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# International Arbitration of Maritime Delimitation: An Alternative for East Asia?

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*International arbitration, as a neutral, flexible, efficient and binding legal means of dispute resolution, has been effective in settling maritime delimitation disputes, especially in recent years since the UNCLOS came into force. There are a number of reasons (i.e. advantages) for its increased popularity. Reasonable expectations thus arise as to its applicability onto similar maritime delimitation disputes of the East Asian countries whose diplomatic efforts have mostly failed to address these matters. This article examines this practical issue primarily from the legal perspective by reviewing relevant international rules including the UNCLOS provisions on compulsory dispute resolution and cases such as the ongoing Philippines-China arbitration over the South China Sea. Observations are also made from the political and cultural perspectives as well. It concludes that, though multiple dispute settlement means are still encouraged, international arbitration could be an important alternative for East Asian countries seeking a peaceful solution to their maritime delimitation disputes.*

## Keywords

Maritime Delimitation, Dispute Resolution, International Arbitration, UNCLOS, Compulsory Procedures, East Asia

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## 1. Introduction

With the ever-increasing importance of the sea and marine resources, recently, more disputes have been witnessed arising from ocean development and usage, some of which are closely related to the traditional issue of maritime boundary delimitation. Contemporary international law, especially the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) provides some general principles and methods for maritime delimitation. *E.g.*, Articles 74 and 83 of the UNCLOS set out the delimitation of exclusive economic zones (“EEZ”) and continental shelf boundaries between opposite or adjacent States. Meanwhile, international tribunals have adjudicated that the delimitation shall be effected by agreement on the international law basis and “by the use of practical methods capable of ensuring ... an equitable result.”<sup>1</sup> However, neither the UNCLOS, nor other international treaties stipulate specifically where the boundaries should be drawn; they do not offer a definitive answer as to the method that should be applied. As such, more than a few maritime delimitation disputes are still in deadlock.

The United Nations Charter requires disputes to be resolved through peaceful means such as negotiation, mediation, arbitration, and judicial settlement.<sup>2</sup> The UNCLOS also provides its contracting States with the political and legal means for maritime dispute settlement. In addition to diplomatic methods,<sup>3</sup> the Convention requires all disputes concerning its application or interpretation to be subject to the so-called “Compulsory Procedures Entailing Binding Decisions” as stipulated in Section 2 of Part XV; it provides four different means for the parties’ selection.<sup>4</sup> Moreover, if a party does not make any choice, the UNCLOS deems it to accept the arbitration mechanism, *i.e.*, the dispute will automatically go to arbitration in accordance with Annex VII, unless the parties agree otherwise.<sup>5</sup> As a consequence, recently, a remarkable number of maritime boundary delimitation disputes have been settled by international arbitration.

<sup>1</sup> Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgment, 1984 I.C.J. ¶ 112 (Oct. 12).

<sup>2</sup> U.N. Charter art. 33, ¶ 1.

<sup>3</sup> UNCLOS art. 284.

<sup>4</sup> These four means are: (1) adjudication before the International Court of Justice; (2) adjudication before the International Tribunal for the Law of the Sea; (3) arbitration under Annex VII; and (4) special arbitration under Annex VIII. *See* UNCLOS art. 287. On the dispute settlement mechanisms under the UNCLOS, *see* N. KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA (2005).

<sup>5</sup> UNCLOS art. 287, ¶ 5.

Maritime delimitation has been controversial in East Asia for a long time. In the East China Sea, *e.g.*, China and Japan have clashed with each other regarding the Diaoyu/Senkaku Islands<sup>6</sup> and the Okinawa Trough in their continental shelf delimitation.<sup>7</sup> China and South Korea have a dispute about the Socotra (Ieodo) Rock as a result of their unsettled boundaries of EEZs in the Yellow Sea.<sup>8</sup> South Korea and Japan are involved in a dispute over the Liancourt (Dokdo/Takeshima) Rocks.<sup>9</sup> North Korea and South Korea have not reached a final agreement on their maritime boundaries (Northern Limit Line: NLL), either. There are some other disputes alike between China, Japan, and North and South Korea, as well.<sup>10</sup> So far, the disputing parties concerned have been trying to resolve these contested issues through various peaceful means, such as the “set aside disputes and pursue joint development” policy as advocated by China.<sup>11</sup> These negotiation-based methods, however, have not been very helpful in easing the tensions caused by overlapping claims of maritime zones in this region.

The primary purpose of this research is to search for an appropriate way to effectively manage the current marine conflicts of East Asian countries. In particular, the author will discuss the issue of whether and under what circumstances international arbitration could become an alternative in settling maritime delimitation disputes. This article is composed of four parts including Introduction and Conclusion. Part two will historically review arbitration in the context of

<sup>6</sup> For details on the Diaoyu/Senkaku Islands disputes, see Hui Wu & Dan Zhang, *Territorial Issues on the East China Sea: A Chinese Position*, 3 J. EAST ASIA & INT'L L. 137-149 (2010); Shigeyoshi Ozaki, *Territorial issues on the East China Sea: A Japanese Position*, 3 J. EAST ASIA & INT'L L. 151-174 (2010).

<sup>7</sup> The Okinawa Trough is a seabed feature of the East China Sea. China claims the whole continental shelf to the Trough, while Japan claims the same shelf to a median line between its territory and that of China. See B. Dolven, S. Kan & M. Manyin, *Maritime Territorial Disputes in East Asia: Issues for Congress*, CRS Report for Congress, No. R42784 (2013), available at <http://www.fas.org/sgp/crs/row/R42930.pdf> (last visited on Oct. 8, 2014). For details on the Okinawa Trough dispute, see J. GAO, *The Okinawa Trough Issue in the Continental Shelf Delimitation Disputes within the East China Sea*, 9 CHINESE J. INT'L L. 143-177 (2010).

<sup>8</sup> The Socotra Rock, known as ‘Suyan’ in Chinese and ‘Ieodo’ in Korean, is a submerged rock below the sea level located in the Yellow Sea. Both China and South Korea consider it lying within their own exclusive economic zones. For details on the geographical and historical features of the Socotra Rock, see the official website of the Society of Ieodo Research, available at <http://www.ieodo.kr> (last visited on Sept. 22, 2014).

<sup>9</sup> The Liancourt Rocks is a group of small islands in the East Sea of Korea (Sea of Japan). Japan refers to it as ‘Takeshima’ islands, while South Korea, as ‘Dokdo’ islands.

<sup>10</sup> For details on the maritime disputes in East Asia, see J. van Dyke, *Disputes over Islands and Maritime Boundaries in East Asia*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA (Seoung-yong Hong & J. Dyke eds., 2009).

<sup>11</sup> This strategic initiative was first put forward by Deng Xiaoping in 1979 to handle the Diaoyu/Senkaku islands dispute. See PRC Ministry of Foreign Affairs, *Set Aside Dispute and Pursue Joint Development*, available at [http://www.fmprc.gov.cn/mfa\\_eng/ziliao\\_665539/3602\\_665543/3604\\_665547/t18023.shtml](http://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18023.shtml) (last visited on Sept. 23, 2014).

resolving boundary disputes and analyze the rationales behind this quasi-judicial mechanism by referring to its current practices in international judicial organs like the Permanent Court of Arbitration (“PCA”). Part three will then investigate how international arbitration is acceptable in the case of maritime delimitation disputes. The non-legalistic tradition of settling territorial disputes of East Asian countries and the applicability of the UNCLOS’ compulsory procedures that both China and Korea have made exclusive declarations will be tackled; the ongoing Philippines-China arbitration proceedings and its implications will be looked into as well. Finally in Part four, prospects and suggestions are presented with respect to the settlement of maritime delimitation disputes in East Asia.

## 2. International Arbitration of Maritime Boundary Disputes

### A. Historical Practice of Arbitrating Boundary Disputes

As one of “the oldest methods for the peaceful settlement of international disputes,”<sup>12</sup> inter-State arbitration might even be traced back to the ages of ancient Greece and Rome.<sup>13</sup> The modern era of international arbitration was, however, started from the Jay Treaty in 1794,<sup>14</sup> in which the United States and Great Britain agreed, *inter alia*, that their maritime and boundary delimitation disputes were to be sent to arbitration. Afterwards, there were numerous cases of international arbitration to resolve disputes like territorial sovereignty.<sup>15</sup> The Alabama Claims of 1871<sup>16</sup> is one of noticeable examples. The 1907 Hague Convention then recognized arbitration as “the most effective, and at the same time the most equitable, means of settling disputes

<sup>12</sup> A. STUYT, *SURVEY OF INTERNATIONAL ARBITRATIONS: 1794-1989*, vii (1990).

<sup>13</sup> *E.g.*, the treaty between Sparta and Argos provided that: “If there should arise a difference between any of the towns of the Peloponnesus or beyond, either as to frontiers or any other object, there shall be an arbitration.” See J. RALSTON, *INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO* 157 (1929); G. BORN, *INTERNATIONAL ARBITRATION: CASES AND MATERIALS* 1-2 (2011).

<sup>14</sup> The Jay Treaty is officially known as “Treaty of Amity, Commerce and Navigation between His Britannic Majesty and The United States of America,” signed on November 19, 1794. See K. Ziegler, *Jay Treaty (1794)*, in 6 *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 449-452 (R. Wolfrum ed., 2012).

<sup>15</sup> H. FOX, *Arbitration*, in *THE INTERNATIONAL REGULATION OF FRONTIER DISPUTES* 168 (E. Luard ed., 1970).

<sup>16</sup> The Alabama claims were a series of claims by the US against Britain for damages arising out of the American Civil War. According to their agreement dated May 8, 1871, known as the Treaty of Washington, an arbitration tribunal was established to evaluate the US financial claims. On September 14, 1872 the tribunal rendered its award and ordered Britain to pay USD15.5 million as compensation for the Alabama claims. For details, see T. Bingham, *The Alabama Claims Arbitration*, 54 *INT’L & COMP. L.Q.* 1 (2005).

which diplomacy has failed to settle.”<sup>17</sup>

International arbitration has also often been resorted to in order to settle maritime disputes, especially in situations where diplomacy could not work out the definite boundary lines between coastal States.<sup>18</sup> Over 150 years of practice, international arbitration, whether conducted by *ad hoc* tribunals or by permanent institutions, has sometimes proven itself a useful means of settling sophisticated maritime boundary disputes. Take the *Anglo-French Continental Shelf Arbitration* case of 1977<sup>19</sup> as an example. This is the first arbitration case between contracting States to the 1958 Geneva Convention on the Continental Shelf. At that time, the *ad hoc* Court of Arbitration, composed of five arbitrators in accordance with the Arbitration Agreement between France and the UK, successfully delineated the boundaries in dispute. This arbitral award is “an important landmark in the development of continental shelf law.”<sup>20</sup> The *Guinea-Guinea Bissau* case of 1985,<sup>21</sup> consulted by an International Arbitral Tribunal at the Peace Palace in The Hague, is another example that “served as a prototype for the settlement of boundary disputes elsewhere in Africa.”<sup>22</sup> Other remarkable arbitration cases concerning maritime delimitation are the *Norway-Sweden Grisbardana* case of 1909<sup>23</sup> and the *Canada-France* case of 1992.<sup>24</sup> These arbitration proceedings led the parties, in one way or another, to the eventual settlement of maritime boundary disputes, even though not all the arbitral awards were fully implemented by the disputing parties. The *Argentina-Chile Beagle*

<sup>17</sup> The 1907 Convention for the Pacific Settlement of International Disputes, art. 38.

<sup>18</sup> See UNITED NATIONS HANDBOOK ON THE DELIMITATION OF MARITIME BOUNDARIES BETWEEN ADJACENT STATES 90-92 (2000), available at [http://www.un.org/depts/los/nippon/unff\\_programme\\_home/fellows\\_pages/fellows\\_papers/dundua\\_0607\\_georgia.pdf](http://www.un.org/depts/los/nippon/unff_programme_home/fellows_pages/fellows_papers/dundua_0607_georgia.pdf) (last visited on Sept. 23, 2014).

<sup>19</sup> See *Continental Shelf Delimitation between France and the United Kingdom*, Decision of June 30, 1977, reprinted in 54 I.L.R. 6-138 (1977). For details, see D. McRae, *Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration*, 15 CAN. Y.B. INT'L L. 173-197 (1977).

<sup>20</sup> E. Brown, *The Anglo-French Continental Shelf Case*, 16 SAN DIEGO L. REV. 461-530 (1979). For details, see D. Bowett, *The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches*, 49 BRIT. Y.B. INT'L L. 1-29 (1978); D. Colson, *The United Kingdom-France Continental Shelf Arbitration*, 72 AM. J. INT'L L. 95-112 (1978).

<sup>21</sup> *Delimitation of Maritime Boundary (Guinea v. Guinea-Bissau)*, XIX R.I.A.A. 149-196 (Feb. 14, 1985), reprinted in 25 I.L.M. 251-305, available at [http://legal.un.org/riaa/cases/vol\\_XIX/149-196.pdf](http://legal.un.org/riaa/cases/vol_XIX/149-196.pdf) (last visited on Oct. 8, 2014).

<sup>22</sup> M. Aquarone, *The 1985 Guinea/Guinea-Bissau Maritime Boundary Case and Its Implications*, 26 OCEAN DEV. & INT'L L. 413-431 (1995).

<sup>23</sup> *Maritime Boundary Delimitation Arbitration (Grisbadarna) (Nor.v. Swed.)*, XI R.I.A.A. 147-166 (Oct. 23, 1909), available at [http://legal.un.org/riaa/cases/vol\\_XI/147-166.pdf](http://legal.un.org/riaa/cases/vol_XI/147-166.pdf) (last visited on Oct. 8, 2014). For details, see S. M. Rhee, *Sea Boundary Delimitation between States before World War II*, 76 AM. J. INT'L L. 555-588 (1982).

<sup>24</sup> *Delimitation of Maritime Areas Arbitration (Can. v. Fr.)*, reprinted in 31 I.L.M. 1145-1219 (1992). For details, see K. Highet & G. Kahale, *Delimitation of the Maritime Areas between Canada and France*, 87 AM. J. INT'L L. 452-464 (1993).

*Channel Arbitration* case of 1977 is another good example.<sup>25</sup> The arbitral award was repudiated by Argentina in the beginning. However, the parties could resolve their disputes in the end through negotiations, as Argentina later fully recognized the award through their 1984 Friendship and Peace Treaty.<sup>26</sup>

As arbitration was recognized by the UNCLOS as the ‘default’ means of sea dispute resolution,<sup>27</sup> more maritime boundary disputes have been referred to international arbitration. So far, twelve cases have been submitted for arbitration under Annex VII of the UNCLOS since the Convention came into effect in 1994. As the registry for eleven of these cases,<sup>28</sup> the Permanent Court of Arbitration (“PCA”) has helped achieve significant progress in the settlement of maritime delimitation disputes.<sup>29</sup> *E.g.*, the *Eritrea-Yemen Arbitration* case of 1999<sup>30</sup> is acknowledged as one of the most important cases in the history of international arbitration.<sup>31</sup> The Arbitral Tribunal on this case successfully solved the problem of ownership of the southern islands of the Red Sea, which had been expected since the World War I, and “paved the way for a harmonious relationship between the littoral States of the Red Sea.”<sup>32</sup>

<sup>25</sup> Dispute concerning the Beagle Channel (Arg. v. Chile), 21 R.I.A.A. (Feb. 18, 1977), available at [http://untreaty.un.org/cod/riaa/cases/vol\\_XXI/53-264.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XXI/53-264.pdf) (last visited on Aug. 16, 2014).

<sup>26</sup> For details, see G. Wyshynski, *The Beagle Channel Arbitration*, 7 AUSTR. Y.B. INT’L. L. 332-385 (1977).

<sup>27</sup> Pursuant to Article 287(3) of the UNCLOS, arbitration under Annex VII is the default means of dispute settlement if a State has not expressed any preference with respect to the means of dispute resolution available under Article 287(1) and has not expressed any reservation or optional exceptions pursuant to Article 298. Likewise, pursuant to Article 287(5), if the parties have not accepted the same procedure for the settlement of the dispute, arbitration under Annex VII is the default means of dispute settlement. See PCA: *Ad Hoc Arbitration under Annex VII of the United Nations Convention on the Law of the Sea*, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1288](http://www.pca-cpa.org/showpage.asp?pag_id=1288) (last visited on Sept. 23, 2014).

<sup>28</sup> The cases arbitrated under the auspices of PCA are as follow: The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe: Oct. 2013-Present); The-Arctic Sunrise Arbitration (Neth. v. Russ.: Oct. 2013-Present); The-Atlanto-Scandian Herring Arbitration (Denmark in respect of the Faroe Islands v. the European Union: Aug. 2013-), (Phil. v. China: Jan. 2013-Present), (Mauritius v. U.K.; Dec. 2010-Present); The-Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India: Oct. 2009-), The-ARA Lebertad Arbitration (Arg. v. Ghana: Oct. 2012- Nov. 2013.)(Barb. v. Trin. & Tobago: Feb. 2004 - Apr. 11, 2006.) (Guy. v. Surin.: Feb. 2004 - Sept. 17, 2007), (Malay. v. Sing.: July 2003 – Sept. 1, 2005.), The-MOX Plant(Ireland v. U.K.: Nov. 2001 - June 6, 2008.)

<sup>29</sup> T. Hout, *Resolution of International Disputes: The Role of the Permanent Court of Arbitration - Reflections on the Centenary of the 1907 Convention for the Pacific Settlement of International Disputes*, 21 LEIDEN J. INT’L L. 643-661 (2008).

<sup>30</sup> The case was triggered in December 1995 when Eritrean and Yemeni armed forces clashed around an island in the Red Sea where the two States claimed different maritime boundaries. On October 3, 1996, the dispute was referred to an Arbitral Tribunal in PCA which was asked to adjudge in two separate stages. The Award of the first stage, regarding territorial sovereignty and scope of the dispute, was rendered on October 9, 1998, and the Award of the second stage, regarding maritime delimitation, was rendered on December 17, 1999. For the full text of the Awards, see the official website of PCA, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1160](http://www.pca-cpa.org/showpage.asp?pag_id=1160) (last visited on Sept. 23, 2014).

<sup>31</sup> M. Reisman, *Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)*, 94 AM. J. INT’L L. 721 (2000).

<sup>32</sup> K. Noussia, *On International Arbitration for the Settlement of Boundary Maritime Delimitation Disputes and Disputes*

The arbitral awards, as noted by another observer, represented “a model to be followed for the resolution of such international disputes.”<sup>33</sup>

Over the past decades international arbitration has been used from time to time. It seems to have been more frequently invoked by the disputing State parties of maritime delimitation. The arbitration proceedings have generally played positive roles in assisting the final solution of those disputes. Those decisions by various arbitral tribunals also “made significant contributions to the development of this area of law,”<sup>34</sup> as the vast jurisprudence concerning the international legal principles and norms for maritime boundary delimitations has concurrently been developed.<sup>35</sup>

### ***B. Advantages of Arbitrating Maritime Delimitation***

The flourish of arbitration cases in international maritime delimitation disputes could be attributed to the inherent ‘advantages’ of the arbitration mechanism itself. Compared with those political means of dispute resolution like diplomatic negotiation, international arbitration is not only more foreseeable and stable, but also fairer in terms of the final outcomes.<sup>36</sup> This is because arbitration proceedings are largely based on international law that necessarily provides the principle of predictability and certainty. Also, the arbitral tribunals are usually expected to decide a case in accordance with the precedents set forth by other international judicial organs.<sup>37</sup>

Meanwhile, in comparison with judicial settlement, arbitration could offer more flexibility and freedom to the disputing parties who are usually very eager to gain more control over sensitive sovereignty issues such as maritime delimitation. Judicial settlement requires the dispute to be handled by a permanent court with fixed judges and proceedings, while, in arbitration, the parties could decide by

*from Joint Development Agreements for the Exploitation of Offshore Natural Resources*, 25 INT’L J. MARINE & COASTAL L. 63-80 (2010).

<sup>33</sup> B. Kwiatkowska, *The Eritrea-Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, 32 OCEAN DEV. & INT’L L. 25 (2001).

<sup>34</sup> Jiuyong Shi, *Maritime Delimitation in the Jurisprudence of the International Court of Justice*, 9 CHINESE J. INT’L L. 271-291 (2010).

<sup>35</sup> This is not to neglect the role of other international judicial institutions such as the ICJ in this regard. As a matter of fact, the jurisprudence of the Court has also evolved and up to now it has established a set of unified principal steps for maritime delimitation. *See Shi, id.*

<sup>36</sup> M. INDLEKOFER, INTERNATIONAL ARBITRATION AND THE PERMANENT COURT OF ARBITRATION 222-228 (2013).

<sup>37</sup> Though there is no written international law requiring arbitration to follow the doctrine of precedent, i.e. *stare decisis*, in practice most arbitral tribunals “constantly refer to their previous decisions”. *See G. Guillaume, The Use of Precedent by International Judges and Arbitrators*, 2 J. INT’L DISPUTE SETTLEMENT 5-23 (2011); E. GAILLARD & Y. BANIFATEMI, PRECEDENT IN INTERNATIONAL ARBITRATION (2008).

themselves not only the arbitrators, but also the arbitral procedures and even the applicable laws. State parties generally have more confidence and willingness to go for arbitration; they are thus more likely to accept and implement the final arbitral award, as well.<sup>38</sup>

The requirement for a higher degree of expertise also makes international arbitration a more suitable means for resolving maritime delimitation issue. Territorial and sea disputes in most cases involve not only pure legal issues, but also political, economic, social, cultural and even historical and geographic aspects, so that the deep understanding and full considerations of all these factors would be essential for the adjudicating body to deliver a satisfying solution. In order to decide complicated cases of maritime delimitation, a competent tribunal should be able to deeply understand the nature of the dispute including the strategic, economic, and even symbolic values of the sea territory at issue.<sup>39</sup> In arbitration proceedings, the State parties could choose the most suitable candidates for the arbitral tribunal. They might also recommend other experts as necessary to provide professional support in the proceedings.<sup>40</sup> Such expertise and professionalism certainly could help ensure a higher level of fairness and reasonableness in the final solution.

In addition, arbitration is relatively less costly, more transparent, and quicker than court litigation; it can more adequately maintain the disputing parties' request for confidentiality.<sup>41</sup> All these relative advantages might also inspire the disputing parties to consent to international arbitration. While, under the currently emerging trend of 'global legalism'<sup>42</sup> maritime dispute resolution is expected to be more judicialized,<sup>43</sup> the preference for international arbitration would be thus apparent in these fields. Some observers even suggest that there has appeared a 'renaissance'

<sup>38</sup> *Supra* note 36, at 222-224.

<sup>39</sup> C. Copeland, *The Use of Arbitration To Settle Territorial Disputes*, 67 *FORDHAM L. REV.* 6 (1999).

<sup>40</sup> For details, see S. Santivasa, *The NGOs' Participation in the Proceedings of the International Court of Justice*, 5 *J. EAST ASIA & INT'L L.* 380-389 (2012).

<sup>41</sup> *Supra* note 36, at 226-228.

<sup>42</sup> Some observers maintain that international law would be the possible solution "for those problems that exceed the scope and capability of individual governments," and "states will comply because a legalistic culture will establish faith in international law." See C. Eby, *Global Legalism: The Illusion of Effective International Law*, 38 *DENV. J. INT'L L. & POL'Y* 687 (2010); E. Posner, *The Rise of Global Legalism*, Max Weber Lecture Series 2008/04, delivered on Jan. 16, 2008, available at [http://cadmus.eui.eu/bitstream/handle/1814/8206/MWP\\_LS\\_2008\\_04.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/8206/MWP_LS_2008_04.pdf?sequence=1) (last visited on Sept. 27, 2014). However, this argument is actually controversial. For details, see E. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009).

<sup>43</sup> This tendency is manifested by the increased number of international judicial organs as well as the caseload they received. See A. Schneider, *Not Quite a World without Trails: Why International Dispute Resolution is Increasingly Judicialized?* *J. DISP. RESOL.* 119-130 (2006).

of public international arbitration in the past decades.<sup>44</sup> This is why international arbitration is getting more popular for maritime dispute resolution.

### 3. A Promising Alternative for East Asian Countries?

#### *A. Non-Legalistic Tradition of Dispute Settlement in East Asia*

Maritime delimitations are complicated and troublesome in East Asia. Historical, geographic as well as geopolitical factors are particularly involved in this question. Political means to settle the existing maritime disputes has failed to achieve any substantial solution, especially when the disputing parties' positions are too fundamentally contradicting to compromise. Since the 1980s, *e.g.*, China and Japan have held numerous rounds of bilateral negotiations concerning their disagreements over territory and boundaries in the East China Sea.<sup>45</sup> Nonetheless, the tensions were never truly eased and military conflicts were nearly triggered on occasion. South Korea and Japan have not reached any agreement on the Liancourt Rocks, either.<sup>46</sup> In the face of such a difficult, if not totally unpromising, situation for a bilateral peaceful settlement, would any legal means, namely third-party adjudication, be any assistance?

It must be also noted that East Asian countries are traditionally not in favor of adopting legal approaches as the main method of settling disputes, especially relating to their territorial sovereignty. This is largely because of their traditional legal culture as they "have maintained different legal concepts and mindset based on their respective traditional values and lifestyle"<sup>47</sup> that are different from the west. In particular, court litigation is undesirable and even unacceptable according to

<sup>44</sup> B. Daly, The Renaissance of State-to-State Arbitration at the Permanent Court of Arbitration, speech at the Yale Law School, Apr. 4, 2011. Others also noted that: "There has also been a resurgence in state-to-state arbitration." See D. Rivkin, *The Impact of International Arbitration on the Rule of Law*, 29 ARB. INT'L 327-360 (2013). For reasons for the renaissance of public international arbitration, see *supra* note 36, at 214-220.

<sup>45</sup> In June 2008, *e.g.*, China and Japan "through serious consultations" reached a Principled Consensus on East China Sea issue and agreed to 'continue consultations' on joint development in other parts of the East China Sea. See Xinhua News, *China, Japan Reach Principled Consensus on East China Sea Issue*, June 18, 2008, available at [http://news.xinhuanet.com/english/2008-06/18/content\\_8394206.htm](http://news.xinhuanet.com/english/2008-06/18/content_8394206.htm) (last visited on Oct. 8, 2014).

<sup>46</sup> For details, see J. Dyke, *Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary*, 38 OCEAN DEV. & INT'L L. 157-244 (2007); S. Fern, *Dokdo or Takeshima? The International Law of Territorial Acquisition in the Japan-Korea Island Dispute*, 5 STAN. J. EAST ASIAN AFF. 78-89 (2005).

<sup>47</sup> Eric Yong-Joong Lee, *Evolving Concept of Law in Korea: A Historical and Comparative Perspective*, 21 ASIA PAC. L. REV. 77 (2013).

dominant ideologies such as Confucianism in China.<sup>48</sup> Apart from the non-legalistic tradition, some scholars would also attribute the inactiveness or reluctance to their relatively insufficient legal experiences and capacities in conducting international litigations.<sup>49</sup>

Territories are the grounds of a nation's 'core interests' so that no party is willing to risk losing a dispute as such.<sup>50</sup> Moreover, judicial settlement itself has drawbacks. Litigation would not foster mutual compromise, *e.g.*, although it is crucial and indispensable in any of human life including peaceful relations between States.<sup>51</sup> Even if the legal controversies are decided, the underlying political issues and concerns would not be fully addressed at all. Without a straightforward legal framework over the maritime delimitation issue, States are not willing to submit their disputes to judicial settlement.<sup>52</sup> It is not surprising to see that in August 2012 South Korea rejected Japan's suggestion immediately to submit the Liancourt Rocks dispute to the International Court of Justice.<sup>53</sup> China has not submitted any of its territorial disputes to third-party judicial settlement.

Instead, international arbitration would be more acceptable to the East Asian countries, given the above mentioned comparative advantages it might offer to the disputing parties. As arbitration is basically subject to the mutual consent of the disputants, countries like China with a negative position in this regard<sup>54</sup> might not accept such a third-party mechanism, either. Then, how could the compulsory dispute settlement procedures under the UNCLOS be applied differently to the East Asian countries in their maritime delimitation disputes?

<sup>48</sup> For discussion on legal culture in East Asia, see S. Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 ASIAN PAC. L. & POL'Y J. 2 (2000); K. Fujikura, *Legal Culture in a Non-Legalistic Tradition*, in JAPANESE LAW AND LEGAL THEORY (K. Fujikura ed., 1996).

<sup>49</sup> L. Han & H. Gao, *China's experience in Utilizing the WTO Dispute Settlement Mechanism*, in DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE 137–173 (G. Shaffer & R. Melendez-Ortiz eds., 2010).

<sup>50</sup> H. Darwin, *Judicial Settlement*, in THE INTERNATIONAL REGULATION OF FRONTIER DISPUTES 198 (E. Luard ed., 1970).

<sup>51</sup> R. Bilder, *International Third Party Dispute Settlement*, 17 DENV. J. INT'L L. & POL'Y 480-481 (1989).

<sup>52</sup> *Supra* note 32.

<sup>53</sup> See MOFAT Spokeperson's Commentary on the Japanese Government's Announcement on Dokdo, Aug. 17, 2012, available at [http://dokdo.mofa.go.kr/kor/dokdo/government\\_announce\\_list.jsp?pagenumber=3&sn=1&st=&sn02=&st02=&sc=&sdate=&edate=&orderby=&sort=&status=&at=view&idx=455&category=kr](http://dokdo.mofa.go.kr/kor/dokdo/government_announce_list.jsp?pagenumber=3&sn=1&st=&sn02=&st02=&sc=&sdate=&edate=&orderby=&sort=&status=&at=view&idx=455&category=kr); T. Nakagawa, *South Korea Refuses to Take Takeshima to ICJ*, THE YOMIURI SHIMBUN DAILY, Aug. 31, 2012, available at <http://www.asianewsnet.net/news-35807.html> (all last visited on Aug. 16, 2014).

<sup>54</sup> In the majority of its bilateral and multilateral agreements, except for a very limited number of trade-related ones, China has made reservations to nearly all the dispute settlement clauses containing international arbitration.

### ***B. Applicability of the UNCLOS Compulsory Procedures***

The dispute settlement procedures laid down in Part XV Section 2 of the UNCLOS are both compulsory and binding.<sup>55</sup> It means that China, Japan and Korea who are all parties to the Convention, in principle, could not escape from these provisions. However, there are exceptions and limitations to these provisions. Article 298 provides that a contracting State may opt out of the compulsory mechanism for certain categories of disputes including those “concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations.”<sup>56</sup> In this connection, on April 18, 2006, South Korea declared “not [to] accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1(a), (b) and (c) of Article 298 of the Convention.”<sup>57</sup> China also delivered such a declaration using the same wording on August 25, 2006.<sup>58</sup> Because China and Korea have decided to exclude the compulsory mechanism for maritime sovereignty related issues under the UNCLOS system, the option for settling disputes concerning delimitations of their EEZs or continental shelf boundaries through a binding procedure is more limited.

Nevertheless, this does not mean that issues of East Asian maritime delimitation would be completely immune from international arbitration. As not all the paragraphs in Articles 74 and 83 of the UNCLOS deal with “sea boundary delimitations,” it is debatable what kinds of specific disputes or activities would essentially be excluded by those declarations and could therefore not be referred to the compulsory mechanism. As a procedural matter, certain disputes relating to the interpretation or application of the relevant UNCLOS provisions could still be referred to a duly constituted arbitral tribunal. Even though the arbitrators neither directly decide the ownership of the disputed islands, nor draw any maritime boundary lines for the parties, the tribunal might find it has jurisdiction to decide some other related issues. Take the Sino-Japan EEZ delimitation dispute in the East China Sea as an example. If China unilaterally authorized its State-owned companies to drill in disputed maritime zones beyond the Chunxiao gas field, Japan

<sup>55</sup> UNCLOS art.296.

<sup>56</sup> *Id.* art. 298(1)(a).

<sup>57</sup> UN Division for Ocean Affairs and the Law of the Sea, Declarations and Statements: Republic of Korea, available at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#RepKorea](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#RepKorea) after ratification (last visited on Sept. 27, 2014).

<sup>58</sup> UN Division for Ocean Affairs and the Law of the Sea, Declarations and Statements: People’s Republic of China, available at [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#China](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China) after ratification (last visited on Sept. 27, 2014).

might bring this matter to international arbitration by claiming that China breached the UNCLOS obligation prohibiting its parties from engaging in any activities that would jeopardize the reaching of a final agreement on the disputed sea boundaries.<sup>59</sup> If China interferes with Japan's exploitation of natural resources around the Median line, Japan might also be able to invoke the compulsory mechanism by asserting that such a dispute is not excluded by China's 2006 Declaration because it would not require the arbitral tribunal to delimit the maritime boundary in that region. All such scenarios could be possibly referred to the compulsory mechanism, regardless of the exception declarations made by China and South Korea.

### *C. The Philippines-China Arbitration and its Implications*

The ongoing Philippines-China arbitration question<sup>60</sup> is exactly a case in point to illustrate the applicability of the UNCLOS compulsory arbitration despite of a single State's declaration. Back in May 2012 when the Philippines firstly expressed its intention to arbitrate the disputes over Scarborough Shoal, China immediately rejected this proposal by maintaining that it was "a weird thing in international affairs to submit a sovereign country's territory to international arbitration."<sup>61</sup> Regardless of China's express objection, on January 22, 2013, the Philippine government officially initiated the arbitration proceeding in accordance with Article 287 and Annex VII of the UNCLOS.<sup>62</sup> In its Notification and Statement of Claim, the Philippines acknowledged that, as a result of China's 2006 declaration, it "was conscious of" the fact that the tribunal had no jurisdiction over territorial sovereignty and maritime boundary delimitation issues.<sup>63</sup> The Philippines nevertheless turned to argue that its claims were all about the interpretation or application of some related UNCLOS provisions, such as whether or not China had interfered with the exercise by the Philippines of its rights to navigation or exploit living resources in its EEZ

<sup>59</sup> UNCLOS art. 83.3. It requires: "The States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement."

<sup>60</sup> For details on the dispute over Huangyan Island (Scarborough Shoal), see L. Bautista, *The Philippine Claim to Bajo de Masinloc in the Context of the South China Sea Dispute*, 6 J. EAST ASIA & INT'L L. 497-529 (2013); R. Gao, *Legal Basis of China's Claim over the Huangyan Island*, 6 J. EAST ASIA & INT'L L. 521-552 (2013).

<sup>61</sup> See PRC Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on 8 May 2012, available at <http://si.chineseembassy.org/eng/fyrth/t930782.htm> (last visited on Sept. 27, 2014).

<sup>62</sup> See Notification and Statement of Claim of the Philippines (Jan. 22, 2013), available at <http://www.gov.ph/2013/01/22/statement-the-secretary-of-foreign-affairs-on-the-unclos-arbitral-proceedings-against-china-january-22-2013> (last visited on Oct. 27, 2014).

<sup>63</sup> *Id.* ¶ 7.

and continental shelf.<sup>64</sup> Upon receiving the Philippines' notification of arbitration, China reiterated its opposition to go for arbitration.<sup>65</sup> However, the arbitration went on despite China's refusal to participate in any of the proceedings. The arbitral tribunal was successfully constituted and held its first meeting on July 11, 2013 at the Peace Palace in The Hague, with the PCA acting as Registrar. Afterwards, the Philippines filed its Memorial on March 30, 2014 in accordance with the Tribunal's Procedural Orders and China is now requested to submit her Counter-Memorial by December 15, 2014 though she reiterated the position that [China] "does not accept the arbitration."<sup>66</sup> All these proceedings of this landmark case so far once again demonstrate that, even though there is a declaration of exception, an UNCLOS party might not be completely immune from the compulsory procedures since such a matter over jurisdiction shall be addressed by decision of the arbitral tribunal.<sup>67</sup>

The Philippines-China arbitration will also bring significant implications. According to the UNCLOS, if no bilateral settlement is reached through negotiations thereafter,<sup>68</sup> the arbitral tribunal will go on with the hearings and then make an award even if China continues to refuse to participate in the proceedings.<sup>69</sup> If the arbitral award is eventually rendered, such a third-party decision on the basis of contemporary international law, though the underlying sovereignty issue remains unsettled, would certainly "be a major step in helping define the areas in dispute"<sup>70</sup> and consequently contribute to the final solution of the South China Sea disputes. If China refuses to recognize and implement the award which might be adverse to its sovereign claims and interests, other countries in the region and beyond would very likely extend more pressure onto China to reassure its consistency with the acknowledged order of the international community. Under the current trend of global legalism, China, as a key actor in the global governance system, is unlikely to go too far against the rest of the world. All these factors would in turn strengthen

<sup>64</sup> *Id.* ¶ 31.

<sup>65</sup> *See China Opposes Taking Sea Disputes to UN*, XINHUA NEWS, Jan. 31, 2013, available at [http://www.china.org.cn/world/2013-01/31/content\\_27855302.htm](http://www.china.org.cn/world/2013-01/31/content_27855302.htm) (last visited on Sept. 27, 2014).

<sup>66</sup> PCA, *The Republic of the Philippines v. The People's Republic of China*, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1529](http://www.pca-cpa.org/showpage.asp?pag_id=1529) (last visited on Sept. 27, 2014).

<sup>67</sup> UNCLOS art. 288(4).

<sup>68</sup> *Id.* art. 280.

<sup>69</sup> *Id.* Annex VII, art. 9. In fact, China's nonparticipation in the arbitration proceedings has been widely challenged even by some Chinese scholars. *See* Mincai Yu, *China's Responses to the Compulsory Arbitration on the South China Sea Disputes: Legal Effects and Policy Options*, 45 OCEAN DEV. & INT'L L. 1-16 (2014).

<sup>70</sup> R. Beckman & L. Bernard, *Disputed Areas in the South China Sea: Prospects for Arbitration or Advisory Opinion*, Third International Workshop on South China Sea, Hanoi, Nov. 3-5, 2011.

the rule-based world public order<sup>71</sup> and foster the overall commitments of disputing States to adhere to legalistic resolutions of maritime disputes.

## 4. Conclusion

The arbitral settlement of maritime delimitation disputes, as reflected in many cases such as the *Eritrea-Yemen Arbitration*, would “consolidate peace and stability” in the disputed region and “create a zone of peace, development and mutual benefit.”<sup>72</sup> In the past, East Asian countries were relatively reluctant towards the third-party dispute settlement mechanism. However, some changes have emerged recently. In world trade, China, Japan and Korea are all becoming increasingly enthusiastic in utilizing the WTO’s dispute settlement body.<sup>73</sup> Some observers even advocate an ‘aggressive legalism’ trend in this regard.<sup>74</sup> Other Asian countries are also becoming more inclined and adaptable to international adjudication with respect to their territorial and sea disputes.<sup>75</sup> In particular, Bangladesh and India submitted their dispute concerning delimitation of maritime boundary to PCA in 2009;<sup>76</sup> Pakistan and India also decided in 2010 to settle their dispute concerning the Indus Waters

<sup>71</sup> G. Dorsey, *The McDougal-Lasswell Proposal to Build a World Public Order*, 82 AM. J. INT’L L. 1 (1988). See also M. REISMAN, INTERNATIONAL LAW IN THE TWENTY-FIRST CENTURY: THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY (2013).

<sup>72</sup> *Supra* note 33.

<sup>73</sup> It is observed that Japan’s passive participation in the GATT dispute settlement has changed into the aggressive use of the WTO rules and judicial bodies to defend its interests against trade partners. See J. Nakagawa, *No More Negotiated Deals?: Settlement of Trade/Investment Disputes in East Asia*, 10 J. INT’L ECON. L. 4 (2007); Korea has similarities with Japan in its legal behaviors in the WTO dispute settlement. See S. Pekkanen, *The Socialization of China, Japan and Korea in International Economic Law: Assessment and Implications*, THE ASIL PROCEEDINGS OF THE ANNUAL MEETING 531 (2010). China has also changed from being a passive player to an aggressive player. See H. Gao, *Aggressive Legalism: The East Asian Experience and Lessons for China*, in CHINA’S PARTICIPATION IN THE WTO 315-351 (H. Gao & D. Lewis eds., 2005).

<sup>74</sup> The term was once defined as “a conscious strategy where a substantive set of international legal rules can be made to serve as both ‘shield’ and ‘sword’ in trade disputes among sovereign states.” See S. Pekkanen, *Aggressive Legalism: The Rules of the WTO and Japan’s Emerging Trade Strategy*, 24 THE WORLD ECONOMY 707 (2001).

<sup>75</sup> E.g., Indonesia and Malaysia brought their sovereignty disputes over two islands in the Celebes Sea to the ICJ in 1998; Malaysia and Singapore also brought their disputes over three islands/rocks to the ICJ in 2003. See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.)*, Judgment, 2002 I.C.J. (Dec. 17), available at <http://www.icj-cij.org/docket/files/102/10570.pdf>; *Sovereignty over Pedra Branca/Pulau Puteh, Middle Rocks and South Ledge (Malay. v. Sing.)*, Judgment, 2008 I.C.J. (May 23), available at <http://www.icj-cij.org/docket/files/130/14492.pdf> (all last visited on Oct. 4, 2014).

<sup>76</sup> *Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India)*, available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1376](http://www.pca-cpa.org/showpage.asp?pag_id=1376) (last visited on Sept. 27, 2014).

Kishenganga through the PCA arbitration.<sup>77</sup> All these new developments would show that international arbitration could be an important alternative for East Asian countries in settling their maritime delimitation disputes.

Whereas, it must be noted that maritime boundary delimitation is not simply a legal issue, but also “a politically sensitive process.”<sup>78</sup> Even though the compulsory dispute settlement procedures of the UNCLOS might function in some cases, the decision of a disputing State on whether to go for arbitration over a given case would still be largely subject to her willingness based on the overall considerations and a balance of all interests. Not only will the legal risks, effects, pros and cons of resorting to international arbitration be examined, but the non-legal factors like foreign policies, international relations and geopolitics shall be evaluated in this decision-making process, as well.

In the meantime, international arbitration as a mechanism of dispute resolution also has its own limits, such as the relative lack of judicial authoritativeness and weak enforceability of the arbitral awards in comparison to the judgments rendered by the ICJ. Besides, due to jurisdictional restrictions, the arbitral tribunal might decide merely the legal controversies but fail to address the underlying political or economic concerns; some disputing parties are therefore more apt to use arbitration only on relatively apolitical disputes.<sup>79</sup> As no single method is capable of resolving all kinds of disputes, a combined use of both diplomatic and legal means would therefore be desired in most cases.<sup>80</sup> The maritime delimitation disputes of the East Asian countries are so contentious that they should be handled in a sophisticated manner considering their regional features. A more ultimate and multilateral solution should be introduced with international arbitration.

<sup>77</sup> Indus Waters Kishenganga Arbitration (Pak. v. India), available at [http://www.pca-cpa.org/showpage.asp?pag\\_id=1392](http://www.pca-cpa.org/showpage.asp?pag_id=1392) (last visited on Sept. 27, 2014).

<sup>78</sup> *Supra* note 18, at 1.

<sup>79</sup> *Supra* note 39.

<sup>80</sup> By identifying the various duties of cooperation both in political and legal settlement strategies, some scholars even argue that contemporary international law of dispute settlement is envisaged as a network of obligations. See A. Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 EUR. J. INT'L L. 1-34 (2003).

