

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

INTERNATIONAL COURTS’ SHADOW EFFECTS AND THE AIMS OF
JUDICIALIZED INTERNATIONAL COOPERATION

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In “Judicialization of the Sea: Bargaining in the Shadow of UNCLOS,” Sara Mitchell and Andrew Owsiak make a valuable contribution to an expanding body of scholarship that considers whether and how international courts have out-of-court “shadow effects.”¹ The authors argue that, in the UN Convention on the Law of the Sea (UNCLOS) regime, the threat of binding international dispute settlement (IDS)—which entails high costs for states—encourages rational potential litigants to settle out of court through other peaceful and less costly IDS mechanisms. In this essay, I challenge the narrow focus of Mitchell and Owsiak’s analysis, considering the diverse aims and processes of judicialized international cooperation in two key ways. First, the authors’ focus on peaceful IDS as the sole outcome of interest overlooks other important cooperation goals driving judicialization and delegation to international courts. An emphasis on out-of-court IDS, even when achieved peacefully, can actually undermine other objectives for judicialized international cooperation, including the development of international law and greater compliance with international law. Second, Mitchell and Owsiak’s theoretical mechanism assumes that an international court contributes to its out-of-court influence through its case law, but this discounts how international courts can engage in a range of out-of-court, non-adjudicative activities that can affect potential litigants’ cost-benefit analyses regarding judicialized versus non-judicialized IDS. Indicating its preference for increasing its “direct effects” through adjudicating disputes, the International Tribunal for the Law of the Sea (ITLOS) has developed capacity-building and training programs to encourage judicialized IDS under UNCLOS and states’ litigation at the ITLOS. Overall, I highlight how there is a broad range of actors and processes underpinning international courts’ out-of-court effects, and how these actors and processes can work towards multiple, at times conflicting, aims for judicialized international cooperation.

The Aims of Judicialized International Cooperation Beyond Peaceful IDS

Mitchell and Owsiak argue that the credible threat of international adjudication—facilitated by states’ Article 287 declarations under UNCLOS—reduces conflict and promotes bilateral cooperation through other, less costly means of peaceful IDS (e.g., negotiation, mediation). Essentially, delegating authority to an international court rather counterintuitively promotes states’ cooperation to avoid costly litigation at the court. The aims of international law and adjudication include the peaceful settlement of international disputes, so this is an important

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¹ For an overview of international courts’ potential shadow effects on interstate bargaining and beyond, see Karen J. Alter et al., *Theorizing the Judicialization of International Relations*, 63 INT’L STUD. Q. 449 (2019).

outcome to analyze. However, the aspirations of legalized and judicialized international cooperation are often much greater than peace. Other objectives can include the clarification and development of international law, and greater compliance with international law, all of which can be significant for facilitating international cooperation and strengthening international regimes. What some may consider the shadow effect of judicialization, others may consider dejudicialization, with states removing areas from judicial review by not bringing cases to court.² Therefore, it is important to consider whether international courts' shadow effect of encouraging out-of-court settlements may complement or undermine international courts' other means of influencing international cooperation.

Shifting IDS out of court has implications for the development of norms, rules, and procedures—and the reduction of legal uncertainty—in the international legal regime, as it shifts the balance of which actors manage these developments away from courts and towards states. States negotiate treaties with variable levels of precision and legal ambiguity, and international adjudication is often a means for filling in these gaps that states do not overcome during treaty negotiations.³ During UNCLOS negotiations, states considered the inclusion of compulsory dispute settlement necessary for moving negotiations forward. Authoritative third-party international dispute settlement was expected to clarify ambiguities in the treaty text, which could not be resolved during treaty negotiations, as cooperation proceeded.⁴

International adjudication, as opposed to other forms of IDS, has distinct cooperation benefits, which a lack of litigation can compromise. International courts are authoritative actors that clarify the meaning of treaty provisions, especially as cooperation proceeds and new issues may arise. Judicial independence and expertise distinguish international courts' interpretations and applications of international law from other actors' potential interpretive claims. Litigation provides international courts opportunities to reduce legal uncertainty and develop international law. International courts' authority and expertise to clarify international legal obligations is a key benefit, which distinguishes international adjudication from other means of peaceful IDS (e.g., negotiation, conciliation, and mediation).

An international court's shadow effect at the dyadic level may undermine its ability to clarify and develop international law at the systemic level. Focusing on dyads of states, Mitchell and Owsiak argue that the credible threat of international adjudication—determined by states' Article 287 declarations and courts' case law—discourages costly litigation at an international court in favor of out-of-court IDS. Scaled up to the systemic level, the more states make Article 287 declarations selecting international adjudication through the ITLOS and/or the ICJ, the greater the emphasis on non-judicialized IDS within the international legal regime overall. Less litigation reduces international courts' opportunities to clarify and develop UNCLOS and maritime law.

The shadow effect of the threat of international adjudication and the emphasis on non-judicialized IDS also has questionable implications for state compliance and therefore the credibility of states' commitments within the international regime. One of the core functions of judicialized IDS is to provide authoritative determinations of compliance and non-compliance with international law. What constitutes compliance with international law can often be ambiguous.⁵ Bargaining and IDS in the shadow of an international court does not overcome this ambiguity, and may allow for more traditional international political dynamics to dominate. At least based on Mitchell and Owsiak's empirical analysis, which focuses on the outcome of peaceful dispute settlement, it is unclear whether settling out of court moves the needle in the direction of outcomes consistent with legality. In other words,

² Daniel Abebe & Tom Ginsburg, *The Dejudicialization of International Politics?*, 63 INT'L STUD. Q. 521 (2019).

³ Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 417 (2000).

⁴ NATALIE KLEIN, *DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA* 54 (2009).

⁵ ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

it is questionable whether international courts' shadow effects complement or compete with their ability to promote compliance in their international legal regimes—a core objective driving the judicialization trend. For international courts' shadow effects to promote compliance with international law, we would need to consider first order compliance (with international law in general) rather than second order compliance (with an authoritative decision of a third party).⁶ The terms of out-of-court settlements—which are beyond the scope of Mitchell and Owsiak's empirical analysis—would need to broadly fit within the boundaries of the international law governing the issue. Theories of international judicial behaviour highlight how judges have a zone of discretion with legally plausible rulings,⁷ so we may expect that international courts' shadow effects should promote settlements that would be consistent with this discretionary range.

On the one hand, as Mitchell and Owsiak imply, states may be able to predict the outcome of judicialized dispute settlement, and bargain on those terms, within the boundaries of their international legal obligations. A dyad of states could equally avoid judicializing the dispute because both parties have an interest in settling beyond the confines of international law, and this non-compliance would be observed by other states and have broader regime consequences, undermining international courts' role in increasing the credibility of states' commitments. In the shadow of an international court, there is less transparency, so typical regulating mechanisms, like reputational costs or domestic political costs, cannot operate as they would with the transparency embedded in international adjudication. Both of these scenarios fall under Mitchell and Owsiak's outcome of interest—settlement without conflict—but have very different implications for the strength of the international regime and whether an international court's shadow effect generally aligns with its mandate, is indifferent to it, or could be a form of backlash against it.

International Courts' Out-of-Court Activities and Influence

Mitchell and Owsiak's theoretical mechanism for the shadow effect of international adjudication combines states' delegation of authority to international courts and courts' development of case law. Case law increases predictability and reduces uncertainty over the outcomes (and threat) of international adjudication for rational potential litigants, which Mitchell and Owsiak argue improves the efficiency and effectiveness of inter-state bargaining out of court. International courts' contribution to their shadow effects is thus limited to their adjudicative, in-court activities.

International courts can, however, also conduct various non-adjudicative activities, in the shadow of international adjudication, which aim to influence actors in their legal regimes.⁸ These non-adjudicative activities (e.g., diplomacy, training, outreach) can provide alternative mechanisms for disseminating information that clarifies the costs and benefits of international adjudication, reducing potential litigants' uncertainty and influencing their decision-making. States, for example, may delay delegation to an international court to observe its case law, reducing their uncertainty about how it will adjudicate cases,⁹ but providing information out of court can also serve to decrease states' uncertainty regarding international adjudication. By clarifying their jurisdiction, rules of procedure, case law, etc. through these activities beyond adjudication, international courts can increase

⁶ ROGER FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* (1981).

⁷ See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 943 (2005).

⁸ Nicole De Silva, *International Courts' Socialization Strategies for Actual and Perceived Performance*, in *THE PERFORMANCE OF INTERNATIONAL COURTS AND TRIBUNALS* 288 (Theresa Squatrito et al. eds., 2018).

⁹ See, e.g., Darren Hawkins & Wade Jacoby, *Agent Permeability, Principal Delegation and the European Court of Human Rights*, 3 REV. INT'L ORGS. 1 (2007).

the precision of potential litigants' understanding of the processes and outcomes of international adjudication, and the prospective costs and benefits of international adjudication compared to non-judicialized means of IDS. Essentially, international courts' non-adjudicative activities can provide alternative mechanisms, beyond case law, for courts to have out-of-court effects.

Crucially, depending on how international courts choose to direct these non-adjudicative activities, they may aim to sway potential litigants for *or against* non-judicialized IDS. Whether international courts encourage or discourage potential litigants could depend on their caseloads. If they have high caseloads, they may encourage potential litigants to settle out of court, but if they lack cases to exercise their adjudicative function, they may focus on encouraging litigation. These activities may also be targeted to particular potential litigants or areas of the court's jurisdiction. The Community Court of Justice of the Economic Community of West African States, for example, developed a sensitization (outreach) program, with visits to member states, to tackle its lack of interstate litigation and address how filing a case against another state "is often seen as confrontational and an inimical act," especially compared to traditional diplomatic means of dispute resolution.¹⁰

Under UNCLOS, the ITLOS—the sole international court dedicated to the law of the sea—substantially expanded its non-adjudicative activities roughly a decade into its existence. These initiatives have been in place for most of the Tribunal's existence but notably fall outside the temporal scope of Mitchell and Owsiak's empirical analysis until 2001. In 2006–07, the Tribunal institutionalized three out-of-court forums for disseminating information on international adjudication under UNCLOS: a capacity-building and training program on dispute settlement under UNCLOS; a summer academy on the law of the sea; and regional workshops exclusively for state officials.¹¹

These Tribunal initiatives heavily focus on engaging state officials, especially from developing states with limited legal capacity. The Tribunal's capacity-building and training program on dispute settlement under UNCLOS has provided information to current and future government officials on topical issues related to the law of the sea and maritime law, and training courses on negotiation and delimitation.¹² The Tribunal aims for participants to "acquire the necessary knowledge and skills to enable them to provide legal and expert advice to their governments on the various mechanisms of dispute settlement under the Convention and in the implementation of the Convention in their home countries."¹³ The Summer Academy targets developing states for "the development of their competence with regard to exercising rights and complying with obligations under the Convention on the Law of the Sea."¹⁴ The Tribunal has held workshops for senior government officials to provide information on UNCLOS and the procedures for bringing disputes before the Tribunal. These workshops often focus on the relevance of UNCLOS and the Tribunal in specific regions, such as West Africa, the Caribbean, and Asia.¹⁵

The ITLOS's capacity-building and training efforts thus provide potential litigants information on UNCLOS and judicialized IDS within it, which could influence potential litigants' cost-benefit analyses in their Article 287 declarations and choices for judicialized versus non-judicialized means of IDS. The influence of these non-adjudicative activities would need to be considered alongside Mitchell and Owsiak's focus on case law when explaining

¹⁰ Community Court of Justice of Economic Community of West African States, 2006 Annual Report of Research Department 6 (Nov. 26, 2006).

¹¹ Int'l Tribunal for the Law of the Sea, *Training Opportunities*.

¹² Int'l Tribunal for the Law of the Sea, *Annual Report of the International Tribunal for the Law of the Sea for 2007*, SPLOS/174, 21 (Mar. 25, 2008).

¹³ *Id.*

¹⁴ Int'l Foundation for the Law of the Sea, *The Foundation*. The ITLOS collaborates with the International Foundation for the Law of the Sea to run the Summer Academy.

¹⁵ *Id.*

the ITLOS's shadow effects. For example, the authors observe that the high costs of judicialized IDS (e.g., resources for legal research and documentation) can incentivize rational states generally, and weaker states particularly, to avoid courts, but the ITLOS's capacity-building and training may mitigate these costs (e.g., through building legal capacity in litigation under UNCLOS) and influence IDS choices. The ITLOS's non-adjudicative activities may also clarify the benefits of judicialized over non-judicialized IDS more compellingly than case law alone can, especially considering the Tribunal's caseload has been limited. Discerning whether the Tribunal's non-adjudicative activities are influential would require empirical investigation beyond the temporal scope of Mitchell and Owsiak's analysis until 2001.

These various state-oriented capacity-building and training programs also emphasize the diverse aims of judicialized international cooperation, as previously discussed. As they are directed at encouraging states' use of international adjudication under UNCLOS, particularly at the Tribunal, the Tribunal's ambitions for judicialization clearly emphasize direct effects through international adjudication rather than shadow effects through out-of-court IDS. Tribunal officials have openly expressed dissatisfaction with states' limited use of international adjudication under the ITLOS, based on the lack of Article 287 declarations selecting the ITLOS and of litigation at the Tribunal. Since the Tribunal's inception, ITLOS presidents have criticized how the Tribunal has only been "partially used,"¹⁶ and how it "will be able to live up to the community expectations only when litigants, especially States, make full use of it."¹⁷ They have repeatedly emphasized to states that there is a wider range of disputes that states can litigate at the Tribunal,¹⁸ there are benefits of using the Tribunal over arbitration,¹⁹ and the Tribunal's advisory jurisdiction can "be a useful tool to States" considering the "new challenges in ocean activities."²⁰ These statements indicate that, from the perspective of the ITLOS, its shadow effects (including under the period of Mitchell and Owsiak's analysis) have been insufficient for achieving the aims of judicialization, and the Tribunal strives to have different direct and indirect effects in its legal regime.

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Overall, Mitchell and Owsiak's argument and findings aim to show that judicialization casts a shadow over out-of-court IDS, and international courts' disuse by litigants does not mean they lack influence in their international legal regimes. In a world where international institutions, including international courts, are under pressure to justify their impacts to various constituencies, the authors' analysis offers a valuable defense of international courts' less conventional and self-evident means of influence. This shadow effect, however, may not satisfy many actors, including international courts themselves, which have broader ambitions for judicialization that more clearly remove disputes from state control and rely on international courts' direct effects through international adjudication.

¹⁶ Thomas A. Mensah, [Statement by the President of the International Tribunal for the Law of the Sea](#) at the 69th Plenary Meeting of the 53rd Session of the United Nations General Assembly (Nov. 24, 1998).

¹⁷ Chandrasekhara Rao, [Statement by the President of the International Tribunal for the Law of the Sea](#) at the 12th Meeting of the States Parties to the Law of the Sea Convention (Apr. 16, 2002).

¹⁸ [Mensah](#), *supra* note 16.

¹⁹ Rüdiger Wolfrum, [Statement by the President of the International Tribunal for the Law of the Sea](#) at the Plenary of the 62nd Session of the United Nations General Assembly (Dec. 10, 2007).

²⁰ José Luis Jesus, [Statement by the President of the International Tribunal for the Law of the Sea](#) at the Plenary of the 63rd Session of the United Nations General Assembly (Dec. 5, 2008).