "ITLOS and the Saga of the Saiga: Peaceful Settlement of a Law of the Sea Dispute." *The International Journal of Marine and Coastal Law* 15(3): 355-392.

Charney, Jonathan I. 1996. "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea." *The American Journal of International Law* 90(1): 69-75.

David, Rene, and John E. Brierly. 1985. *Major Legal Systems in the World Today*. London: Stevens.

de la Fayette, Louise. 2000. "ITLOS and the Saga of the Saiga: Peaceful Settlement of a Law of the Sea Dispute." *The International Journal of Marine and Coastal Law* 15(3): 355-392.

Dillard, Hardy Cross. 1978. "The World Court: Reflections of a Professor Turned Judge." *American University Law Review* 27(2): 205-250.

Dixon, William. 1994. "Democracy and the Peaceful Settlement of International Conflict." *American Political Science Review* 88 (1): 14-32.

Djankov, Simeon, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer. 2002. "Courts: The Lex Mundi Project." *NBER Working Paper Series* 8890.

Gent, Stephen E. and Megan Shannon. 2011. "Decision Control and the Pursuit of Binding Conflict Management: The Ties That Bind." *Journal of Conflict Resolution* 55(5): 710-734.

Glenn, H. Patrick. 2007. *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford, UK: Oxford.

Ginsburg, Tom and Richard H. McAdams. 2004. "Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution." *William and Mary Law Review* 45(4): 1229-1339.

Guzman, Andrew T. 2002. "The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms." *Journal of Legal Studies* 31(2): 303-326.

Hadfield, Gillian. 2008. "The Levers of Legal design: Institutional Determinants of the Quality of Law." *Journal of Comparative Economics* 36: 43-73.

Hensel, Paul R., Sara McLaughlin Mitchell, Thomas E. Sowers II, and Clayton L. Thyne. 2008. "Bones of Contention: Comparing Territorial, Maritime, and River Issues." *Journal of Conflict Resolution* 52(1): 117-143.

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

Jouannet, Emmanuelle. 2006. "French and American Perspectives on International Law: Legal Cultures and International Law." *Maine Law Review* 58(2): 293-336.

Keohane, Robert O., Andrew Moravcsik, and Anne-Marie Slaughter. 2000. "Legalized Dispute Resolution: Interstate and Transnational." *International Organization* 54(3): 457-88.

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

- Koch, Charles H. 2003. "Envisioning a Global Legal Culture." *Michigan Journal of International Law* 25(1): 1-77.
- Kolb, Robert. 2006. "Principles as Sources of International Law (With Special Reference to Good Faith)." *Netherlands International Law Review* 53(1): 1-36.
- McAdams, Richard H. 2005. "The Expressive Power of Adjudication." *University of Illinois Law Review* 5(5): 1043-1121.
- Merrills, J.G. 2011. *International Dispute Settlement*. New York, NY: Cambridge University Press.
- Merryman, John Henry. 1985. *The Civil Law Tradition*. Stanford, CA: Stanford University Press.
- Nordquist, Myron H., Rosenne, Shabtai and Louis B. Sohn. 1982. *United Nations Convention on the Law of the Sea 1982: A Commentary*. Dordrecht, the Netherlands: Martinus Nijhoff Publishers.
- Noussia, Kyriaki. 2010. "On International Arbitrations for the Settlement of Boundary Maritime Delimitation Disputes and Disputes from Joint Development Agreements for the Exploitation of Offshore Natural Resources." *The International Journal of Marine and Coastal Law* 24: 63-80.
- Noyes, John E. 1998. "The International Tribunal for the Law of the Sea." *Cornell International Law Journal* 32: 109-182.
- O'Connor, J.F. 1991. *Good Faith in International Law*. Brookfield: Dartmouth Publishing Company.
- Opolot, James. 1980. *An Analysis of World Legal Traditions*. Jonesboro, TN: Pilgrimage Press.
- Picker, Colin B. 2008. "International Law's Mixed Heritage: A Common/Civil Law Jurisdiction." *Vanderbilt Journal of Transnational Law* 41: 1085-1140.
- Posner, Eric A. and John C. Yoo. 2005. "Judicial Independence in International Tribunals." *California Law Review* 93(1): 1-74.
- Rah, Sicco and Tillo Wallrabenstein. 2006. "Sustainability Needs Judicial Support: what Does the International Tribunal for the Law of the Sea (ITLOS) Offer in This Respect?" Pp. 285-316 in *International Maritime Organisations and Their Contribution Towards a Sustainable marine Development*. Peter Ehlers and rainer Lagoni, eds. Hamburg, Germany: Lit Verlag.
- Rao, P. Chandrasekhara. 2002. "ITLOS: the First Six Years." Pp. 183-300 in J.A. Frowein and R. Wolfrum, eds. *Max Planck Yearbook of United Nations Law V. 6*. The Netherlands: Kluwer Law International.
- Rayfuse, Rosemary. 2005. "The Future of Compulsory Dispute Settlement Under the Law of

- the Sea Convention.” *Victoria University of Wellington Law Journal* 36: 683-711.
- Roach, Steven C. 2005. “Arab States and the Role of Islam in the International Criminal Court.” *Political Studies* 53(1): 143-161.
- Rosenne, Shabtai. 1962. *The International Court of Justice: What it is and How it Works*. New York, NY: Oceana Publications.
- Schlesinger, Rudolf, Hans Baade, Mirjan Damaska, and Peter Herzog. 1998. *Comparative Law: Case-Text-Materials*. New York: The Foundation Press, Inc.
- Scott, Gary L. and Craig L. Carr. 1987. “The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause.” *The American Journal of International Law* 81(1): 57-76.
- Seymour, Jillaine. 2006. “The International Tribunal for the Law of the Sea: A Great Mistake?” *Indiana Journal of Global Legal Studies* 13(1): 1-35.
- Shany, Yuval. 2003. *The Competing Jurisdictions of International Courts and Tribunals*. Oxford: Oxford University Press.
- Shaw, Malcolm N. 2003. *International Law, 5<sup>th</sup> edition*. New York, NY: Cambridge University Press.
- Simmons, Beth A. 1999. “See You in ‘Court’? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes,” In Paul F. Diehl (ed.), *A Road Map to War: Territorial Dimensions of International Conflict*. Nashville, TN: Vanderbilt University Press.
- Stevenson, John R. and Bernard H. Oxman. 1975. “The Third United Nations Convention on the Law of the Sea: The 1974 Caracas Session.” *American Journal of International Law* 69: 1-30.
- Tanaka, Yoshifumi. 2004. “Reflections on Maritime Delimitation in the Cameroon/Nigeria Case.” *The International and Comparative Law Quarterly* 53 (2): 369-406.
- Treves, Tullio. 1999. Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice.” *New York University Journal of International Law and Politics* 31: 809-820.
- Vago, Steven. 2000. *Law and Society*. Upper Saddle River, NJ: Prentice Hall.
- Virally, Michael. 1983. “Review Essay: Good Faith in Public International Law.” *The American Journal of International Law* 77(1): 130-134.
- Zimmermann, Reinhard, and Simon Whittaker. 2000. *Good Faith in European Contract Law*. New York, NY: Cambridge University Press.

Table 1: Ratification/Accession of the UNCLOS Treaty

Ratify UNCLOS	Civil law	Common law	Islamic law	Mixed law	Total
No	23 (22.8%)	2 (4.3%)	5 (19.2%)	4 (21.1%)	34 (17.6%)
Yes	78 (77.2%)	45 (95.7%)	21 (80.8%)	15 (78.9%)	159 (82.4%)
Total	101 (52.3%)	47 (24.4%)	26 (13.5%)	19 (9.8%)	193

$\chi^2 = 7.83$  (p = 0.05)

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

Accept ICJ as Forum	Civil law	Common law	Islamic law	Mixed law	Total
No	57 (73.1%)	43 (95.6%)	20 (95.2%)	15 (100%)	135 (84.9%)
Yes	21 (26.9%)	2 (4.4%)	1 (4.8%)	0 (0%)	24 (15.1%)
Total	78 (49.1%)	45 (28.3%)	21 (13.2%)	15 (9.4%)	159

$\chi^2 = 16.91$  ( $p = 0.001$ ); includes only countries who have ratified the UNCLOS treaty.

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

Accept ITLOS as forum	Civil law	Common law	Islamic law	Mixed law	Total
No	57 (73.1%)	40 (88.9%)	19 (90.5%)	15 (100%)	131 (82.4%)
Yes	21 (26.9%)	5 (11.1%)	2 (9.5%)	0 (0%)	28 (17.6%)
Total	78 (49.1%)	45 (28.3%)	21 (13.2%)	15 (9.4%)	159

$\chi^2 = 10.13$  ( $p = 0.018$ ); includes only countries who have ratified the UNCLOS treaty.

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

	Model 1 <i>ICJ</i>	Model 2 <i>ITLOS</i>	Model 3 <i>Annex VII or VIII</i>
<i>Civil Law</i>	2.335*** (0.806)	1.374*** (0.604)	2.234* (1.210)
<i>Islamic Law</i>	1.261 (1.344)	0.647 (0.967)	2.323 (1.442)
<i>Capabilities</i>	-2.358 (19.109)	-3.020 (14.849)	30.256* (16.257)
<i>Polity Score</i>	0.146*** (0.039)	0.074** (0.031)	0.039 (0.041)
<i>Constant</i>	-3.580*** (0.804)	-2.381** (0.561)	-4.327*** (1.210)
<i>N</i>	130	130	130
<i>Pseudo R<sup>2</sup></i>	0.26	0.10	0.13
<i>Wald <math>\chi^2</math></i>	31.67***	13.06**	10.61**

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