

GENERALIZATIONS AND HALF-TRUTHS ABOUT INTERNATIONAL DISPUTE SETTLEMENT



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Maritime Dispute Resolution Project

Generalizations and Half-Truths about International Dispute Settlement

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The U.S.-Asia Law Institute's Maritime Dispute Resolution Project seeks to understand when states successfully resolve their international maritime disputes through the peaceful methods outlined in the United Nations Charter and in the United Nations Convention on the Law of the Sea (UNCLOS), namely conciliation, mediation, arbitration, or adjudication. The general goals of the project are to generate answers to two critical questions, namely (1) when are international institutional dispute resolution mechanisms effective in resolving maritime disputes and (2) to the extent general insights can be drawn, can these be applied to maritime disputes in East Asia? For the first round of the project, case studies were selected from around the world in which two states submitted their territorial or maritime disputes to various forms of formal adjudication or arbitration for a binding decision. For each case the writer was asked to provide an overview of the dispute, a summary of the case (including the litigants' respective positions on substantive issues as well as the tribunal's disposition of each), and a description of whether or how the ruling was implemented to date. Future rounds of the project are expected to include cases submitted to mediation or conciliation and to elicit input from political scientists (and not only lawyers) with respect to the two critical research questions.

This introduction does not address the many issues of procedure and substantive law raised by the case studies. It only seeks to put the project and its purposes in a broader context.

Despite considerable differences in terms of geographic origin and much else, the cases considered in this project share certain generalizable features. Consider as an example the case between the neighboring states of Qatar and Bahrain involving complex and longstanding territorial and maritime boundary disputes submitted to the International Court of Justice (ICJ) in 1991 that produced a comprehensive judgment by that court ten years later.² The Qatar/Bahrain case is one of this project's ostensible success stories. Its ruling case indicates what may be a more general truth: namely that disputes over land territory (including over ownership of disputed islands) and over maritime boundaries, while the subject of distinct legal rules and frequently of distinct adjudicative forums, are, in terms of effects, hard to disentangle. That case tells us that the adage that “the land dominates the sea” has real-world legal implications. As that judgment indicates, maritime delimitations are dependent not only on baselines that can only be drawn off of physical coastlines but on which state has sovereignty over disputed islands (in that case, the Hawar, Janan, and Zubarah islands). The ICJ was able to resolve the underlying territorial and maritime sovereignty claims because it found, over the jurisdictional objections of Bahrain, that the parties had indeed agreed to submit *all* of these disputes to the court. Thanks to that broad acceptance of jurisdiction, the ICJ was able to address and resolve, first, the competing territorial claims and, second, based on those determinations, to resolve and demarcate the relevant maritime boundaries. The comprehensive nature of the jurisdictional and merits rulings in the Qatar/Bahrain judgment is surely a factor in explaining its success.

² Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Case Summary.

The Qatar/Bahrain case shares other characteristics with nearly all of the other case studies. As is likely to be true with respect to most of the world's existing territorial/maritime disputes, the competing sovereignty claims in that case had lengthy pedigrees; they had also been the subject of considerable prior inter-state interactions, including mediation efforts. As is typical, the reach for binding adjudication came at the end of fruitless diplomacy, that is, as a last, not first, resort. As with many of the other claims in this project, the underlying claims were the product of unresolved issues left over from the period of colonial rule. That fact, as well as that they concerned disagreements over the geographic limits of states, meant that they were laden with considerable political baggage. That the disputes involved the very essence of sovereign concerns likely explains why it took so long for the dispute to be submitted for binding third-party resolution. But what is also clear is that the effect of submitting such disputes to judicial authority was transformative. It turned the rival states into litigants in a forum where they each enjoyed equal rights to procedural fairness – equal rights to presenting evidence, to responding to each other's evidence and arguments, to due deliberation by a pre-constituted body, and to a reasoned judgment at the end of the day. In exchange for these equal rights and to an effective remedy, the litigants accepted that, at least before the third party adjudicator, they would need to limit their sometimes-inflammatory rhetoric. Polemical arguments previously used by one or both parties were left outside the courthouse door. Inside that judicial proceeding the parties were limited to making legal arguments directed exclusively to determining whether the court had jurisdiction to decide the claims and, if so, to whether one or the other party should prevail based on a delimited list of primary sources of legal obligation, namely bilateral and multilateral treaties (including UNCLOS), customary international law (in this case relevant because one of the litigants was not a party to UNCLOS), national

laws and practices, as well as, if applicable, principles of law and equity such as *effectivités*, *uti possidetis juris*, and the principle of proportionality. Despite considerable differences among permanent international courts and between such courts and arbitral bodies, all of these forms of formal adjudication insist on this transformation of rhetoric – this delimited form of discourse.

The relevant rules applied by the ICJ in Qatar/Bahrain included relatively precise rules subject to mechanical application as well as vague standards anticipating considerable delegation of interpretative authority. The adjudicators in Qatar/Bahrain were entrusted with certain determinations requiring a mix of both – such as, in this case deciding whether one of the litigants could assimilate itself to an archipelagic state for purposes of establishing archipelagic baselines. They were also tasked with making a number of factual determinations dependent on technical or scientific expertise brought into the court from outside sources, including experts and maps. Such determinations of fact required subjective assessments of veracity as applied to documents or persons submitting testimony. As in many of the other cases in the project, the judges in Qatar/Bahrain were also required to apply rules likely to produce an “equitable result” with respect to some matters. This demand required subtle exercises of judgment attentive to the particular circumstances. In Qatar/Bahrain the ICJ judges had to consider, for example, whether the alleged practices of pearl divers from Bahrain in fishing banks or the remote projection of Bahrain’s coastline in the Gulf area requires an adjustment of the normally applicable equidistance line. Finally, like most cases in the project, the final judgment in Qatar/Bahrain was a blend of fact-specific determinations unique to the case at hand and more general legal conclusions amenable to setting an informal precedent that might be applied to subsequent cases involving other litigants despite international law’s resistance to the common law notion of *stare decisis*.

The Qatar/Bahrain case, like the others in this project, inspires questions about exactly what is “international dispute settlement.” At a minimum, the ICJ’s ruling suggests that characterizing its effort as merely settling a dispute is an over-simplification of the judicial or arbitral function. Students of international adjudication – and of the rulings issued by such forums – have differed sharply on whether international adjudicators should be seen as the “agents” of the states that establish the respective tribunals or that accord them jurisdiction over a particular case, independent “trustees” charged with enforcing the rule of law on behalf of the international community, or “triadic” dispute settlers intent on legitimizing the result by convincing the loser of a dispute that it has been heard.³ These competing visions of the adjudicative function yield distinct predictions of how adjudicators behave and distinct prescriptions on how they should behave. If adjudicators are mere state agents, for example, some argue that they:

should exercise the “passive virtues” – they should deploy concepts of admissibility, standing, and mootness to narrow the dispute before them and increase the likelihood of successful settlement or compliance. Adjudicators should not take on legal or factual issues not raised by the disputants and should resist third-party interventions or court-initiated processes for fact-finding. Adjudicator-agents should avoid accusations of “judicial lawmaking” by rendering opinions containing only as much reasoning as necessary, by applying deferential canons of interpretation and by adhering to codes of judicial behavior consistent with the formal “rule of law.”

³ See, e.g., José E. Alvarez, “What are International Judges for? The Main Functions of International Adjudication,” in C. Romano, K. Alter, and Y. Shany, *The Oxford Handbook of International Adjudication*, 159, at 161-66 (2014).

A faithful agent of the litigating parties should, for example, adhere strictly to the “plain meaning” rule in the interpretation of treaties; find customary law only in express state practice paired with explicit *opinio juris*; and avoid filling gaps in the existing law in ways that would be seen as exceeding the narrow delegation of power given in the tribunal’s choice of law clause.⁴

Those who think that international adjudicators are seen (or should be seen) as more akin to trustees take a very different view of how they behave or should behave. Hersch Lauterpacht, the leading opponent of the adjudicator-as-agents view, argued that states value judges precisely because these persons are not the agents of states but agents of the law charged with filling in international law’s myriad legal gaps.⁵ On this view, third-party adjudicators are not limited by the arguments of the litigants before them as agents would be; instead, they should be attentive to providing guidance as to what the general law is and for that reason may reach for arguments that would assist them in filling legal gaps even if the litigants do not want certain issues to be addressed. Some of those who see international adjudicators as trustees for the international rule of law oppose some or all of the so-called passive virtues suggested by the quotation above. They consider judicial minimalism to be a vice, not a virtue, and that adjudicators who fail to clarify the law when given the opportunity are abdicating their duty. Lauterpacht, like others who distinguish adjudicators from diplomats, encouraged teleological interpretations of basic legal sources (evident in, for example, certain of the ICJ’s Advisory

⁴ Id., at 161-62 (citing a number of authors).

⁵ Id., at 163-64 (citing Hersch Lauterpacht, The Function of Law in the International Community).

Opinions). He and others argued that broad treaty interpretations that go beyond the plain meaning of the underlying text are justified if necessary to secure greater legal coherence among international law's sub-regimes (e.g., to enable law of the sea rules to be applied consistently with international legal obligations with respect to human rights or the environment).⁶

Others see all or some international tribunals as emulating the triadic dispute settlement functions of national courts. On this view, a core function of the judicial process, whether at the international or national level, is to win over the respective litigants by convincing both sides of the legitimacy of the adjudicative process and of the results reached by that process. As one of the advocates of this framework has put it, the goal of triadic dispute settlement is to avoid the perception that at the end of the day the third-party adjudicator has merely joined forces with one of the litigants to produce an arbitrary “two against one” outcome.⁷

This framework helps to explain what is sometimes the most lengthy part of judicial or arbitral rulings, namely recitations in considerable detail of each party's arguments on every factual and legal point. Under the triadic understanding of dispute settlement, these passages are designed to indicate that the adjudicators have been attentive to both sides. It is assumed that this is important

⁶ Hersch Lauterpacht, The Function of Law in the International Community 118-19 (OUP edition 2011); A. von Bogdandy and I. Venzke, “On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority,” Amsterdam Law School Legal Studies Research Paper No. 2012-69, at 19 (enumerating examples of international courts acting as “organs of a value-based international community”).

⁷ Martin Shapiro, Courts: A Comparative and Political Analysis 1 (U. of Chicago 1981).

because research suggests that litigants before national courts are most likely to comply with an adverse judicial outcome if they believe that the process was fairly designed to elicit and seriously consider their legal arguments.⁸ While there is doubt about whether the attitudes of individual litigants in national courts can be transposed to states participating in interstate adjudication, it is clear that when states refuse to accept the results of an interstate ruling, they often contend that the proceeding was unfair or did not seriously consider their arguments.⁹

The triadic frame may also help to explain “split the baby” rulings that are common to boundary/maritime disputes, particularly when the underlying law requires a reach for an equitable result that enable both sides to claim victory, thereby encouraging them to comply. Another possible manifestation of this framework are instances in which international adjudicators, like some national judges, seize the power to manage compliance over time by enabling the litigants to have continuing access to the court, as where parties are requested by a court to report back on compliance efforts and its judges reserve judgment on particular issues until a

⁸ See, e.g., E. Allan Lind and Tom R. Tyler, The Social Psychology of Procedural Justice (1988).

⁹ Such arguments were, for example, made by the United States in response to the ICJ’s jurisdictional and merits rulings in *Nicaragua v. United States*, as well as by the PRC in response to *Philippines v. China*. See Statement of the Legal Adviser of the State Department, Abraham D. Sofaer, to the Senate Foreign Relations Committee, 86 Dep’t St. Bull. 67 (Dec. 4, 1985); Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, (July 12, 2016), at https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml.

later point in time. Such examples of “managerial” or “experimentalist” judging is seen as one way to enhance or induce compliance with third-party rulings over time.¹⁰

Readers of the Qatar/Bahrain case and other cases in this project are likely to see aspects of all three models of the dispute settlement function in operation.

The Qatar/Bahrain judgment also illustrates that those who decide territorial/maritime disputes also function as, and are valued as, factfinders.¹¹ Such cases often require adjudicators to decide, for example, whether claims to “historic title,” historic fishing rights, or other forms of state practice with potential legal significance are grounded in fact. While such factual determinations are crucial to legal findings, they are important in and of themselves, may have considerable political significance, rely on judge-made rules on such matters as the production of evidence and burdens and standards of proof, and call upon a different set of adjudicators’ skills, including their ability to judge scientific or technical evidence. The last has led to numerous critiques of international courts’ capacity to engage in accurate fact-finding, particularly given the likelihood that international adjudicators are usually located at a considerable geographic, cultural, and linguistic remove from the place giving rise to the disputes, lack subpoena powers to compel the production of evidence or witnesses, and tend to rely on fact-

¹⁰ See, e.g., Grainne de Burca, “Human Rights Experimentalism,” 11 *AJIL* 277 (2017).

¹¹ Alvarez, *supra* note 2, 166-168 (describing international courts’ “fact-finding” function). Of course, the line between fact and law has long been contested and many law of the sea issues require both legal interpretation and fact-finding, such as efforts to distinguish an inhabitable island from a mere rock.

finding undertaken by others.¹² Disagreements over the facts that adjudicators find may also be the basis for challenging the ultimate legal conclusions reached by a tribunal, thereby providing excuses for failures to comply.

The Qatar/Bahrain outcome, like a number of others described in this project, also appears to serve distinct “governance” functions.¹³ The ruling in that case does not merely settle a particular dispute. As two of the leading experts on international dispute settlement, von Bogdandy and Venzke, point out generally, judgments on territorial/maritime disputes stabilize normative expectations not only for particular litigants but for others facing comparable facts. Such rulings fill legal gaps in the primary sources of law and therefore make law. When such forms of judicial law-making are seen as legitimate, they constitute a form of “public legal authority” which embraces the tribunal itself.¹⁴ This is the type of function associated with a legislature and not a court.

¹² See, e.g., Thomas M. Franck, “Fact-Finding in the ICJ,” in Richard B. Lillich, ed., Fact-Finding Before International Tribunals 21 (Brill 1992) (criticizing the ICJ’s avoidance of the facts and reliance in a number of cases). For competing views of adjudicators’ ability to assess scientific facts, compare M. M. Mbengue, “International Courts and Tribunals as Fact-Finders: The Case of Scientific Fact-finding in International Adjudication,” 34 *Loy. L. A. Int’l & Comp. L. Rev.* 53 (arguing that adjudicators are not up to the task of assessing scientific evidence) to José E. Alvarez, “Are International Judges Afraid of Science? A Comment on Mbengue,” 34 *Loy. L. A. Int’l & Comp. L. Rev.* 81 (questioning Mbengue’s premises and conclusions).

¹³ Alvarez, *supra* note 2, 170-75 (describing international courts’ “governance” functions).

¹⁴ von Bogdandy and Venzke, *supra* note 5.

As all this implies, while the Maritime Dispute Resolution Project was principally designed to provide possible lessons for Asian states seeking ways to resolve their maritime disputes, it should be of interest more broadly, namely to those seeking to understand the many different roles of international adjudicators.

The case studies produced here also tell us something about the competing claims of certain scholars of international relations and international law, respectively. Beth Simmons, a leading political scientist, has written path-breaking work, focused on Latin America, on when and why states delegate decision-making authority over territorial issues to an international institution such as a court.¹⁵ As she points out, she has had that line of inquiry more or less all to herself among political scientists because her colleagues, heavily committed to the realist school of international relations, presume “that states generally desire to preserve their legal sovereignty, particularly in an areas as central to their interests as title to territory.”¹⁶ Most political scientists undervalue (and therefore understudy) the role of law, and particularly of binding international adjudication, in inter-state relations. Apart from Simmons, international relations theorists generally believe that disputes over territory, often connected to access to natural resources and to matters of national security, are the least amenable to law and legal resolution.

Political realists argue that such issues are most likely to be settled through the exercise of political power or leverage, including the threat of use of force where one party can credibly deploy that

¹⁵ See, e.g., Beth A. Simmons, “Capacity, Commitment, and Compliance,” 46 *J. Conflict Res.* 829 (2002).

¹⁶ *Id.*, at 831.

threat relative to a weaker party. Most research by political scientists on this subject, as Simmons points out, treats territory “as a zero-sum issue . . . influenced almost exclusively by the military or strategic context of the states concerned.”¹⁷ Most political scientists argue that international dispute settlement is only deployed and can only be effectively enforced on matters of little political salience where the stakes are low and where, therefore, a state might voluntarily comply.¹⁸ When it comes to territorial or maritime disputes, realists tell us that relative power – not judges – dictate the result. In this study, there is certainly evidence that some disputes raise such high-profile political stakes that neither governments nor international judges appear able to resolve them. The ICJ’s ruling in Nicaragua-Columbia, for example, while legally uncontroversial, appears to resist (at least to date) judicial resolution.

Simmons canvasses many instances, particularly but not only involving Latin American states, where states have turned to institutional dispute settlement in an attempt to resolve a multitude of territorial and maritime disputes. She points out the many reasons why states large and small, militarily powerful or not, value uncontested borders and, as a result, may successfully resort to

¹⁷ *Id.*, at 832.

¹⁸ The literature on why states resist third-party dispute settlement is vast. As Oscar Schachter has pointed out: “It is no great mystery why they are reluctant to have their disputes adjudicated. Litigation is uncertain, time consuming, troublesome. Political officials do not want to lose control of a case that they might resolve by negotiation or political pressures. Diplomats naturally prefer diplomacy; political leaders value persuasion, maneuver and flexibility. They often prefer to “play it by ear,” making their rules fit the circumstances rather than submit to pre-existing rules . . .” Oscar Schachter, International Law in Theory and Practice, 228 (Brill 1991).

third parties to resolve such disputes in defiance of realist expectations. To be sure, Simmons finds evidence that realists are not entirely wrong with respect to their assumptions or predictions of failure. She uncovers evidence that power asymmetries between rival claimants to territory matter and that the greater that asymmetry, the more likely the more powerful state will avoid binding dispute settlement.¹⁹ She finds that “overwhelmingly powerful countries are unlikely to commit themselves to arbitration.”²⁰ But Simmons also finds that states, including those with authoritarian regimes, have many political reasons to turn to binding dispute settlement that are usually ignored. A turn to arbitration, she finds, is associated with a history of failed diplomatic efforts or unsuccessful attempts to negotiate a treaty to resolve the dispute.²¹ Simmons also finds that the prospect of mutually settled borders can entice states to seek out arbitration even with respect to high stakes boundary disputes, including those presenting a history of violence or opportunities for access to natural resources (even as the existence of such resources may make compliance with an adverse ruling less likely).²²

States can be enticed to entrust a third-party to resolve such disputes because settled borders present the prospect of considerable joint gains, including valuable economic windfalls that can only take place once disputes over ownership are settled. States may also be convinced to opt for third-party binding resolution

¹⁹ Simmons, *supra* note 14, at 837.

²⁰ *Id.*, at 839.

²¹ *Id.*, at 839-840.

²² *Id.*, at 840.

when the prospects of losing the dispute in such a proceeding (which they often underestimate) seems outweighed by the high opportunity costs of the status quo – in terms of lost trade and increased military expenditures needed to defend contested space. Simmons also explains a number of the successful resorts to dispute settlement that she documents as resulting at least in part from pressure brought by internal interest groups that favor disinterested third-party resolution over diplomatic settlement.²³ Such groups may fear that a willingness to settle politically (in the absence of a third party dispute settler) can signal governmental weakness and establish an adverse precedent. Political resolutions to territorial disputes may also be unattractive to the government officials that have to negotiate them when these fear that their decisions can come to haunt them, and they might eventually be blamed for a “bad” deal. Such fears are particularly prevalent if there is a serious prospect that a different set of leaders may soon come to power.²⁴

In Simmons’ view, resort to and ultimately compliance with a third-party’s ruling, on the other hand, can be blamed on others and can be portrayed as sending a positive signal of cooperation and routine willingness to abide by the rule of law.²⁵ These realities may

²³ *Id.*, at 832-835.

²⁴ A recent survey of attitudes towards negotiated settlement versus resort to investor-state arbitration supports many of these conclusions. See Seraphina Chew, Lucy Reed, and J. Christopher Thomas, “Report: Survey on Obstacles to Settlement of Investor-State Disputes,” NUS-Centre for International Law Working Paper 18/01 (2018) (reporting that the number one obstacle to settling investor-state disputes out of court was fear by government officials that they would be blamed for the terms of settlement).

²⁵ Simmons, *supra* note 14, at 834.

sometimes prompt governments to roll the dice and opt for arbitration. But Simmons finds that the ways states agree to dispute settlement matters. Based on the cases that she examines Simmons concludes that general multilateral commitments that commit states in advance to submit disputes to formal adjudication are not as effective as bilateral and especially *ad hoc* commitments targeted to resolve a dispute after it arises.²⁶ The latter are far more likely to get states to participate in the arbitral or judicial forums to which they have consented.

Simmons explains many of the instances of resort to court or arbitration in terms of the self-interests of internal interests within states (including parts of the government). She is careful to distinguish, however, a government's decision to opt for third-party binding resolution from its decision to comply with any subsequent ruling should it prove to be adverse to its interests. Simmons argues that the same political factors, including internal interests, that may drive a state to seek third-party resolution may propel it to resist compliance with a subsequent ruling should a government decide that the adverse reputational consequences of failing to abide by a legally binding decision are worth the costs.²⁷ One factor that appears to influence the decision to comply is whether there is a substantial gap between a states' (often wrongly optimistic) *ex ante* expectations of the likely result and the actual ruling that emerges. Governments and internal interest groups within them with good access to accurate information – which tend to be democracies responsive to constituents – are less likely to be surprised by judicial outcomes. These considerations underlie Simmons' predictions that while democracies, which may have to corral a more diverse

²⁶ *Id.*, at 841.

²⁷ *Id.*, at 842-845.

set of interests, face greater political constraints in agreeing ex ante to formal adjudication, they are more likely to comply with an arbitral ruling once they commit to the process.²⁸

These considerations indicate why it is a good thing that the latter stages of this project anticipate collaborations with political scientists. Lawyers may learn much from those inclined to look at wider considerations than adherence to the rule of law. It remains to be seen how the territorial/maritime cases addressed in this project and in its next phase comport with Simmons' intriguing conjectures and conclusions. It would be interesting to see, for example, whether her conclusions about the greater propensity of democracies to comply with third-party resolution has traction in a region where many governments are perceived as non-democratic.

We should beware of cavalier contentions, sometimes premised on alleged differences of culture or presumed general attitudes towards adversarial litigation, that Asia is pre-disposed to resist third-party settlement of international disputes. Asia encompasses a remarkable diversity of cultures, histories, and legal traditions. Even those scholars who have speculated about the concept of "Eastphalia" or "Asian regionalism" acknowledge that "Asian economic and even cultural integration have far outpaced political or legal integration, and the current state of affairs is likely to continue."²⁹ It would be extremely foolish to extrapolate from the

²⁸ *Id.*, at 843.

²⁹ Tom Ginsburg, "Eastphalia and Asian Regionalism," 44 *Univ. of Cal. Davis L. Rev.* 859, at 861 (2010). See also Jean d'Aspremont, "International Law in Asia: The Limits to the Western Constitutionalist and Liberal Doctrines," 13 *Asian Yearbook Int'l L.* 27 (2007) (acknowledging that there is "not a unitary set of legal scholarship" among Asian scholars even while arguing for some

idea that the philosophical writings of Confucius have implications for world order,³⁰ for example, to suggest that Asian states are all equally influenced by such traditions or that even in those countries where Confucius continues to be venerated, the Confucian gentleman's ostensible aversion to settling a dispute by turning to a third-party who applies the law has anything to do with modern attitudes towards litigating national or international disputes.³¹

There is considerable evidence that a number of Asian countries have seen an increased resort to third-party dispute settlement - and particularly to litigation in national courts and arbitration.³² In some Asian countries this includes increased resort by elements of civil society to using national courts to wage public law litigation.³³

common ground with respect to concepts of the public character of international law).

³⁰ See, e.g., Frederick Tse-shyang Chen, "The Confucian View of World Order," *I Ind. Int'l & Comp. L. Rev.* 45 (1991).

³¹ See generally, Henry C. K. Liu, "The Abduction of Modernity, Part 3: Rule of Law vs. Confucianism," *Asia Times Online*, July 24, 2003, available at <http://www.atimes.com>.

³² See, e.g., Weixia Gu, *Dispute Resolution in China* (Routledge 2021) (providing considerable empirical data confirming the increased resort to litigation and arbitration within China to accompany recent changes in Chinese laws).

³³ See, e.g., Chao-ju Chen, "A Same-sex Marriage that is Not the Same: Taiwan's Legal Recognition of Same-sex Unions and Affirmation of Marriage Normativity," *20 Australian J. Asian L.* 1 (2019); Timothy Webster, "The Price of Settlement: World War II Reparations in China, Japan, and Korea," *51 NYU J. Int'l L. & Pol.* 301 (2019); Thomas J. Shattuck, "Transitional Justice in Taiwan," *Foreign Policy Institute Report* (2019), available at

It would be equally hazardous to conclude that Asian countries would all be unlikely to resort to modern international courts, from the ICJ to ITLOS, with respect to particular disputes because of a common “ambivalence” towards international legal institutions or a shared aversion to international law’s colonialist legacies.³⁴ As is suggested by Japan’s modern embrace of international law³⁵ or China’s contemporary defense of the WTO’s methods for settling disputes and investor-state dispute settlement,³⁶ Asian countries do not share uniformly negative or ambivalent views of international legal regimes or adjudication. And while all or most Asian states experienced forms of colonialism, their reactions to that legacy of foreign domination vary considerably.

Chesterman’s argument that Asian states tend to be “the wariest of international settlement procedures” may be a useful generalization for some purposes but that author still has to contend with the fact that eight Asian states have accepted the compulsory jurisdiction of the ICJ, 15 Asian-Pacific states have appeared before that court, and that while the majority of Asian territorial disputes have not been submitted to third-party adjudication, three territorial

<https://www.fpri.org/article/2019/11/transitional-justice-in-taiwan-a-belated-reckoning-with-the-white-terror/>.

³⁴ See generally, Simon Chesterman, “Asia’s Ambivalence about International Law,” Simon Chesterman, Hisashi Owada, and Ben Saul, eds., The Oxford Handbook of International Law in Asia and the Pacific, 16 (2019).

³⁵ See, e.g., Mogami Toshiki, “Japan,” in *id.*, 320.

³⁶ See, e.g., Congyan Cai, The Rise of China and International Law: Taking Chinese Exceptionalism Seriously, at 101-152 (OUP 2019).

delimitation cases have been brought by Asian states to that court.³⁷ And even Chesterman would accept that circumstances change over time. Asian countries have been increasingly willing to engage with international courts in recent decades; indeed, by some measures – such as the share of Asian states that have submitted written statements to ICJ advisory proceedings – the Asian region is now more proactive with respect to the that court than their African or Latin American counterparts.³⁸

There are also striking contradictions among Asian states with respect to the types of disputes they are willing to submit to third-party international resolution. Despite China's intense negative response to the arbitration ruling under UNCLOS in *Philippines v. China*, it has been an active (and increasingly confident and successful) litigant in the WTO's dispute settlement mechanism and has entered into more international investment agreements containing advance commitments to investor-state arbitration than has the United States.³⁹ It would be interesting, based on these

³⁷ Chesterman, *supra* note 33, at 29-30.

³⁸ Hisashi Owada and Samuel Chang, "International Dispute Settlement," in Chesterman, Owada, and Saul, *supra* note 33, 267, at 268. These authors also point out that there is great diversity among Asian states with respect to participation in the ICJ more generally. While Asia's participation in contentious cases in that Court are lower than other region's (with 31 percent having participated in such cases through 2018 compared to 48 percent of African and Latin American states), when five Central Asian states and 13 small Pacific Island states are excluded, the percentage rate in ICJ disputes raises to 46 percent, nearly the same as other regions. *Id.*, at 272-73.

³⁹ Compare International Investment Navigator, containing numbers of international investment agreements for the PRC, at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china>, to those for the United States,

cases studies, to disentangle which aspects of international disputes lend themselves to such resolution among countries in the region, rather than relying on broad generalizations about the turn to “authoritarian international law” – defined by, among other things, a common resistance to international courts.⁴⁰

At a minimum, Simmons’ work as well as the case studies produced for this project suggest that it is premature to dismiss altogether, as some realists have, the role of law, lawyers, and binding third-party dispute settlement when it comes to even high-profile territorial or maritime disputes – in Asia or anywhere else. Like the cases that Simmons surveys, the cases in this project suggest that states sometimes commit to formal adjudication in such instances and that while the resulting awards do not all achieve complete compliance, they do not support the conclusion that states routinely ignore third-party rulings when these are issued. As with the cases that Simmons surveys, the case studies here also demonstrate that judging the “effectiveness” of these rulings or the level of state “compliance” with them are matters of subtle judgment where conclusions may vary depending on the timetable permitted to render an evaluation. It may be that disputes that have lasted for generations may take at least one to achieve relative compliance with a judicial or arbitral result.⁴¹

<https://investmentpolicy.unctad.org/international-investment-agreements/countries/223/united-states-of-america>.

⁴⁰ See generally, Tom Ginsburg, “Authoritarian International Law,” 114 AJIL 221 (2020).

⁴¹ See, e.g., Alexandra Valeria Huneus, “Compliance with International Court Judgments and Decisions,” in Romano, Alter, and Shany, *supra* note 2, 438.

Simmons' work and the case studies here also prompt questions about the paradigmatic ways that traditional international lawyers, at least in the West, have described international dispute settlement. Realists have not been the only ones propagating half-truths or myths in this regard. Idealist international lawyers have taken a dramatically different view of the prospects for inter-state adjudication (including with respect to territorial/maritime disputes) from realist political scientists. Inspired by the UN Charter's obligations to settle disputes peacefully, international lawyers have argued that the international rule of law requires states to settle all territorial and maritime disputes through the methods enumerated in the Charter's Art. 33. For international lawyers, the gold standard for resolving those disputes that are the most likely to lead to a breach of the international peace is to have these heard before a binding arbitral tribunal or an international court that looks like national courts in rule of law states. This explains the never ceasing efforts among international lawyers to build ever more global courts.⁴² The ideal international tribunal or court on this view requires (1) independent judges (2) applying relatively precise and pre-existing legal norms (3) after adversarial proceedings (4) yielding a dichotomous decision in which one of the parties clearly wins.⁴³

In the immediate wake of a post-Cold War proliferation of international courts and tribunals, many scholars praised

⁴² See, e.g., José E. Alvarez, *Mythic Courts*, iCourts Working Paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3685739

⁴³ See, e.g., Shapiro, *supra* note 6, 1; see also J.G. Merrills, *International Dispute Settlement* 293-96 (CUP 3rd ed. 1998) (setting out slightly different criteria).

international law's apparent "judicialization."⁴⁴ Thanks to some 20 international courts and tribunals that opened for business, along with ever greater numbers of quasi-judicial bodies (to address international administrative law before UN system organizations, counter-corruption efforts within international financial institutions, human rights violations by numerous human rights committees, and violations of international labor law in the International Labor Organization), many eagerly anticipated a singular transformation in the very nature of international law given the expanding competence and power of its "international judiciary." The view that there was a fundamental shift in favor of institutionalized dispute settlement on the basis of law over power-based diplomacy, first articulated by prominent international trade scholars at the conclusion of the Uruguay Round with the establishment of the WTO's dispute settlement mechanism, spread to other fields. Faith in judicialization accompanied a wave of international caselaw produced under regimes addressing investment, international criminal law, and regional human rights.⁴⁵ For a time, at least prior to a more recent populist backlash against UN system institutions, some international law scholars anticipated that international law would become ever more "human" in the sense of being amenable to human rights concerns through the spread of trans-judicial communications among international

⁴⁴ See, e.g., Alec Stone Sweet, "Judicialization and the Construction of Governance," 32 *Comp. Pol. Stud.* 147 (1999).

⁴⁵ See, e.g., *id.*, at 169-72; John H. Jackson, The World Trading System 85-88 (MIT 1989) (comparing 'power-oriented diplomacy' to 'rule-oriented diplomacy'); see also José E. Alvarez, "The New Dispute Settlers: (Half) Truths and Consequences," 38 *Tx. Int'l L. J.* 405 (2003).

tribunals.⁴⁶ Others anticipated that the example set by European supra-national courts would “constitutionalize” international law.⁴⁷

While some still hold fast to hopes for greater “judicialization” through the establishment of ever more global courts, fewer international lawyers express such sentiments today. Along with other aspects of the liberal international order, those global dispute mechanisms that once saw the greatest number of cases – investor-state arbitration and the World Trade Organization’s Dispute Settlement Understanding – are now cowering under sovereign backlash.⁴⁸ The case studies produced here suggest why, even prior to the current populist backlash, idealist international lawyers’ anticipated “humanization” or “constitutionalization” of the law was as flawed as the political realists’ contention that “states don’t do law.” As the next stage of the project will likely demonstrate, there are far more instances in which states resolve such disputes without resort to binding adjudication but through diplomatic negotiations, including mediation and conciliation efforts with or without institutionalized assistance. Despite optimistic claims of judicialization, most international legal disputes – including but not only territorial/maritime disputes – are not heard before any kind of court, domestic or international. Only some 300 treaties, of the many thousands in existence, contain authorizations for ICJ

⁴⁶ See, e.g., Ruti Teitel, *Humanity’s Law* (OUP 2011).

⁴⁷ See, e.g., Alvarez, *supra* note 44, at 431-33 (citing proponents of “constitutionalization”).

⁴⁸ See, e.g., Armand de Mestral, ed., *Second Thoughts* (CIGI 2017) (essays on the backlash against investor-state dispute settlement); United States Trade Representative, Report on the Appellate Body of the World Trade Organization, Feb. 2020 (reporting US views on the problems with the WTO’s dispute settlement system).

jurisdiction.⁴⁹ Most treaties do not incorporate resort to arbitral or judicial as part of their terms. Indeed, even the UN Charter stops short of requiring states to take their disputes to binding third-party resolution. That remains but one option in its Art. 33 and not even the Security Council is explicitly authorized under the Charter to force a state to take a dispute to the ICJ or to any other third-party dispute settler.⁵⁰

International law remains an incomplete legal system. It anticipates that states commit international wrongful actions when they violate international law, provides a formidable list of possible remedies for such breaches (from apologies to reparations), but fails to establish any juridical or arbitral entity that in the absence of state consent is assured the power to enforce the law. Absent demonstration that a state has consented either in advance of or in the wake of a particular dispute, international dispute settlers have no jurisdiction and states injured by an international wrongful act need to resort to political remedies – from complaints before relevant international organizations to proportional countermeasures to illegal reprisals. Successful resort to third-party dispute resolution requires both disputing states to agree to it – as in an *ad hoc* compromise seeking answers to a defined set of questions. States need to be willing to delegate a circumscribed “dispute” to that third-party. Securing agreement on the

⁴⁹ Lori Fisler Damrosch and Sean D. Murphy, International Law 359 (West 7th ed. 2019)

⁵⁰ Compare UN Charter, Art. 37 (2), (indicating that the Security Council and “recommend” such terms of settlement as it may consider appropriate); Art. 38 (anticipating that the Council can make “recommendations” on pacific settlement).

parameters of their “dispute” may prove to be more difficult than deciding which kind of arbitral or judicial forum ought to hear it.⁵¹

Consistent with these realities, the premise of this project is not that states resort to third-party dispute settlement most or almost all of the time or that when they do, compliance with a subsequent third-party ruling is assured. Nor is the premise that resort to binding arbitration or an international court is the ideal to aspire to – as opposed to alternatives, such as mediation or conciliation. As a number of the territorial/maritime disputes described in this project indicate, there is a continuous interplay among dispute settlement alternatives – from the tools of negotiation to efforts to conciliate or mediate and back again. Soft techniques – from negotiation to conciliation to mediation – may lead to distilling or particularizing a cognizable dispute that is more susceptible to binding settlement. In other cases, non-binding dispute settlement techniques may enable parties to reach a peaceful settlement *because* that avoids the strict application of the law.⁵²

⁵¹ For an illustration of the difficulties states face on agreeing to the parameters of a “dispute” that is amenable to adjudication, compare Shinya Murase, “Why China Should Take Japan to the ICJ,” USALI Perspectives, Dec. 3, 2020 to Zhang Haiwen, “Why China Should Take Japan to the ICJ: A Response,” USALI Perspective, Dec. 16, 2020.

⁵² For examples, see Mark Landy, “The Vatican Mediation of the Beagle Channel Dispute: Crisis Intervention and Forum Building,” in Greenberg, et al, eds. Words Over War: Mediation and Arbitration to Prevent Deadly Conflict 293 (Carnegie 2000); see also Damrosch and Murphy, *supra* note 48, at 534-536 (summarizing a number of successful conciliations, including between Timor-Leste and Australia under Annex V of UNCLOS). For a general defense of the power of deliberative processes deploying the tools of international law in the absence of third-party adjudication, see Ian Johnstone, The Power of Deliberation (OUP 2011).

As Simmons' work illustrates, there are tradeoffs between states' resort to political resolution and their decisions to seek the help of third parties. Settlements of maritime or territorial disputes may occur in the shadow of formal dispute settlement – because one or both parties has previously resolved important issues pursuant to adjudication, because of clarifications of the respective positions of the parties (and differing conclusions about the likelihood of each to prevail), because of leverage asserted by threats to bring part or all of the dispute to adjudication, or because a public award involving another set of litigants clarify some points of law and enable a settlement.⁵³ The pros and cons of one method or another vary for particular interest groups within states and may change over time. Diplomatic efforts may need to be exhausted before states are persuaded to go with binding adjudication and even when that occurs and a binding ruling is issued, diplomatic efforts may need to resume to achieve successful compliance or to resolve issues left open by the arbitral or judicial ruling.

For these reasons, another assumption once shared by international lawyers – that resort to international courts and tribunals “depoliticizes” disputes – is at best a half-truth. As a number of these case studies suggest, while political rhetoric is discouraged within the courts and tribunals with jurisdiction, political concerns remain relevant at least off the court – off stage – and sometimes re-emerge with a vengeance once a ruling is issued. Politics does not stop once the courthouse is reached – although ideally it is waylaid while the parties are actually within the courthouse. Success in convincing states to submit their dispute to binding adjudication may only be a step towards actually resolving the

⁵³ For a fascinating insiders' look at the shadow effects of the prospects of ICJ adjudication, see S. Jayakumar, Tommy Koh, and Lionel Yee, Pedra Branca Story of Unheard Cases (Strait Times Press 2018).

underlying dispute or disputes. The challenge of successful compliance remains. In a world where international law needs to rely on voluntary compliance, achieving that often requires resort to political tools.

The case studies here also cast some doubt on the four-part ideal model for an international court or tribunal described above. Not all the adjudicators selected for such tribunals are chosen for their independence. The usual model for selecting arbitrators permits each of the states to choose its own arbitrator and while such individuals claim to be independent of the party that selected them, there is considerable evidence that at least some such arbitrators see themselves as representing, within the tribunal, the legal interests of the party that selected them. Indeed, this would be consistent with the controversial view that the most effective international tribunals are precisely those whose judges or arbitrators behave as the “agents” of their state principals.⁵⁴ That “whiff of arbitration” is even present in some permanent courts such as the ICJ, whose statute permits litigating states that do not have a permanent judge of their nationality on the court to appoint a judge ad hoc for that case. Such ad hoc judges, as might be expected, often rule in favor of the party that appointed them.⁵⁵

⁵⁴ Eric Posner and John Yoo, “Judicial Independence in International Tribunals,” 93 Calif. L. Rev. 1 (2005).

⁵⁵ See, e.g., Eric Posner and Miguel De Figueiredo, “Is the International Court of Justice Biased?,” 34 Journal of Legal Studies 599 (2005). The appeal of arbitral methods is also suggested by the authority granted to states under the ICJ’s Statute to have their contentious dispute heard by a specially selected chamber of the Court containing only those judges of the ICJ which the parties select for this purpose.

Nor, as noted above, are the rules applied to resolve territorial/maritime disputes always precise from the outset. Moreover, these rules do not all exist prior to the adjudication that deploys them. Some of the rules applied in these cases were judicially created in the case that applied the rule; others were the product of prior “case law.” In neither case do such judicially created rules resemble the hard sources of international law to which states consent that are set out in Article 38 of the Statute of the ICJ. The more experience states have with formal international adjudication, the more they realize that a commitment to international courts and tribunals requires, in effect, a commitment to judge-made law and adjudicators’ *de facto* reliance on “*jurisprudence constante*.”⁵⁶

It is also not clear what is meant by the third characteristic of an ideal international court: “adversarial proceedings.” Some commentators bemoan the “Americanization” of certain types of international adjudication, such as investor-state arbitration, by which is meant a certain style of “trial by combat” involving the international equivalent of thorough discovery of documents, exhaustive cross-examination of witnesses, and the by-product of both: ever lengthier and costly proceedings.⁵⁷ If that is what is

⁵⁶ See, e.g., José E. Alvarez, The Impact of International Organizations on International Law at 288-290 (Brill/Nijhoff 2017) (discussing the many reasons why international courts and tribunals evince a preference to rely on their own or others’ caselaw).

⁵⁷ See, e.g., L. Reed and J. Sutcliffe, “The ‘Americanization’ of International Arbitration?” 16 *Mealey’s International Law Reporter* 11 (2001).

meant by “adversarial” there is clearly a backlash against it.⁵⁸ More generally, nothing in these case studies suggests that the longer an arbitral or judicial proceeding takes or the more aggressively adversarial the litigants’ behavior, the better the outcome or the level of compliance.

Finally, the case studies in this project cast doubt on the suggestion that in order to be successful, an arbitral or judicial outcome needs to consist of a dichotomous decision clearly indicating that one party lost. That is precisely the perception that the triadic framework for understanding adjudication warns against. On the contrary, as a number of the case studies in this project suggest, less binary outcomes may be associated with greater legitimacy for the adjudicators and with enhanced or more rapid compliance with their decisions.

More broadly, the case studies cast doubt on the premise that we ought to aspire to an ideal form of international court or tribunal in the first place. The territorial/maritime disputes surveyed in this project indicate that even when states opt for binding dispute settlement they choose among types of tribunals or arbitral models. Binding forms of adjudication come in various flavors. They follow different procedural rules and adhere to distinct hermeneutical traditions in terms of interpretation.⁵⁹ To suggest, in the absence of evidence, that a presumptive ideal of a domestic court can or

⁵⁸ Thus, among the complaints states now have concerning the WTO’s Appellate Body is that its adjudicators have not always respected the 90-day limit formally imposed on its consideration of cases.

⁵⁹ See, e.g., Joost Pauwelyn and Manfred Elsig, “The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals,” in J. Dunoff and M. Pollack, eds., Interdisciplinary Perspectives on International Law and International Relations 445 (CUP 2013).

should be exported globally to apply to all inter-state disputes – most of which are vastly different from the usual torts, contracts, and crimes applied by local courts – elevates hope (and hubris) over experience. It may be that the more one examines how territorial/maritime disputes have been resolved and in what forums, the less likely one will be inclined to believe that there is one best model for third-party resolution of such disputes or a single archetype for achieving successful compliance with any resulting awards. Of course, adherence to one such model is inconsistent with treaties that accord states a choice of such forums – as does UNCLOS. To the extent case studies like the ones in this project prompt a re-evaluation of what an effective arbitration or court is, that is all to the good.

Conclusion

It is a half-truth to contend that international law has been “judicialized” – whether with respect to trade, investment, human rights, or the subject of this project. Most inter-state disputes are still resolved the old-fashioned way: through diplomacy behind closed doors if we are lucky, and through less peaceful means when we are not. The paradigmatic judicial ideal international lawyers hold dear – namely a tribunal of independent adjudicators who apply relatively precise pre-existing legal rules after adversarial proceedings that secures a dichotomous decision in which one party clearly wins – accurately describes only a subset of the institutionalized modes of international dispute settlement now in use, including to resolve territorial/maritime disputes. At the same time, this project demonstrates that states may submit even high-profile disputes involving matters essential to their sovereign identities to formal adjudication and that sometimes, but not always, that initial commitment translates to compliance with any resulting award.



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