

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

INTERNATIONAL JUDICIAL PERFORMANCE AND THE LAW OF THE SEA

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In “Judicialization of the Sea: Bargaining under the UNCLOS Regime,” Sara McLaughlin Mitchell and Andrew P. Owsiak examine the extent to which legalization and judicialization of the law of the sea has changed how states manage conflicts.<sup>1</sup> They argue that legalization and judicialization have diminished maritime conflict because disputing parties are able to predict how a court would rule and, therefore, they will be more likely to bargain out-of-court to achieve more favorable outcomes. Their analysis suggests that how adjudicators perform as dispute resolution bodies is basically irrelevant. Drawing on the literature on the performance of international courts, this essay identifies numerous ways that the contribution of international courts to the resolution of disputes is contingent on key performance criteria, including legal clarification and compliance. When international courts perform at their best, judicialization enhances the impact of legalization. If performance is a contingent feature of international adjudication, then the generalizability of Mitchell and Owsiak’s argument might be limited by the extent to which adjudicators achieve certain key performance criteria.

Performance can be conceived as the extent to which international institutions, such as courts, achieve substantive and procedural goals.<sup>2</sup> It describes the outcomes achieved (or not) by courts and the processes by which they operate. A perspective based on performance puts the outcomes and processes of international courts at the center of analysis, as opposed to reducing international law and international courts down to their existence and acceptance by states. Extensive research shows that international judicial performance varies substantially across several key performance criteria, not to mention across courts and over time. Against this backdrop, I reflect on how court performance bears on Mitchell and Owsiak’s argument.

*Can International Courts Adequately Clarify the Law?*

Mitchell and Owsiak seem to presume that adjudication has helped to clarify the law so that states can anticipate how adjudication may impact their territorial claims. They argue that the judicialization of the law of the sea facilitates conflict prevention and peaceful resolution because case law “reduces uncertainty so that states bargain more efficiently and effectively.”<sup>3</sup> They contend that case law enables states to predict how a court will settle a dispute.<sup>4</sup>

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<sup>1</sup> Sara McLaughlin Mitchell & Andrew P. Owsiak, *Judicialization of the Sea: Bargaining Under the UNCLOS Regime*, 115 AJIL 579 (2021).

<sup>2</sup> See [THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS](#) (Theresa Squatrito et al., 2018); Tamar Gutner & Alexander Thompson, *The Politics of IO Performance: A Framework*, 5 REV. INT’L ORG. 227 (2010).

<sup>3</sup> See [Mitchell & Owsiak](#), *supra* note 1 at 598.

<sup>4</sup> *Id.* at 599.

For this to be the case, however, international courts need to be good at clarifying the law. So, a missing piece of the puzzle remains: can and do international courts sufficiently clarify the law? This question of sound performance cannot be assumed away.<sup>5</sup>

International relations scholarship raises serious questions about the ability of international courts to provide clear legal signals. The concern is that legal factors are not the only imperative that courts face when making decisions; they must also be sensitive to and are constrained by politics.<sup>6</sup> States can defy courts, try to curb their authority, or employ extra-institutional means of de-legitimation.<sup>7</sup> The trade-offs between law and politics affect judicial decision-making,<sup>8</sup> through practices such as judicial economy,<sup>9</sup> vague decisions,<sup>10</sup> or reliance on doctrines or methods which engender flexibility, like proportionality analysis.<sup>11</sup> These practices can come at the cost of legal clarity. Adjudication of the law of the sea is probably no exception.<sup>12</sup> Even if judicial interpretations are adequately precise, courts can and do develop the law in unexpected ways.<sup>13</sup> Ultimately, as courts face political uncertainty of their own and exogenous factors change, legal clarification is not an obvious outcome of court performance.

Second, regime complexity can hinder legal clarification or predictability and generate legal fragmentation.<sup>14</sup> While the extent to which fragmentation has arisen is unclear, the law of the sea and oceans governance can be described as what international relations scholars call a “regime complex”—a compound institution composed of elemental institutions that are partially overlapping and non-hierarchically ordered.<sup>15</sup> In addition to the UN Convention on the Law of the Sea (UNCLOS) institutions and dispute settlement mechanisms, oceans governance concerns the International Maritime Organization, Food and Agriculture Organization, the UN Security Council, regional seas regimes, regional fisheries management organizations, and biodiversity and other conservation-related regimes.<sup>16</sup> Regime complexity has been shown to at times result in inconsistency, ambiguities, and

<sup>5</sup> Theresa Squatrito et al., *A Framework for Evaluating the Performance of International Courts and Tribunals*, in *THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS* 3, *supra* note 3.

<sup>6</sup> See Tom Ginsburg, *Political Constraints on International Courts*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 483 (Cesare Romano et al. eds., 2013); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AJIL 247 (2004); Olof Larsson & Daniel Naurin, *Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU*, 70 INT'L ORG. 377 (2016); Ryan Brutger & Julia C. Morse, *Balancing Law and Politics: Judicial Incentives in WTO Dispute Settlement*, 10 REV. INT'L ORG. 179 (2015).

<sup>7</sup> See Theresa Squatrito, *International Courts and the Politics of Legitimation and De-Legitimation*, 33 TEMP. INT'L & COMP. L. J. 298 (2019); Ginsburg, *supra* note 6.

<sup>8</sup> See Larsson & Naurin, *supra* note 6; Steinberg, *supra* note 6.

<sup>9</sup> Marc L. Busch & Krzysztof J. Pelc, *The Politics of Judicial Economy at the World Trade Organization*, 64 INT'L ORG. 257 (2010); Brutger & Morse, *supra* note 6.

<sup>10</sup> Jeffrey K. Staton & Georg Vanberg, *The Value of Vagueness: Delegation, Defiance, and Judicial Opinions*, 52 AM. J. POL. SCI. 504 (2008); Jeffrey K. Staton & Alexia Romero, *Rational Remedies: The Role of Opinion Clarity in the Inter-American Human Rights System*, 63 INT'L STUD. Q. 477 (2019).

<sup>11</sup> Tanaka Yoshifumi, *Reflections on the Concept of Proportionality in the Law of Maritime Delimitation*, 16 INT'L J. MARINE & COASTAL L. 433 (2001).

<sup>12</sup> Evans suggests that jurisprudence on maritime delimitation oscillates between predictability and flexibility. See Malcolm D. Evans, *Maritime Boundary Delimitation*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 254, 278 (Donald Rothwell et al. eds., 2015).

<sup>13</sup> See, e.g., Leslie Johns et al., *Judicial Economy and Moving Bars in International Investment Arbitration*, 15 REV. INT'L ORG. 923 (2020); Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006).

<sup>14</sup> Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37 (1997).

<sup>15</sup> Karen J. Alter & Kal Raustiala, *The Rise of International Regime Complexity*, 14 ANN. REV. L. & SOC. SCI. 329, 331 (2018).

<sup>16</sup> Alex Oude Elferink et al., *Charting the Future for the Law of the Sea*, in *THE OXFORD HANDBOOK OF THE LAW OF THE SEA* 888, 893–895 (Donald Rothwell et al. eds., 2015); JAMES HARRISON, *MAKING THE LAW OF THE SEA: A STUDY IN THE DEVELOPMENT OF INTERNATIONAL LAW* (2011).

institutional competition.<sup>17</sup> Overall, interinstitutional dynamics are likely to affect the performance of international courts, including their ability to adequately clarify the law.<sup>18</sup>

Mitchell and Owsiak's analysis offers some reason to question whether case law enables sufficient legal clarity to facilitate peaceful conflict management. They find that if a dyad of states jointly declares a preference for the ICJ, the probability of maritime claims rises, while if their joint preference is for the International Tribunal for the Law of the Sea (ITLOS), the probability of claims decreases. Also, a joint declaration for the ICJ corresponds with an increased probability of the onset of militarized dispute.

The performance of these two courts, especially in terms of legal clarification, sheds light on these discordant findings. The ITLOS did not have a single judgment relevant to maritime claims before 2002, meaning it had no relevant case law during the time period featured in the authors' analysis.<sup>19</sup> So, it seems that it was the absence, not the presence, of case law which enabled the ITLOS' positive effects on conflict management. Conversely, the ICJ had ample case law.<sup>20</sup> Why did the ICJ produce worse maritime outcomes? One possibility is that the ICJ's abundant case law reduces certainty, rather than increasing it, as Mitchell and Owsiak posit. Alschner and Charlotin suggest that the growing density of ICJ jurisprudence increases the complexity of litigation before the ICJ—making it potentially less certain and more costly.<sup>21</sup> Put differently, more case law can render judicialized dispute settlement less predictable and more costly to states than we might otherwise expect. Overall, it seems that future research should make some evaluation of whether international courts clarify the law in practice (not only in theory) when seeking to understand how legalization and judicialization leads to bargaining in the shadow of law and courts.

#### *Compliance or Conflict Management: What to Make of Declining Maritime Claims?*

Mitchell and Owsiak interpret the decline in maritime claims as evidence that law and courts shape bargaining. I posit an alternative interpretation: the decline of maritime claims could be indicative of a court's performance based on a criteria of compliance, or its compliance performance.<sup>22</sup> Compliance performance in the first instance concerns whether disputants adhere to a judicial ruling, also known as second-order compliance.<sup>23</sup> A court's compliance performance can also be reflected in *erga omnes* compliance, or whether states that are not legally bound to do so implement a judgment.<sup>24</sup> While most international judicial decisions are binding only on the disputants in contentious cases, Helfer and Voeten find evidence of *erga omnes* compliance with the European Court of Human

<sup>17</sup> Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSPECTIVES POL. 13, 13 (2009).

<sup>18</sup> Benjamin Faude, *How the Fragmentation of the International Judiciary Affects the Performance of International Judicial Bodies*, in THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS 234 (Theresa Squatrito et al. eds., 2018).

<sup>19</sup> Before 2002, the ITLOS had only issued decisions in applications for provisional measures and prompt release.

<sup>20</sup> As some commentators note, "maritime boundary delimitation has given rise to more cases before the International Court of Justice (ICJ) than any other single subject." See Evans, *supra* note 12, at 255.

<sup>21</sup> Wolfgang Alschner & Damien Charlotin, *The Growing Complexity of the International Court of Justice's Self-Citation Network*, 29 EJIL 83 (2018).

<sup>22</sup> In his contribution to this symposium, Donald Rothwell offers yet another interpretation, namely, that UNCLOS expects delimitation to be by way of agreement. See Donald R. Rothwell, *The Law of the Sea, International Courts, and Judicialization*, 115 AJIL UNBOUND 373 (2021).

<sup>23</sup> Diana Kapiszewski & Matthew M. Taylor, *Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings*, 38 L. & SOC. INQ. 803 (2013).

<sup>24</sup> Theresa Squatrito, *Measurement and Methods: Opportunities for Future Research*, in THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS 373, 379 (Theresa Squatrito et al. eds., 2018).

Rights' rulings on LGBT rights.<sup>25</sup> The absence of maritime claims therefore could speak to states' adherence to the law of the sea as it has been developed through jurisprudence. In this sense, Mitchell and Owsiak offer good news for compliance performance by revealing that UNCLOS is associated with a decrease in the number of maritime claims.

The authors attribute these findings to legalization—or the shadow effects of the *law*. From the perspective of international judicial performance, however, these findings may point to the shadow effects of *courts*, or the possibility that courts affect how states make decisions on compliance *ex ante*.<sup>26</sup> Distinguishing between these two possible causes is extraordinarily difficult, raising the question of how to disentangle legalization and judicialization.

*The Interplay Between Legalization and Judicialization: How Do Courts Factor into the Mix?*

Abbott et al. argue that legalization has three dimensions: precision, obligation, and delegation of dispute settlement.<sup>27</sup> Judicialization is thus a part of legalization. Mitchell and Owsiak adopt this perspective, subsuming judicialization within legalization (i.e., their empirical models measure judicialization as delegation of dispute settlement). A performance perspective, in contrast, recognizes that international courts generate regime or system-wide outcomes and processes,<sup>28</sup> with legalization being only one possible outcome, which leads us to ask whether or not international courts have contributed to legalization.

The authors' findings illustrate the value of this question. They reveal that the *adoption* of the UNCLOS is associated with a decreased likelihood that maritime claims will arise, but the *entry into force* of UNCLOS does not have the same statistically significant effect on maritime claims.<sup>29</sup> Their findings on the effects of ratification are mixed.<sup>30</sup> The regime-level performance of international courts helps to explain these findings—that is, international courts have played a pivotal role in legalization. Jurisprudence in the early 1980s, prior to its entry into force and when ratification was low, specified that UNCLOS' provisions on maritime delimitations and the continental shelf and the exclusive economic zone represented customary international law.<sup>31</sup> This would essentially render these provisions binding law. Therefore, international courts changed the obligation or legal status of UNCLOS' provisions prior to the Convention's entry into force or irrespective of ratification. Even before UNCLOS, as Judge Treves acknowledges, “[t]he development of the international law of the sea in the decades leading up to UNCLOS III cannot be fully understood without considering the impact of the decisions of international courts and tribunals in this area.”<sup>32</sup> While treaties do introduce entirely new rules into international law, international

<sup>25</sup> Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014).

<sup>26</sup> LESLIE JOHNS, *STRENGTHENING INTERNATIONAL COURTS: THE HIDDEN COSTS OF LEGALIZATION* (2015); Theresa Squatrito, *Domestic Legislatures and International Human Rights Law: Legislating on Religious Symbols in Europe*, 15 J. HUM. RTS. 550 (2016); Tracy Slagter, *National Parliaments and the ECJ: A View from the Bundestag*, 47 J. COMMON MKT. STUD. 175 (2009).

<sup>27</sup> Kenneth Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

<sup>28</sup> Squatrito et al., *supra* note 5, at 15–17.

<sup>29</sup> See Mitchell & Owsiak, *supra* note 1, at fig. 4.

<sup>30</sup> *Id.* at fig. 4, 6, and 8.

<sup>31</sup> See J. Ashley Roach, *Today's Customary International Law of the Sea*, 45 OCEANS DEV. & INT'L L. 239 (2014); *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can./U.S.), Judgment, 1984 ICJ REP. 246 (Oct. 12); *Continental Shelf* (Libyan Arab Jamahiriya/Malta), Judgment, 1985 ICJ REP. 13 (June 3).

<sup>32</sup> Tulio Treves, *Historical Development of the Law of the Sea*, in THE OXFORD HANDBOOK OF THE LAW OF THE SEA 1, 17 (Donald Rothwell et al. eds., 2015); see also Rothwell, *supra* note 22.

lawmaking also entails the codification of preexisting rules, including those that are developed through case law.<sup>33</sup> By looking for international courts' regime-level effects, we can see that courts and tribunals are probably more central to Mitchell and Owsiak's empirical findings than they recognize, and that evaluations of the international judicial performance can help us to better understand the interplay between legalization and judicialization.

*Generalizability: How Far Do Mitchell and Owsiak's Findings Travel?*

Research on the performance of international courts identifies significant variation in judicial performance over time and across courts.<sup>34</sup> For this reason, it is important to consider whether Mitchell and Owsiak's findings travel. Changing dynamics raise doubts that the observed patterns will persist because uncertainty in the law of the sea is unfolding. I point to three developments. First, rising sea levels and coastal erosion brought on by climate change is expected to have uncertain impacts. It is not clear that the law of the sea is adequately clear for states to predict how to manage future conflicts over maritime boundaries in the face of climate change.<sup>35</sup> Second, technological advances, such as seabed drilling technologies, affect how states pursue maritime claims.<sup>36</sup> Such state-of-the-world uncertainty will present challenges both inside the courtroom and in its shadow. Third, recent non-participation in judicial proceedings by Russia and China may pose challenges to legalization and judicialization of the law of the sea.<sup>37</sup>

These two instances of non-participation reflect a dynamic of politicization which may undermine the stability and legitimacy of the law and relevant judicial processes. The literature on international courts is only beginning to understand how politicization and legitimacy crises affect judicial performance and the broader dynamics of legalization and judicialization. Some speculate that politicization and legitimacy challenges affect courts' decision-making, off-the-bench judicial activities, and recontacting or treaty modifications.<sup>38</sup>

Mitchell and Owsiak are rightfully cautious when relating their findings to other international legal regimes, such as the World Trade Organization. I add a few reasons to not draw too many generalizations. First, their key causal mechanism, as discussed above, merits further examination. Second, their analysis points to key differences between the impacts of the different dispute settlement forums associated with UNCLOS (arbitral tribunals, ITLOS, and the ICJ). Third, the vast majority of international adjudication is not state-to-state but concerns disputes between states and *non*-state actors.<sup>39</sup> While the authors' findings may not travel exceedingly far, their article illustrates how the effects of legalization and judicialization may in fact be contingent upon the performance of international courts.

<sup>33</sup> ALAN BOYLE & CHRISTINE CHINKIN, [THE MAKING OF INTERNATIONAL LAW](#) (2007); RACHEL CICHOWSKI, [THE EUROPEAN COURT AND CIVIL SOCIETY LITIGATION, MOBILIZATION AND GOVERNANCE](#) (2007).

<sup>34</sup> [THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS](#), *supra* note 2.

<sup>35</sup> DONALD R. ROTHWELL & TIM STEPHENS, [THE INTERNATIONAL LAW OF THE SEA](#) 26 (2010).

<sup>36</sup> [Treves](#), *supra* note 32 at 1.

<sup>37</sup> [Elferink et al.](#), *supra* note 16 at 910.

<sup>38</sup> See [Squatrito](#), *supra* note 7 at 314–320; Alexander Thompson et al., [Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design](#), 73 INT'L ORG. 859 (2019).

<sup>39</sup> KAREN J. ALTER, [THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS](#) (2014).