BUILDING A TWO-FOLD STRUCTURE IN RESOLVING POLITICAL DISPUTES ON THE KOREAN PENINSULA: CASE STUDY ON THE KAESONG INDUSTRIAL COMPLEX*

*Yi Seul Kim***

* While certain advancements have been made between the two Koreas lately, it still remains of utmost importance to recognize the need to install a claims review organization. The proposed arbitration rules have also been suggested in respect of what the author deems necessary in reflection to the dispute surrounding the temporary closing of the Kaesong Industrial Complex (KIC).

** Harvard Law School LL.M. candidate and a J.D. and J.M. graduate from Peking University School of Transnational Law. This article does not express opinions on behalf of any organizations mentioned in this article. I am grateful to Professor Michael S. Greco, Professor Peter Malanczuk, and my friends for their comments and advice.

I. PRINCIPLES OF THE NORTH-SOUTH KOREA CONFLICT

A. *The Kaesong Industrial Complex as the Symbol of North-South Conflict*

Since the armistice signed on the Korean peninsula, the peninsula has continuously been in a state of unrest. Many small and big conflicts defined the mood of the Korean peninsula for over six decades.[1] Power was transformed over three generations in North Korea, bringing unpredictable changes in politics each time power was transferred.[2] Many factors are commonly known to influence the mood on the Korean peninsula—the ruling political party in South Korea and its interaction with the North, North Korea's willingness to engage in talks, and even natural disasters shared in the North and South.[3]

Out of the many disputes that have occurred on the Korean peninsula, this paper focuses on the most recent one. The dispute surrounding the Kaesong Industrial Complex (KIC) is one of the most recent disputes that significantly have affected not only the South Korean government, but also private South Korea corporations.[4] North Korea also was heavily affected when it decided to temporarily cease

1. Charles K. Armstrong, *Inter-Korean Relations in Historical Perspective*, 14 INT'L J. KOREAN UNIFICATION STUD., no. 2, 2005, at 1.

2. *See* Dae-Won Koh, *Dynamics of Inter-Korean Conflict and North Korea's Recent Policy Changes: An Inter-Systemic View*, 44 ASIAN SURV. 422, 422-23 (2004).

3. Korean Cent. News Agency, *Defusing Inter-Korean Confrontation Called for*, KOREAN NEWS (Jan. 9, 2013), http://www.kcna.co.jp/index-e.htm (follow "Past News" hyperlink).

4. Jeyup S. Kwaak, *North Halts Evacuation of Korean Factory Site*, Wall St. J., Apr. 30, 2013, at A12.

all operations at the KIC and ordered all South Koreans to leave the industrial complex.[5]

The opportunity to legally analyze the dispute under the framework of international law is desirable. In fact, the true importance of considering the KIC dispute is its harmful impact on the individuals affected by both States' actions.[6] Developing a sustainable and creative mass claims process that both parties can agree upon will further dispute resolution in areas where it is difficult to reach a resolution at the political level. Only by doing so will it be possible to arbitrate future disputes between the two Koreas, which this paper presupposes is the ultimate goal in the intra-Korean relationship.

Earlier this year, the two Koreas agreed upon an arbitration panel for businesses operating within the complex. While this has raised awareness of the possibility of arbitration for future disputes, it is still silent on arbitrating damages directly related to the complex's shutdown. This paper focuses on the shutdown that occurred in 2013 and the damages that could be claimed in relation to the shutdown.

Having a transparent method of analyzing claims serves to improve opportunities for dispute resolution, as a certain trust can be built into the relationship. Arbitration will increase the likelihood of State participation, owing to greater control of the intra-State dispute resolution method.[7] In addition, arbitration allows States to effectively resolve disputes. Each State will be given more rights in choosing which arbitrators to have and which issues to cover.[8] For these reasons, there are many ways to achieve progress in dispute resolution for both North and South Korea once individual claims are fairly reviewed and reasonably resolved under objective, independent legal standards. Thus, an independent claims review organization that can utilize arbitration and procedural rules the two Koreas agree upon can alleviate the most current dispute at hand—the KIC dispute.

---

5. *Id.*

6. Alastair Gale & Jeyup S. Kwaak, *Last Workers Exit Joint Korea Venture*, Wall St. J., May 4-5, 2013, at A10.

7. GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 1 (4th ed. 2013).

8. *Id.* at 2.

B. *Overview of the Kaesong Industrial Complex*

Located in North Korea, the KIC is 106 miles from Pyongyang.[9] The Complex covers 16,000 acres in Bongdong-ri of the Gaeseong City.[10]

South Korea provided a large amount of support in constructing the KIC. The South Korean Land Corporation financed the leasing of land from North Korea, and Hyundai Asan Corporation of South Korea managed the Complex's construction.[11]

Symbolic of the North-South economic interaction, the KIC was shut down in April, 2013 when North Korea pulled its civilians working in the KIC. They did this in protest against South Korea's joint military drills with the United States. The KIC soon became a "ghost town."[12]

As a result, trade between North and South Korea virtually halted, reduced to approximately one percent of the $23.4 million recorded in May before the KIC was shut down.[13] This one percent of trade was mainly the electricity costs incurred to maintain the plant facilities at the KIC.[14] It was reported that South Korea spent approximately $260,000 on exporting electricity while it imported paper magazines worth $60,000 from North Korea.[15]

While South Korean workers were not forced to leave the facility from North Korea, situations prevented them from resisting for long. They subsisted on readily available instant noodles at the plants and planned to stay as long as they could with the food available.[16] However, this resistance did not last long. By the end of the month, the remaining South Korean managers—by then very few—left the complex.[17]

---

9. MARK E. MANYIN & DICK K. NANTO, CONG. RESEARCH SERV., RL34093, THE KAESONG NORTH-SOUTH KOREAN INDUSTRIAL COMPLEX 5 (2011).

10. Jeong Hyung-gon, *North Korea's Economic Development and External Relations: Economics of the Kaesong Industrial Complex*, 2007 KOREA ECON. INST. AMERICA 69.

11. CONG. RESEARCH SERV., RL34093, at 5.

12. Youkyung Lee, *North Korea Recalls Workers, Suspends Operations at Factory Complex Jointly Run with the South*, WORLD POST (Apr. 7, 2013, 10:33 AM), http://www.huffingtonpost.com/2013/04/08/north-korea-recalls-workers-factory-complex_n_3032827.html.

13. *Inter-Korean Trades Comes to Almost Naught in May*, YONHAP NEWS AGENCY (June 24, 2013, 11:35 AM) (S. Kor.), http://english.yonhapnews.co.kr/northkorea/2013/06/24/20/0401000000AEN20130624004000315F.html.

14. *Id.*

15. *Id.*

16. Lee, *supra* note 12.

17. Gale & Kwaak, *supra* note 6.

The societal understanding of the dispute at this point for both Koreas was neither the national interest nor the economic wellbeing of their private companies.[18] As one professor put it, the KIC dispute was more understood as a "war of pride" between North and South Korea.[19] The South Korean government ordered the withdrawal of its national in the complex due to safety reasons concerning the depletion of medical supplies and food.[20] In this unfortunate event, the South Korean Prime Minister stated that "a task force would assess the damages suffered by the firms with factories at Kaesong and . . . devise comprehensive and practical supportive measures."[21] The South Korean government then provided numerous tax benefits to the corporations operating within the KIC.[22]

The North-South dispute related to the KIC was badly managed on both sides. In order to meaningfully address the historical and characteristic failure to resolve the long-simmering conflict, it is necessary to go beyond the ineffectual conventional resolution efforts and find a way to bring the two key players on stage.

The losses suffered by individuals and manufacturing corporations that entered the KIC reached 100 billion KRW ($89.4 million).[23] Some of these companies operating in the KIC had their contracts unilaterally terminated in the midst of the uncertain future.[24] In order to meet product supply deadlines, these companies rented manufacturing facilities elsewhere in South Korea at additional cost.[25]

To make matters worse for both sides, it was not only South Korean private companies and individuals that suffered economic losses from what seemed to be purely political acts. North Korean employees working for South Korean factories within the KIC had been earn-

18. *See* Justin McCurry, *South Korea to Withdraw Last Workers from Kaesong Joint-Venture with North*, GUARDIAN (Apr. 29, 2013, 3:35 PM) (U.K.), http://www.theguardian.com/world/2013/apr/29/south-korea-workers-venture-north.

19. *Id.* ("Lee Hochul, a political science professor at Incheon National University, said it was significant that neither side had announced the park's permanent closure. 'This is a war of pride between the Koreas, but they are conducting it while leaving some room for talks,' he told the Associated Press.").

20. *Id.*

21. *Id.*

22. *Park Orders Swift Support for Firms Hit by Kaesong Shutdown*, YONHAP NEWS AGENCY (Apr. 22, 2013, 4:35 PM) (S. Kor.), http://english.yonhapnews.co.kr/national/2013/04/22/6/030 1000000AEN20130422006251315F.html [hereinafter *Kaesong Shutdown*].

23. Lee Jae Hoon, *GIC Delivery Breach Harm 'Snowball'*, KIHOILBO.CO.KR (Apr. 22, 2013), http://www.kihoilbo.co.kr/news/articleView.html?idxno=508667.

24. *Kaesong Shutdown*, *supra* note 22.

25. Lee, *supra* note 12.

ing twice as much as other workers in Pyongyang.[26] Such high earnings ceased the moment the KIC shut down.

In a surprising turnaround by North Korea, five months after ceasing operations at the KIC, the road to the Complex was reopened to South Koreans.[27] North and South Korea succeeded in establishing a joint management committee to operate the business within the complex and to set a reopening date.[28] After the five months of shutdown, more than 800 South Koreans were allowed to re-enter the complex.[29] Approximately 123 South Korean factories were again able to conduct operations within North Korea for the KIC.[30] Nevertheless, the affected private companies and individuals were left with many problems.[31] A month after reopening, businesses were still struggling to get back to their usual outputs.[32] The factories had been significantly harmed, and some lost contracts with their suppliers,[33] effectively losing access to the market.

C. *Recent Disputes and an Absence of a Dispute Resolution Mechanism Poses a Threat to Peace on the Korean Peninsula*

The problem with the North-South Korea dispute has been the absence of a dispute resolution mechanism. This was true even when both Koreas intended to build stronger ties, and when South Korea took a breakthrough initiative to construct the KIC in North Korea.[34] While private companies entered the KIC to produce goods for the sake of building economic interaction, the two Korean governments failed to guarantee a safe dispute resolution system with regards to the

26. Simon Mundy, *Kaesong Reopening Offers No Quick Fix,* FIN. TIMES (Oct. 14, 2013, 6:12 AM) (U.K.), http://www.ft.com/intl/cms/s/0/5178609a-3094-11e3-9eec-00144feab7de.html#axzz3TrbreNfL.

27. K.J. Kwon, *North and South Korea Reopen Kaesong Industrial Complex*, CNN (Sept. 16, 2013, 6:45 AM), http://www.cnn.com/2013/09/15/world/asia/kaesong-korea-complex-reopens.

28. Lucy Williamson, *Koreas Restart Operations at Kaesong Industrial Zone*, BBC NEWS (Sept. 16, 2013, 7:03 AM), http://www.bbc.com/news/world-asia-24104774.

29. *Id.*

30. *Id.*

31. Simon Mundy, *Kaesong's Woes Reflect Challenge Facing Seoul: Border Project*, FIN. TIMES, Oct. 15, 2013, at 3 (U.K.).

32. *Id.*

33. Mundy, *supra* note 26.

34. *See* Worldwide Projects, Inc., *North Korea: Construction Start-Up on Planned 66 Million Square Meter Industrial Complex Is Tentatively Scheduled to Begin in November 2000 to be Followed by an Identical Development, Hyundai Asan Co.*, 9 BUS. OPPORTUNITIES ASIA & PAC. (2000), 2000 WLNR 10110492.WWP-Business Opportunities in Asia & the Pacific.

KIC; when the political relationship between the two countries strained, the KIC was unilaterally shut down by North Korea.[35]

However, South Korea has not claimed damages nor shown an intent to arbitrate.[36] Instead, South Korea is making internal efforts to handle the most urgent matters.[37] In consideration of the losses suffered by the South Korean companies that previously operated in the KIC, the South Korean state-owned Korea Electric Power Corporation decided to extend payment deadlines of these companies' electric bills for one month.[38] The expected bill total for the 123 corporations affected by the unilateral shutdown of the KIC amounted to 2.03 billion KRW ($1.8 million).[39] There are several practical reasons why the two Koreas have failed to mitigate losses resulting from the KIC in an effective way. The most significant reason is the overly close nexus of politics and law between North and South Korea.[40] Politics induced the South Korean government to screen losses and claims by considering its broad political interests.[41] Politics also intervened in the North Korean government's decision to withdraw from the KIC.[42] The lack of both a clearly defined understanding of violations and an enforcement mechanism comprise a constant and real threat to peace and security on the Korean peninsula.

The threat persists because it is left to each State to decide which claims are to be brought against the host country: "Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the state is asserting."[43] As Justice Holmes wisely noted, "Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp."[44]

---

35. Choe Sang-Hun, *South Korea: North-South Industrial Complex in Peril*, N.Y. TIMES, July 26, 2013, at A6.

36. *Kaesong Shutdown*, *supra* note 22.

37. *See id.*

38. Jo Junghoon, *Korea Electric Power Corporation Extends the Electric Fee Payment Deadline for One Month*, NEWSTOMATO (Apr. 21, 2013, 2:40 PM) (S. Kor.), http://www. newstomato .com/readnews.aspx?no=356074.

39. *Id.*

40. *Ruling Party Calls for Normalization of Kaesong Park*, YONHAP NEWS AGENCY (Apr. 10, 2013, 4:38 PM) (S. Kor.), http://english.yonhapnews.co.kr/northkorea/2013/04/10/13/04010000 00AEN20130410010100315F.html [hereinafter *Calls for Normalization*].

41. *See* IVAR ALVIK, CONTRACTING WITH SOVEREIGNTY: STATE CONTRACTS AND INTERNATIONAL ARBITRATION 16 (2011).

42. *Calls for Normalization*, *supra* note 40.

43. Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 78 (Feb. 5).

44. The Western Maid, 257 U.S. 419, 433 (1922).

Another explanation as to why the problem between North and South Korea has been largely unresolved is the intra-Korean relationship as a *special legal status*.[45] Since communication between the two Koreas has always been political, one does not recognize the other as a sovereign nation-state with the right to enter into formal legal agreements.[46] In fact, North and South Korea did not enter into a Treaty on Basic Relations,[47] and both refuse to recognize the other as a governmental entity.[48] This was also true when the KIC was being formally realized, and the four Agreements executed by North and South Korea to enact the KIC reflect this reality.[49]

The Preamble of the Agreement on Procedures for Resolution of Commercial Disputes Between the South and North—which clearly shows the character of the relationship between North and South Korea—stipulates that:

---

45. Due to the lack of mutual legal recognition of each state's legal sovereignty, any international agreement would be considered at best an informal treaty. Nevertheless, there have been four agreements of relevance here. This includes Buknamsaiui tujabohoe gwanhan habuiseo [Agreement on Investment Protection Between the South and the North], signed December 16, 2000; Buknamasaiui cheongsangyeoljee gwanhan habuiseo [Agreement on Clearing Settlement Between the South and the North], signed December 16, 2000; Buknamsaiui sangsabunjaenghaegyeoljeolchae gwanhan habiseo [Agreement on Procedures for Resolution of Commercial Disputes Between the South and the North], signed December 16, 2000; and Buknamsaiui sodeuke daehan junggwasebangi habuiseo [Agreement on Prevention of Double Taxation Between the South and the North], signed December 16, 2000. To access each agreement see *Major Agreements*, MINISTRY UNIFICATION, http://eng.unikorea.go.kr/content.do?cmsid=1889 (last visited Mar. 31, 2015).

46. *See* Agreement on Clearing Settlement Between the South and the North, *supra* note 45; Agreement on Investment Protection Between the South and the North, *supra* note 45; Agreement on Prevention of Double Taxation Between the South and the North, *supra* note 45; Agreement on Procedures for Resolution of Commercial Disputes Between the South and the North, *supra* note 45.

47. Treaty on Basic Relations Between Korea and Japan, Japan-S. Kor., June 22, 1965, 583 U.N.T.S. 33.

48. *See* Agreement on Clearing Settlement Between the South and the North, *supra* note 45; Agreement on Investment Protection Between the South and the North, *supra* note 45; Agreement on Prevention of Double Taxation Between the South and the North, *supra* note 45; Agreement on Procedures for Resolution of Commercial Disputes Between the South and the North, *supra* note 45; *see also* Chung-In Moon, *The Sunshine Policy and the Korean Summit: Assessments and Prospects*, *in* THE FUTURE OF NORTH KOREA 26, 39 (Tsuneo Akaha ed., 2002); Samuel S. Kim, *The Rivalry Between the Two Koreas*, *in* ASIAN RIVALRIES: CONFLICT, ESCALATION, AND LIMITATIONS ON TWO-LEVEL GAMES 145, 150 (Sumit Ganguly & William R. Thompson eds., 2011).

49. *See* Agreement on Clearing Settlement Between the South and the North, *supra* note 45; Agreement on Investment Protection Between the South and the North, *supra* note 45; Agreement on Prevention of Double Taxation Between the South and the North, *supra* note 45; Agreement on Procedures for Resolution of Commercial Disputes Between the South and the North, *supra* note 45.

> The South and the North hereby confirm that the economic exchange and cooperation being pursued according to the historical South-North Joint Declaration announced on June 15, 2000 are internal transactions among the Korean people and not transactions between two separate nations, and in order to resolve commercial disputes arising in the course of economic exchanges and cooperation in a fair and expeditious manner, agree as follows . . . .[50]

Regardless of the reasons for the long-lasting dispute, it cannot be emphasized enough that in order to be able to solve the dire situation on the Korean peninsula, the two Koreas should separate politics from law, each seeking ways to resolve disputes amicably.[51] This paper suggests one way to achieve the goal of peaceful dispute resolution.

II. DESIGNING A TWO-FOLD DISPUTE RESOLUTION MECHANISM

One fundamental argument of this paper is that the absence of a fair, objective, and transparent mass claims review process makes the road to dispute resolution impossible. Such a claims review process is the first requirement of resolving disputes even before suggesting which arbitration rules would work. A claims review process serves to assemble the entire set of documentation for dispute resolution. In addition, a well-constructed claims review process will allow an efficient discovery process that will exclude irrelevant or repetitive documents.[52] In order for disputing parties to even start considering dispute resolution, there must be a healthy legal administrative procedure.[53]

---

50. Agreement on Procedures for Resolution of Commercial Disputes Between the South and the North, *supra* note 45.

51. *Calls for Normalization*, *supra* note 40.

52. Keith Pickavance & Stephen Barker, *The Use of Indexed Databases in Commercial Litigation and Arbitration*, 1992 ARB. & DISP. RESOL. L. J. 13, 14 (U.K.).

53. In regards to recognizing such importance, there are numerous mass claims processes active today, namely Iran-U.S. Claims Tribunal; the United Nations Compensation Commission; the Foreign Claims Settlement Commission of the United States; the Kosovo Property Claims Commission; the Iraq Property Claims Commission; the Marshall Islands Nuclear Claims Tribunal; the International Criminal Court Trust Fund for Victims; and the International Oil Pollution Compensation Funds. Completed mass claims processes include the Eritrea Ethiopia Claims Commission; the Commission for Real Property Claims for Bosnia Herzegovina; the Housing and Property Claims Commission; and the Claims Resolution Tribunal. *Mass Claims Processes*, PERMANENT CT. ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1059 (last visited Mar. 12, 2015).

A. *Proposing a Claims Review Organization*

To design a fair, independent, and transparent mass claims processing procedure, successful United Nations models are worth considering, as disputes between the Koreas are highly political. It is imperative to eradicate the possibility of involving biased political interests in processing claims by private corporations and individuals.[54] As of now, The United Nations recognizes both South and North Korea as sovereign nations—both are viewed to be on the same normative playing field.[55] If the two Koreas could succeed in establishing a mass claims process within the United Nations, it would be an unprecedented step forward to achieving dispute resolution.

One reason a claims review organization is necessary for the two Koreas is that there are thousands of potential claimants involved in issues between North and South Korea, even from the KIC dispute alone.[56] In a situation like the KIC, it is commonly understood that corresponding with claimants is not a simple task.[57] The great number of claimants involved complicates the handling of settlements.[58] For this reason, prior to agreeing on arbitration provisions and commencing arbitration, the Koreas should consider setting up a framework of a claims process unit. This approach is well supported in the United Nations Commission on International Trade Law Notes on Organizing Arbitral Proceedings:

> When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field . . . . Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.[59]

---

54. North Korea and South Korea have tried to establish joint units to investigate and cooperate on economic affairs in the past. The efforts failed when the two Koreas faced political disputes.

55. *Cf.* Aubrey Belford, *South Korea Asks U.N. Council to Act Against North Korea*, N.Y. TIMES, June 5, 2010, at A8 (providing an example of international diplomacy in light of a specific conflict between North and South Korea).

56. *See* Alastair Gale, *Pyongyang Threatens to End Venture*, WALL ST. J., Apr. 9, 2013, at A7.

57. *See* U.N. Secretariat, *Settlement of Commercial Disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings: Note by the Secretariat*, ¶¶ 51-56, U.N. Doc. A/CN.9/WG.II/WP.186 (Nov. 25, 2014).

58. B. Thomas Florence & Judith Gurney, *The Computerization of Mass Tort Settlement Facilities*, LAW & CONTEMP. PROBS., Autumn 1990, at 189, 190 ("The sheer number of claimants characteristically handled by mass tort settlement facilities can, by itself, create enormous problems.").

59. *Settlement of Commercial Disputes*, *supra* note 57, ¶ 71.

Even before arbitration, many claimants are likely confused by the dispute settlement process. Handling the claimants objectively should be the primary focus of any settlement facility.[60] The facility should present itself as a reliable organization by communicating directly with the claimants to register and quantify claims so that in the future, the claims may be used by the arbitration commission.

Two scholars, Florence and Gurney, point to four important features of a claims process unit: (a) claimant correspondence in dealing with lengthy and emotionally disturbing history; (b) claim status tracking to allow efficient registry of claims; (c) verification and evaluation of claims to interpret the value of each claim made; and (d) management analysis and reporting, such as internal audit, external reporting, and actuarial control.[61] There are various functions that are undertaken by claims process units at the United Nations for politically sensitive issues like the Israel-Palestine and Iran-United States conflicts. Thus, it is difficult to imagine a dispute settlement process leading to effective arbitration without a claims process unit. With this in mind, the lessons learned from the UN are worth considering in designing a claims review organization.

1. The United Nations Register of Damage Created by the Construction of the Wall in the Occupied Palestinian Territory Serves as a Model to Arbitrate North-South Korea Disputes[62]

The United Nations Register of Damage (UNRoD), created as a result of the Construction of the Wall in the Occupied Palestinian Territory, has used legal mechanisms to address the highly political Israel-Palestine dispute.[63] The UNRoD is currently registering claims for losses claimed by individual claimants, such as sheep breeders, students, and farmers.

The UNRod classifies claims into six categories: (a) agricultural; (b) commercial; (c) residential; (d) employment; (e) access to services;

60. *Id.* ¶ 6 (citing U.N. Comm'n. on International Trade Law, Rep. of Working Group II (Arbitration and Conciliation) on its 61st Sess., Sept. 15-19, 2014, ¶ 30, U.N. Doc. A/CN.9/826 (Sept. 24, 2014); *see* William Davis & Helga Turku, *Access to Justice and Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 47, 47 (2011).

61. Florence & Gurney, *supra* note 58, at 190-92.

62. Very little, if any, academic research has been carried out in relation to UNRoD and the claims processing method at UNRoD; I write about the organization based on my own experience at UNRoD.

63. United Nations Register of Damage (UNRoD), Rules and Regulations Governing the Registration of Claims (June 19, 2009), http://www.unrod.org/docs/Rules.pdf [hereinafter UNRoD rules].

and (f) public resources. For the purpose of this paper and the KIC dispute, categories (b) and (d) are relevant.[64]

Category (b) claims focus on five main business activities. These include the details of the business or company affected by the construction of the Wall; what happened to the business as the result of the Wall's construction; the effect of the Wall on the business and commercial land; and the claimant's causation statement. These business activities are but one way how the KIC-stationed South Korean companies that suffered losses may handle their claims.

The claimants submitting category (b) losses are required to show existence or ownership of the business or company. This can be done by submitting documents, such as registration certificates, sale/income records, business licenses, receipts/invoices, or incorporation documents.

The claimants are also requested to specifically state the duration of negative effects resulting from the Wall's construction and state whether such damage was to a business premise, suppliers, or the marketplace to which they lost access. Business equipment and stock are also considered in considering losses suffered. At this point, the required proof to submit a claim includes: demolition orders, photographs, calculations of repair costs, and purchase contracts. This information would be important to know when considering the structure and functions of a claims review organization between the two Koreas.

Another interesting aspect of the UNRoD's considerations when it registers claims is that the Register classifies an affected business in four ways. These include ceased operations, temporary interruptions, reduced operations, and change of business activity. Among the documents the UNRoD accepts to show an affected business activity are tax documents, income records, financial statements, and rent contracts.

Category (d) claims relate to losses of employment. Three focus areas on employment losses relate to obtaining employment information, how employment was affected by the Wall's construction, and reasons employment was affected.

Proof of employment is shown by employment contracts, letters from employers, or salary slips. The Wall's effect on employment are proven by disclosing documents, such as new employment contracts,

64. *Id.* art. 11.

bank records, salary slips, or letters from employers. These documents also establish proof of how and why employment was affected.

In many ways the KIC dispute would similarly focus on categories related to commercial issues and employment. For South Korea, its affected businesses would be required to submit evidentiary documents proving that the pulling of North Korean employees directly affected the businesses in various ways. In order to prove this, the businesses would be required to provide documentation similar to those the UNRoD accepts from its claimants. North Korean employees would have to prove how the subtle cease of operations at the KIC caused material losses to their welfare and that of their family members.

2. The United Nations Compensation Commission Serves as Another Model for North-South Dispute Resolutions

Another example of the work being done at the United Nations is the United Nations Compensation Commission (UNCC). The UNCC was created as an ad hoc institution pursuant to Security Council Resolution 687 following the Persian Gulf War.[65]

One significant difference between the UNRoD and the UNCC is that the UNCC provided actual compensation to its claimants.[66]

> The panel found that many of the losses asserted by the claimants had resulted directly from Iraq's invasion and occupation of Kuwait, and that, accordingly, such losses were compensable. In making its determinations regarding directness, the panel relied upon sources such as Governing Council decisions and commissioner panel reports in other claims categories.[67]

Just like the UNRoD, the UNCC focuses on finding *direct links* of causation. Moreover, in line with its understanding of its role and the law applicable to claims, the panel also referred extensively to other sources of international law, such as treaties, general principles

65. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991). It is important to take into consideration how the Commission processed its claim when it was under pressure to speed up the claims review process. Veijo Heiskanen & Robert O'Brien, *UN Compensation Commission Panel Sets Precedents on Government Claims*, 92 AM. J. INT'L L. 339, 340 (1998).

66. Rosemary E. Libera, *Divide, Conquer, and Pay: Civil Compensation for Wartime Damages*, 24 B.C. INT'L & COMP. L. REV. 291 *passim* (2001). However, it is well recognized that this process was not without obstacles. Lack of cooperation and funding from Iraq turned the compensation fund from $6 to $21 million in worth. *Id.* at 297.

67. Heiskanen & O'Brien, *supra* note 65, at 344.

of law, and precedents set by other international claims commissions and tribunals.[68]

Very similar to the UNRoD, the UNCC categorized claims as follows:[69]

a) Category "A" for departure claims
b) Category "B" for death/serious personal claims
c) Category "C" for individual losses under $100,000
d) Category "D" for individual losses above $100,000
e) Category "E" for corporate claims
f) Category "F" for government and international organizations' claims.[70]

For the purpose of this paper, it is important to note Categories "C," "D," and "E" claims. Category "C" and "D" claims include losses relating to departure from Kuwait or Iraq; personal injury; mental suffering; loss of personal property in the form of bank accounts, stocks, and other securities; loss of income; loss of real property; and other similar individual business losses.[71] The UNCC received approximately 1.7 million claims under this category.[72] The two Koreas could consider these factors in constructing a claims review organization. The UNCC indeed has different focus aspects than the UNRoD in that they only take material damage into consideration when registering claims.

Category "D" is similar to Category "C" with the exception that Category "D" claims are individual claims for damages above $100,000. The UNCC received approximately 12,000 claims in this category.[73]

Category "E" claims include claims made by corporations, private legal entities, and public sector corporations.[74] Corporate claims include construction or other contract losses; losses from the non-pay-

68. *Id.* (citing U.N. Comp. Comm'n., Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Installment of Claims by Governments and International Organizations (Category "F" Claims), ¶¶ 68, 70, 72, 74, 79, 85, U.N. Doc. S/AC.26/1997/6 (Dec. 18, 1997)).

69. The UNCC has a different focus than UNRoD because UNRoD only takes material damage into consideration when registering claims. UNRoD Rules, *supra* note 63 art. 11.

70. U.N. Comp. Comm'n., The Claims, http://www.uncc.ch/claims (last visited Mar. 10, 2015).

71. U.N. Comp. Comm'n., Category C, http://www.uncc.ch/category-c (last visited Mar. 10, 2015); U.N. Comp. Comm'n, Category D, http://www.uncc.ch/category-d (last visited Mar. 10, 2015).

72. Category C, *supra* note 71.

73. *Id.*

74. U.N. Comp. Comm'n., Category E, http://www.uncc.ch/category-e (last visited March 10, 2015).

ment for goods or services; losses related to destroyed or seized business assets; profit losses; and oil sector losses.[75] Approximately 6,000 category "E" claims were received by the UNCC.[76] Again, the two Koreas should take these types of claims into account when designing the claims framework to be accepted by the claims review organization.

There was a limited role the governments could play during the UNCC's claims review process.[77] For example, while the UNCC considered the views and comments on issues related to claims, Iraq could not participate in any subsequent proceedings.[78] The UNCC served on Iraq procedural orders and informed them of the status review; Iraq did not, however, grant the UNCC the authority to look into claim files.

Very similar to the way the UNRoD operates, the claimants at the UNCC were prohibited from making additional submissions to support their claims.[79] This is related to the effective functioning of the claims process, as additional submissions may delay the entire process when individual submissions are further made.[80] However, this rule was flexible upon necessity. For example, after Sri Lanka submitted a claim, the UNCC panel itself requested additional evidence that would have been "critical to the verification of the claim."[81] This general rule is also utilized at the UNRoD where, upon review of claims to be registered and claims made by individuals, denial of the claim results from lack of sufficient evidence. The UNCC Claims Processing Unit often returns the claims to the field, asking for clarifications and additional proof of evidence for the claim made under Article 35 of the UNCC Rules.[82]

To increase predictability and to ensure the claims process would be a strictly legal process conducted with the application of general

75. *Id.*

76. *Id.*

77. *See* Heiskanen & O'Brien, *supra* note 65, at 342.

78. *Id.*

79. *Id.*

80. *See id.* (using Iraq's limited role in Kuwaiti's large, complex claims process as an example of additional submissions that may delay the claims process).

81. Category "F" Claims, *supra* note 68, ¶ 12.

82. Dec. Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session Held on 26 June 1992, art. 35, ¶¶ 3-4, U.N. Doc. S/AC.26/1992/10 (June 26, 1992) [hereinafter Provisional Rules] (requiring that corporate and government claims "must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss. . . . Commissioners may request [additional] evidence required under this Article").

principles of law, the UNCC Secretariat retained the services of an international loss adjusting firm "with experience in handling major catastrophic events at the international level."[83] Only after comparing a claim to "losses arising out of catastrophic events such as hurricanes or floods in the international insurance context," did the UNCC's team of experts give advice on the level and type of evidence submitted by the claimant[84] This use of experts is the established practice of other international claims commissions and tribunals.[85] This approach is also helpful for both North and South Korea. Experts will provide evidentiary analysis beyond the political influence existing in both parties.[86]

Recognizing individuals' claims has been one of the greatest advantages of claims review. The UNCC has "the most citizen participation" because individuals and corporations have leeway not only to claim damages, but seek awarded compensation based on their claims.[87] In fact, the UNCC does not distribute the awards to the government, but rather to the individual claimants directly.[88]

3. Claims Review Organization Directly Leading to Arbitration

As the most imminent task today is creating a shared understanding of the claims review process between North and South Korean Tribunals, and as this can become a very long process, the two Koreas must remain steadfast in full collaboration to a dispute resolution schematic that is both objective and transparent. In this regard, the two Koreas would surely benefit from learning both the UNRoD's and UNCC's civil compensation mechanisms.

South and North Korea should introduce a claims review organization that focuses on reviewing claims related to damages caused directly by the ceased operations of the KIC. The claims should be

83. Category "F" Claims, *supra* note 68, ¶ 107.

84. *Id.*

85. *Id.*

86. *S. Korea, DPRK Launch Dispute Arbitration Panel for Kaesong Complex*, XINHUA NEWS (Dec. 27, 2013) (China), http://news.xinhuanet.com/english/world/2013-12/27/c_133000361.htm ("[E]xperts . . . visited the complex . . . to help Pyongyang promote foreign investment.") [hereinafter *S. Korea, DPRK Launch Dispute*].

87. Keith P. McManus, *Civil Liability for Wartime Environmental Damage: Adapting the United Nations Compensation Commission for the Iraq War*, 33 B.C. ENVTL. AFF. L. REV. 417, 436 (2006); *see* S.C. Res. 687, *supra* note 65, ¶ 18.

88. U.N. Comp. Comm'n. Governing Council, Districution of Payments and Transparency: Dec. Taken by the Governing Council of the United Nations Compensation Commission at the 41st Meeting, Held in Geneva on 23 March 1994, ¶ 6, U.N. Doc. S/AC.26/Dec.18 (Mar. 24, 1994).

submitted by both North Korean employees and South Korean managers of the harmed corporations.

The claims review could categorize each claim in the way the UNRoD and UNCC have done by separating employment and commercial claims. Similar documents serving evidentiary purposes could also be taken into consideration. Borrowing from the lessons of the UNCC, it is imperative to guarantee objectivity of the claims review process. At the same time, the UNCC has its own mechanisms to ensure organization transparency as well.

To guarantee transparency of the UNCC, the Office of Internal Oversight Services (OIOS) conducts audits of the UNCC's claims payment.[89] While the UN Compensation Fund carries out compensation payments, the process is administered by the UN Secretary General.[90]

The OIOS assesses the UNCC's "adequacy and effectiveness of internal controls" to guarantee that each award payment is accurate, and it assesses the Claims Payment Section's procedural "effectiveness."[91] In essence, the OIOS ensures that each claim payment is in full compliance with the UN Financial Regulations and Rules.[92] With regards to the UNCC operations, the OIOS makes recommendations for obtaining outstanding audit certificates or reports to ensure fair compensation and effective claims review.[93]

The two Koreas—with the help from third-party entities—should model these methods of objectivity and transparency by first classifying claims into distinct categories and deciding exactly what the procedural requirements must be for compliance. These procedural mandates should clearly state that losses claimed must have a *direct link* to the temporary halt of the KIC operation. Only when this is well established can the two Koreas proceed to the next step—designing arbitration rules for the arbitration commission related to the KIC dispute.

---

89. U.N. Secretary-General, Financial Regulations and Rules of the United Nations: Secretary-General's Bulletin, art. V(E), U.N. Doc. ST/SGB/2003/7 (May 9, 2003) [hereinafter Secretary-General's Bulletin].

90. The Fund receives approximately 30% of the compensation from Iraqi oil export sales, under a program known as the "oil-for-food" mechanism. John Gaffney, *The Review of Corporate Claims by the United Nations Compensation Commission*, 6 COM. L. PRACTITIONER, no. 1, 1999, at 80, 81.

91. Secretary-General's Bulletin, *supra* note 89.

92. *Id.*; *see, e.g.*, Memorandum from Fatoumata Ndiaye, Acting Dir., Internal Audit Div., to Mojtaba Kazazi, Exec. Head, U.N. Compensation Comm'n., U.N. Memorandum AE2008/820/01 (Apr. 21, 2009) [hereinafter OIOS Memo].

93. *See, e.g.*, OIOS Memo, *supra* note 92.

At this point, there must be a clear understanding on the comprehensiveness and transparency of the claims review process. It is not just claims under the UNRoD Category "B" that would be reviewed, but category "D" claims as well. This means that North Koreans will also realize there is room to request compensation from South Korean companies. There must be an established mutual understanding that each State will be equally and fairly compensated for damages caused by the other party.

The level of proof between South and North Korea would ensure the efficiency of the claims review organization and its satisfactory outcome. For example, in the UNRoD there are cases where grazers with sheep claimed for specific losses of sheep. However, the evidence each grazer submitted as proof of livestock were inoculation certificates that often never showed the exact number of sheep the claimants possessed before the Wall's construction occupied Palestinian territory. In this sort of case, the UNRoD gives the benefit of doubt to the claimant with regards to the missing numbers by considering the circumstances of the area.[94]

Unlike the sheep grazer illustration, the KIC dispute involves potential claims that are much more concrete and clear-cut. Given the nature of the commercial dispute, there will be supporting documents in the Korean language to provide evidence of matters, such as employment, tax, and revenue.

There is also significant room for flexibility and invention in creating a claims process for the KIC dispute resolution.[95] The lessons from the UNRoD and the UNCC will serve as guidelines for the two Koreas regarding which aspects to utilize or challenge, based of course on the unique circumstances underlying the KIC dispute.[96]

---

94. Buckamier v. Islamic Republic of Iran, 28 Iran-I.S. Cl. Trib. Rep. 307 (1992).

95. *See* Ronald J. Bettauer, *The Task Remaining: The Government Cases*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 355, 356 (David D. Caron & John R. Crook eds., 2000) (highlighting the flexibility of the Iran-United States Tribunal process).

Given the circumstance, the claims process can come in many different forms. *See* Bernhard Graefrath, *Iraqi Reparations and the Security Council*, 55 HEIDELBERG J. INT'L L. 1, 41 (1995). Graefrath even noted that it is "somewhat irritating when the Compensation Commission and its practice are quite often described in legal literature as if it were an international legal process, just because it has been established by the Security Council." *Id.*

96. A case very similar to the KIC was brought to the UNCC regarding prepaid offices. Category "F" Claims, *supra* note 68, ¶ 74. One claimant sought compensation for prepaid rent fees for the embassy offices in Kuwait City before the invasion. *Id.* Losses were claimed on the ground that the embassy offices could not be used during the occupation and losses were incurred accordingly. *Id.* On this point, the UNCC stated, "the mere permanent or temporary closure of a diplomatic mission, even in time of armed conflict, does not give rise to a claim for

Another guideline provided by the UNCC that might prove highly political to the KIC dispute may be the use of experts in the same fashion as the UNCC. Article 36(b) of the UNCC Provisional Rules allows requesting of additional information from any other source, including expert advice.[97]

The UNRoD and the UNCC are known to give priority to individuals' claims.[98] Upon establishing a claims process unit similar to the UNRoD and the UNCC, it becomes possible to ensure that claims are adequately quantified and fairly compensated.[99] The Iran-US Claims Tribunal also receives evidence from experts,[100] so a Claims Review Organization established by the two Koreas could serve a similar function.

B. Designing Arbitration Rules and Procedures

After creating a fair and transparent claims process that gives priority to an individual's claims, the next step is establishing arbitration rules acceptable to both Koreas. This proves to be difficult given that arbitration between the two Koreas would be considered to be in a gray area, as the intra-Korean relationship is a special one, with each State not recognizing each other as a legal government. The KIC dispute would therefore not be an investment treaty dispute. At the same time, the dispute would not be classified as wholly commercial. For this reason, it is proposed that the North-South Korea Arbitration Commission should apply parts of the Iran-US Claims Tribunal Rules that modified the UNCITRAL Arbitration Rules, the UNCITRAL Arbitration Rule 2012, and the Permanent Court of Arbitration Rules to ensure flexibility to the fullest extent.

---

compensation. Here, the claimant would have incurred the rental expense regardless of whether Iraq invaded or occupied Kuwait." *Id.* The UNCC found no direct causal link of the loss and the occupation. Heiskanen & O'Brien, *supra* note 65, at 347.

97. Provisional Rules, *supra* note 82, art. 36(b).

98. U.N. Comp. Comm'n. Governing Council, Decision Priority of Payment and Payment Mechanism, Guiding Principles: Dec. Taken by the Governing Council of the United Nations Compensation Commission at the 41st Meeting, Held in Geneva on 23 March 1994, ¶ 1(B), U.N. Doc. S/AC.26/Dec.17 (Mar. 24, 1994). The prioritization of individuals' claims is welcomed as a democratic innovation since the number of individuals claims will ruse in future international disputes. Gregory Townsend, *The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & U.S. Remedies*, 17 LOY. L.A. INT'L & COMP. L. REV. 973, 1005 (1995).

99. Townsend, *supra* note 98, at 1006.

100. IRAN-U.S. CLAIMS TRIBUNAL, TRIBUNAL RULES AND PROCEDURE art. 4 (1983).

1. Scope of Application

The Scope of Application provisions generally serve to address the applicability of the procedural rules of a specific arbitration commission.[101] In the case of conflicting interpretations of the provisions, the two-arbitration commission will not be able to divert from its original intent stated in the Scope of Application provision.[102]

The most noteworthy part of the Article on the scope of application is the Permanent Court of Arbitration (PCA) Rule 2012 where the Article extended the scope of application to states or state-controlled entities with either contractually- or treaty-based disputes.[103] This approach reflects the rather *gray* dispute area between the two Koreas in regards to the KIC. The KIC dispute, by international law, is neither contractual nor treaty-based. The PCA Rule 2012 has opened the door to this application.[104] The PCA Rules on the scope of application have explicitly referred to waiver of the right of immunity by the state when dealing with another non-state entity.[105] This would seem to apply to the current dispute between the two Koreas because each party does not regard the other as a legal state.

Proposed Rules on Scope of Application

The proposed rules regarding the scope of application are as follows:

1. The Claims Settlement Declaration executed by North and South Korea constitutes an agreement in writing on their own behalf, and on behalf of their nationals submitting to arbitration within the framework of the international law and in accordance with the Tribunal Rules. The disputes DIRECTLY arising out of the withdrawal of

101. CLYDE CROFT ET AL., A GUIDE TO THE UNCITRAL ARBITRATION RULES 12 (2013).

102. *Id.*

103. PERMANENT COURT OF ARBITRATION, ARBITRATION RULES art. 1, ¶ 1 (2012) ("Where a State, State-controlled entity, or intergovernmental organization has agreed with one or more States, State-controlled entities, intergovernmental organizations, or private parties that disputes between them in respect of a defined legal relationship, whether contractual, treaty based, or otherwise, shall be referred to arbitration under the Permanent Court of Arbitration[,] Arbitration Rules 2012 . . . then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.").

104. *Id.* art. 1, ¶ 2 ("Agreement by a State, State-controlled entity, or intergovernmental organization to arbitrate under these Rules with a party that is not a State, State-controlled entity, or intergovernmental organization constitutes a waiver of any right of immunity from jurisdiction in respect of the proceedings relating to the dispute in question to which such party might otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.").

105. *Id.*

North Korean employees from the KIC shall be referred to arbitration under the proposed North-South Arbitration Commission Rules of Procedure, then such disputes shall be settled in accordance with these Rules, subject to such modification as the parties may agree.

2. Agreement by a State or State-controlled entity to arbitrate under these Rules with a party that is not a State, or a State-controlled entity constitutes a waiver of any right of immunity from jurisdiction in respect of the proceedings relating to the dispute in question to which such party might otherwise be entitled. A waiver of immunity relating to the execution of an arbitral award must be explicitly expressed.

It is important to stipulate in the Rule on Scope of Application that only disputes arising out of the withdrawal of the North Korean employees from the KIC would be recognized. It must also be made clear that this scope would not involve the concept of "arising in connection with" such withdrawal because the scope would become too broad.[106] This was the approach taken by the UNRoD and the UNCC when registering and reviewing claims from their respective claimants. Based on the lessons from the UNRoD, the UNCC, and the ICC Working Group discussion, the PCA scope of application should be slightly altered to meet the circumstances unique to the Korean peninsula.

2. Composition of the Tribunal

It is well known that when discussing a tribunal composition it is not particularly fair to discuss the matter "in terms of absolute generalities."[107] The financial burden of having a five-member tribunal would be much larger than that of a sole arbitrator.[108] However, when it comes to politically sensitive disputes, it would be reasonable to tentatively disregard the cost in an effort to ensure fairness of the arbitration composition.

As contrasted with the UNCITRAL Rules and the Iran-US Claims Tribunal Rules, the PCA Rules explicitly provide for appointment of a panel of up to five arbitrators. Selecting the members can directly relate to the issues of efficiency and the order of the arbitral proceeding.[109]

106. ALAN REDFORD ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 3-39 (4th ed. 2004).

107. CROFT ET AL., *supra* note 101, at 100.

108. *Id.* at 100-01.

109. KLAUS PETER BERGER, 9 INTERNATIONAL ECONOMIC ARBITRATION 201 (1993).

Given the political situation between the two Koreas, it would be reasonable to assume there would be serious disputes in nominating arbitrators. As the dispute between the two Koreas would be highly political and extremely specific to the geographic location and subject matter under dispute, it would be necessary to consider the "arbitrator's legal knowledge, his availability in terms of both time and geographical distance, his organization and negotiation skills[,] and his ability to carry out his point."[110] Due to this concern, more reference should be made to the PCA Rules, which would give more room for the two Koreas to present their preferences. In fact in the process of discussing future dispute resolution process in 2013, the two Koreas exchanged a list of five panel members for the arbitration panel.[111]

The PCA Rules[112] permit greater discretion for both Koreas in nominating arbitrators; it would therefore heighten the level of long-term credibility in the arbitration proceeding. Regarding the number of arbitrators,[113] this could also become an important area open for agreement for the Koreas. Determining the number of arbitrators must also be decided in light of maximizing the arbitrators' objectivity and efficiency.

Proposed Rules on Composition of Tribunal

The proposed rules regarding the Composition of Tribunal are as follows:

1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the arbitral tribunal. If five arbitrators are to be appointed, the two party-appointed arbitrators shall choose the remaining three arbitrators and designate one of those three as the presiding arbitrator of the tribunal.

2. If within 30 days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator it has appointed, the first party may request the appointing authority to appoint the second arbitrator.

---

110. *Id.*

111. *S. Korea, DPRK Launch Dispute*, *supra* note 86.

112. PERMANENT COURT OF ARBITRATION, ARBITRATION RULES art. 10, ¶ 4 (2012) ("In appointing arbitrators pursuant to these Rules, the parties and the appointing authority are free to choose persons who are not Members of the Permanent Court of Arbitration.").

113. *Id.* art. 9, ¶ 1 ("If five arbitrators are to be appointed, the two party-appointed arbitrators shall choose the remaining three arbitrators and designate one of those three as the presiding arbitrator of the tribunal.").

3. If within 30 days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the remaining arbitrators and/or the presiding arbitrator, the remaining arbitrators and/or the presiding arbitrator shall be appointed by the appointing authority in the same way as a sole arbitrator would be appointed.

There remain certain difficulties with a North-South Korea Arbitral Tribunal. The number of challenges brought against arbitrators has increased significantly in recent years.[114] This could be particularly true between North and South Korea, where there already exists a severe lack of political trust. It has also been recognized that an even number of arbitrators creates the potential risk of a deadlock situation when reaching decisions on the merits.[115] For this reason, an odd number of arbitrators, with the fallback provision stipulated in the arbitration Rules, would be preferable.

3. Jurisdiction

Both the PCA Rules and the UNCITRAL Arbitration Rule 2012 have the same wording on an arbitral tribunal's jurisdiction.[116] In this regard, the Iran-US Claims Tribunal provided more details in terms of the jurisdiction of the Tribunal.[117] The Iran-US Claims Tribunal, which also borrowed from the UNCITRAL rules, demonstrates characteristics of an ad hoc arbitration. The Iran-US Claims Tribunal made clear that it had limited *ratione personae* and *ratione materiae*.[118] The tribunal was empowered only to hear claims of U.S. nationals against Iran, and those of Iran nationals against the United States.[119] In addition, Paragraph 11 of the Declaration of the Government of Algeria listed

114. BERGER, *supra* note 109, at 202.

115. *Id.* at 205.

116. Rep. of the U.N. Comm'n of Int'l Trade Law, 43rd Sess., June 21-July 9, 2010, Annex I, art. 23, U.N. Doc. A/65/17; [hereinafter UNCITRAL Arbitration Rules]; PERMANENT COURT OF ARBITRATION, ARBITRATION RULES art. 23, ¶ 1 (2012) ("The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract, treaty, or other agreement shall be treated as an agreement independent of the other terms of the contract, treaty, or other agreement. A decision by the arbitral tribunal that the contract, treaty, or other agreement is null, void, or invalid shall not entail automatically the invalidity of the arbitration clause.").

117. IRAN-U.S. CLAIMS TRIBUNAL, TRIBUNAL RULES AND PROCEDURE art. 21, ¶ 1 (1983) ("The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.").

118. ISAAK I. DORE, THE UNCITRAL FRAMEWORK FOR ARBITRATION IN CONTEMPORARY PERSPECTIVE 66 (1993).

119. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning Settlement the of Claims by the Government of the United States of America and

the areas to be excluded by the tribunal.[120] The ability to insert the same article in the jurisdiction provision of the North-South Korea Arbitration Commissions Tribunal would mark a significant success in the onset of arbitration, as the existence of an arbitration clause is lacking in the South-North Korea Investment Protection Agreement.[121]

Proposed Rules on Jurisdiction[122]

The proposed rules regarding Jurisdiction are as follows:

1. The arbitral tribunal shall have the power to rule on objections that it lacks jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or validity of the contract in which the arbitration clause appears. For the purposes of this Article, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the validity of the arbitration clause.

---

the Government of the Islamic Republic of Iran, U.S.-Iran, art. 2, ¶ 1, Jan. 18, 1981, 20 I.L.M. 230.

120. *Id.* at 227 ("Upon the making by the Government of Algeria of the certification [of the safe departure of the 52 United States nationals from Iran] described in Paragraph 3, above, the United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events occurring before the date of this Declaration in relation to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to the United States property or property of the United States nationals within the United States Embassy Compound in Tehran after November 3, 1979, and (D) injury to the Islamic Revolution in Iran which were not an act of the Government of Iran. The United States will also bar and preclude the prosecution against Iran in the courts of the United States of any pending or future claim asserted by persons other than the United States nationals arising out of the events specified in the preceding sentence.").

121. *See* Agreement on Investment Protection Between the South and the North, *supra* note 45.

122. This proposed clause is very similar to the UNCITRAL Rules borrowed by the Iran-U.S. Claims Tribunal. UNCITRAL Arbitration Rules, *supra* note 116. Similarity to the UNCITRAL Rules may be seen as a move to take into account party expectations that the Arbitral Tribunal would then faithfully follow the texts of the UNCITRAL Arbitration Rules and the established practices of other institutions using the UNCITRAL Arbitration Rules. Rep. of the U.N. Comm'n of Int'l Trade Law, 45th Sess., June 25-July 6, 2012, Annex I, ¶ 7, U.N. Doc. A/67/17.

For the same purpose, in forming Procedural Rules on the North-South Korea Arbitration Commission jurisdiction, the following provision used in the Iran-US Claims Tribunal will be useful.

3. In general, the arbitral tribunal shall rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

As a procedural matter, it would be efficient for the tirbunal to decide on matters where its jurisdiction is under question. In order to maintain efficiency, the tribunal is recommended to proceed with the arbitration process and rule on the question of jurisdiction in the final award.

4. Interim Measures

There are varied forms of interim measures available in arbitration.[123] Croft, Kee, and Waincymer categorized them as "measures aimed at preserving the status quo"; "measures aimed at preventing, or the refraining from taking, action that is likely to cause (i) current or imminent harm or (ii) prejudice to the arbitral process itself"; "measures aimed at preserving assets out of which a subsequent award may be satisfied"; and "measures relating to the preservation of evidence."[124] For purposes of the dispute directly related to the KIC shutdown in 2013, it is necessary to focus on the second and fourth categories. The proposed rules on interim measures shall include wordings addressing such purposes.

Article 26 of the PCA Rules borrowed the exact wording of the UNCITRAL Arbitration Rules on interim measures.[125] The Article gives a long list to define interim measures. With the UNCITRAL language unchanged in the Iran-US Claim Tribunal, the practice of the tribunal has shown that using interim measures would depend on the necessity to "protect and conserve the subject matter of a case, the rights of the parties including the title to goods and most importantly, to protect its own jurisdiction and authority."[126]

123. CROFT ET AL., *supra* note 101, at 288.

124. *Id.* at 289-92.

125. PERMANENT COURT OF ARBITRATION, ARBITRATION RULES art. 26 (2012) ("1. The arbitral tribunal may, at the request of a party, grant interim measures. 2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: (a) Maintain or restore the status quo pending determination of the dispute . . . .").

126. DORE, *supra* note 118, at 72 (citing Behring Int'l, Inc. v. Islamic Republic of Iran Air Force, 8 Iran-U.S. Cl. Trib. Rep. 44 (1985); Islamic Republic of Iran v. United States, 5 Iran-U.S.

The North-South Korea Arbitration Commission should place heavy emphasis on interim measures given the KIC situation. With the media concerned about North Korea allowing Chinese private companies entering the KIC to replace South Korean companies,[127] a strong interim measure regulation would certainly assist in the public's acceptance of the arbitration process.

Proposed Rules on Interim Measures[128]

The proposed rules regarding Interim Measures are as follows:

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter of the dispute, such as the ordering their deposit with a third person or the sale of perishable goods.
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

In considering the practicality of the proposed rules, the arbitration commission should carefully consider the circumstances unique to the KIC. It is imperative to deal with the public acceptance of arbitration proceedings in such a politically sensitive dispute.

5. Evidence

The North-South Korea Arbitral Commission should incorporate the registered losses from the preceding claims review process in reviewing evidence. For most international arbitration, the process related to understanding facts and processing them take up a major part of the arbitration process itself.[129]

Cl. Trib. Rep. 131 (1984); Behring Int'l, Inc. v. Islamic Republic Iranian Air Force, 3 Iran-U.S. Cl. Trib. Rep. 173 (1983) as general examples illustrating the title of goods).

127. *Kaesong Industrial Complex Suffering from Insufficient Workers with North Korean Manpower Moving to China*, BUSINESSKOREA (Aug. 25, 2014, 5:48 PM), http://www.businesskorea.co.kr/article/6025/labor-shortage-kaesong-industrial-complex-suffering-insufficient-workers-north-korean.

128. This proposed clause remains unchanged from the UNCITRAL Rules borrowed by the Iran-U.S. Claims Tribunal. UNCITRAL Arbitration Rules, *supra* note 116, art. 26.

129. BERGER, *supra* note 109, at 427.

Until now, the International Court of Justice has been flexible on evidence.[130] In fact, it was suggested that "international tribunals are 'not bound to adhere to strict judicial rules of evidence.'"[131] It is for this reason that having a claims review organization between the two Koreas would prove useful.

At the Iran-U.S. Claims Tribunal, it was held that the burden of proof was "heavier" if a fact under question is contested between the two parties.[132] During times of conflicting views on facts, the party submitting the proof was to submit in a timely fashion to allow the other party sufficient time to respond.[133]

Proposed Rules on Evidence[134]

The proposed rules regarding Evidence are as follows:

1. The arbitral tribunal may, if it considers appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of documents and other evidence apart from those registered in the Register of Damage which that party intends to present in support of the facts in issue, as set out in his statement of claim or statement of defense.

2. At any time during the arbitral proceedings, the arbitral tribunal shall have authority to require the parties to produce documents, exhibits, or other evidence not submitted to the Register of Damage within such a period of time the tribunal shall determine.

Much of this political dispute surrounding the KIC lies on evidence—the "fundamental ingredient in most arbitration proceedings."[135]With the acceptance of the proposed claims review process however, it would be relatively simple for both Koreas.

130. Scholars pointed out "little to be to be found in the way of rules of evidence." 3 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005, at 1039 (4th ed. 2006).

131. DURWARD V. SANDIFIER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 9 (rev. ed. 1975).

132. DORE, *supra* note 118, at 70 (citing Harris Int'l Telecomm., Inc. v. Islamic Republic of Iran, 17 Iran-U.S. CI. Trib. Rep. 31, 47 (1987)).

133. *Id.*

134. This provision slightly altered the UNCITRAL Rules borrowed by the Iran-U.S. Claims Tribunal in light of the possible Register of Damage between the Koreas. UNCITRAL Arbitration Rules, *supra* note 116, art. 24.

135. CROFT ET AL., *supra* note 101, at 292.

C. *Plausibility of the Proposed Methodology*

Critics may suggest that successful dispute resolution under international law and politics seems far-fetched when it comes to North and South Korea. However, even the UNCC—which now operates as an effective international organization—was once considered to be severely limited.[136]International law obligates both Koreas to engage in a dispute resolution mechanism. Article 33(1) of the United Nations Charter provides:

> The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.[137]

North and South Korea, as member states of the United Nations as of September 17, 1991, both have the responsibility to abide by the UN Charter and international law. Ignoring the possible quasi-judicial dispute resolution methods that have been listed on the UN Charter[138] only emphasizes the absence and tardiness of the two Koreas. This failure to act in a timely manner creates a responsibility to speed up the consideration for an arbitration process.

As aforementioned, because the KIC has the potential to endanger the maintenance of peace and security on both the Korean peninsula and the region of the world, North and South Korea have the duty under international law to discharge their legal misgivings and predispositions as soon as possible. Furthermore, North Korea promulgated the North-South Economic Cooperation Act as the pilot law regulating the economic cooperation between the two Koreas.[139] Article 27 of the Act states:

> Any difference in opinion related to the business with the North Korean economy is to be resolved with negotiation. If negotiation does not solve the opinion difference, the dispute may be resolved

136. Robin L. Juni, *The United Nations Compensation Commission as a Model for an International Environmental Court*, 7 ENVTL. LAW. 53, 73 (2000); Tiffani Y. Lee, *Environmental Liability Provisions Under the U.N. Compensation Commission: Remarkable Achievement with Room for Improved Deterrence*, 11 GEO. INT'L ENVTL. L. REV. 209, 217-21 (1998).

137. U.N. Charter art. 33, para. 1.

138. *Id.*

139. Joseonminjujuuiinmingonghwagung Bungnamgyeongjehyeomnyeokbeop [North-South Economic Cooperation Act], signed July 6, 2005. To access the act, see *North Laws*, N. KOREAN RESOURCE CENTER, http://unibook.unikorea.go.kr/?sub_num=53&recom=17&state=view&idx=179 (last visited Apr. 22, 2015).

with the commercial dispute resolution process agreed upon by North and South.[140]

North and South Korea executed the Agreement on Commercial Dispute Resolution Process and the Agreement on Formation and Operation of the North-South Korea Arbitration Commission.[141] These agreements serve as the basic presumption the Koreas have acknowledged the necessity for an arbitration commission in relation to the KIC.

Another reason arbitration is possible between the Koreas is the separate and clear self-interests at stake, and the possibility of negotiating respective self-interests. The Koreas, for example, could consider allocating to North Korea more profit derived from products manufactured and sold by the KIC. South Korean companies operate within the KIC in part to utilize and profit from the relatively cheap labor and tax benefits.[142] On the other hand, North Korean employees earned $134 a month.[143] Factors such as these would seem to provide opportunities for negotiation.

Beyond resolving the immediate KIC dispute is a larger, long-sought, but so far elusive goal and benefit to all—unification of the two Koreas. Since the Korean War, both North and South Korea have long called for unification.[144] Considering the long-term political goal of unifying the Korean peninsula, the Koreas can begin by creating a workable arbitral structure to first reconcile smaller, but significant, individual conflicts.

III. CONCLUSION

Successful arbitration requires agreement and genuine commitment by the arbitrating parties. South Korea has been previously in-

140. *Id.* (translated by author).

141. See Agreement on Commercial Disputes, *supra* note 45 that ordered for the establishment of the Agreement on Formation and Operation of a Commercial Arbitration Commission, which was adopted on October 12, 2003. *See* Jhe Seong-Ho, *Four Major Agreements on Inter-Korean Economic Cooperation and Legal Measures for Their Implementation*, J. KOREAN L., December 2005, at 126, 132.

142. Charles Scanlon, *North Korea's Resort Seizure Ends Project of Hope*, BBC NEWS (Aug. 22, 2011), http://www.bbc.com/news/world-asia-pacific-14617827.

143. K.J. Kwon & Jason Hanna, *Last Remaining South Koreans Leave Joint Industrial Complex*, CNN (May 3, 2013, 8:56 AM), http://www.cnn.com/2013/05/03/world/asia/koreas-kaesong-complex.

144. *See* Marcus Noland et al., *Modeling Korean Unification*, 28 J. COMP. ECON., 400, 418 (2000).

volved in arbitrations with its many contributions to external trade.[145] North Korea has entered into arbitral bilateral investment agreements and has adopted model arbitration rules.[146] Thus, it is conceivable the two Koreas would be able to reach an agreement on arbitration regarding the KIC dispute and beyond.

One school of thought suggests waiting for a change in the North Korean government policy in dealing with South Korea. Kim Jung Eun has been viewed as a liberal political figure in terms of foreign relations and trade.[147] In addition, the North Korean political structure is viewed by many as vulnerable.[148]

However, as noted by Townsend, the risk of waiting for political change in North Korea is posed by increasingly compounding interests on the principal of potential arbitration awards.[149] On a number of occasions, North Korean assets have been frozen, and many remain frozen.[150] These assets could become useful in repaying individuals' claims as part of an arbitration award. In the past, the UNCC borrowed frozen Iraqi assets from the United States to compensate individuals.[151] North Korea also has $5 billion in external debt that can be utilized.[152] Bonds can be issued on these debts, and while the risk may seem too high, it could still be considered an option to other alternatives.

There will certainly be economic benefits for both Koreas once mutually accepted and effective arbitration takes place. North and South Korea could engage in discussions to allow larger economic benefits related to the KIC upon commencement of arbitration. This

145. For a list of signatories to the Bilateral Treaties for the Reciprocal Protection of Investment as well as signatories to the Bilateral Conventions for the Avoidance of Double Taxation, see *Bilateral Investment Treaties*, KOREA EXIMBANK, http://www.koreaexim.go.kr/en/fdi/invest_02.jsp (last visited Mar. 14, 2015).

146. *See, e.g.*, Agreement Between the Government of the Kingdom of Thailand and the Government of the Democratic People's Republic of Korea for the Promotion and Protection of Investments, Thai.-N. Kor., art. 11, May 24, 2002, UNCTAD INVESTMENT POL'Y HUB, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1800 (last visited Apr. 22, 2015).

147. *Disneyland for Dictators*, ECONOMIST, July 21-27, 2012, at 36.

148. In fact, Townsend suggested the same method for the United Nations Compensation Committee. Townsend, *supra* note 98, at 1019-20.

149. *Id.* at 1020-21.

150. *See* Thom Shanker & Martin Fackler, *South Korea Says It Will Continue Projects in North*, N.Y. TIMES (Oct. 19, 2006), http://www.nytimes.com/2006/10/19/world/asia/19cnd-korea.html.

151. U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution* 778 (1992), ¶ 8, U.N. Doc. S/25863 (May 27, 1993).

152. *The World Factbook: Debt-External*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/2079.html (last visited Mar. 14, 2015).

could include beneficial tax treatment, increases in North Korean employment rates, and other benefits in the production industry.

It is beyond doubt that political compromise between North and South Korea is necessary and inevitable to resolve disputes. However, the fundamental premise of this paper posits that creating objective, fair, and transparent procedural laws for individual claims review and mutually agreed-upon arbitration rules will help lead the two Koreas in creating an acceptable dispute resolution structure.

Only by each listening to one another, understanding the harms suffered by their respective peoples, and committing fairly to resolving individual claims will the Koreas be able to ameliorate the consequences of prideful and harmful past state behavior. Peaceful coexistence will be possible only when both Koreas recognize the need for compensation to each others' aggrieved citizens and realize the necessity to end their respective violations under international law. It is for these reasons the two Koreas need to embrace law rather than power politics to achieve a sustainable peace on their peninsula.