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The South China Sea *Arbitration: Bindingness, Finality, and Compliance with UNCLOS Dispute Settlement Decisions*

Hao Duy PHAN*
Centre for International Law, National University of Singapore, Singapore
cilpdh@nus.edu.sg

Lan Ngoc NGUYEN**
Utrecht University, the Netherlands
l.n.nguyen@uu.nl

Abstract
On 12 July 2016, the Tribunal in the *South China Sea* arbitration issued its final award. China rejected the ruling as "null and void". The Philippines dismissed it as "a piece of paper" after initially hailing the ruling a "milestone decision". The reactions of the parties concerned raise important questions about the bindingness, finality, and state compliance with UNCLOS dispute settlement decisions. This paper addresses these questions by dissecting China's arguments that the award "has no binding force" and by examining the options available for promoting compliance with the award. The paper also considers the broader question of how states generally comply with UNCLOS dispute settlement decisions and evaluates the significance of UNCLOS dispute settlement mechanisms, including the *South China Sea* arbitration, in the absence of external enforcement.

On 12 July 2016, the Arbitral Tribunal in the South China Sea dispute between the Philippines and China issued its long-awaited final award. The Tribunal rejected China's claim of historic rights within the "nine-dash line". It found that none of the features in the Spratlys is entitled to a maritime zone of more than twelve nautical miles and concluded that China's activities had violated the Philippines' sovereign rights in its exclusive economic zone [EEZ] and caused severe harms to the marine environment.

The Philippines government initially welcomed the award, describing the ruling as a milestone decision and indicating that it would respect the award. It then, however, called the award "a piece of paper" that would "take the back seat" in bilateral

* Senior Research Fellow at the Centre for International Law, National University of Singapore.
** Lecturer of Public International Law, Department of Law, Economics and Governance, Utrecht University, the Netherlands.

negotiations.[1] China, on the other hand, claimed that the arbitration was a political farce and the award was illegal, null, and void. It insisted that the Arbitral Tribunal did not have jurisdiction and refused to recognize the ruling or accept any proposals for negotiation based on the ruling.[2]

While the award addresses many important legal issues concerning the interpretation and application of the 1982 United Nations Convention on the Law of the Sea [UNCLOS], the reactions of the parties concerned have raised doubts and questions about the bindingness, finality, as well as state compliance with UNCLOS dispute settlement decisions.[3] This paper addresses these questions by examining the binding and final nature of UNCLOS judicial and arbitral decisions. It also dissects China's arguments that the award is "null and void" and has "no binding force". The paper then considers the broader question of how States Parties to UNCLOS generally comply with UNCLOS dispute settlement decisions. Finally, it evaluates the significance of UNCLOS dispute settlement mechanisms, including the *South China Sea* arbitration, in the absence of external enforcement.

I. THE BINDINGNESS AND FINALITY OF UNCLOS JUDICIAL AND ARBITRAL DECISIONS

Article 296, paragraph (1) of UNCLOS states that any decision rendered by a court or tribunal having jurisdiction under Part XV, Section 2 UNCLOS "shall be final and shall be complied with by all the parties to the dispute". Paragraph (2) of the same Article stipulates that "any such decision shall have no binding force except between the parties and in respect of that particular dispute". As this Article applies to the decisions of all the dispute settlement bodies "having jurisdiction under Section 2", it follows that an award rendered by an arbitral tribunal under Annex VII is final and binding on the parties to the arbitration.

1. Department of Foreign Affairs of the Republic of the Philippines, "Statement of the Secretary of Foreign Affairs" (12 July 2016), online: <https://www.dfa.gov.ph/documents-on-the-west-philippine-sea>; Benjamin Kang LIM, "Philippines' Duterte Says S.China Sea Arbitration Case to Take 'Back Seat'", *Reuters* (19 October 2016), online: Reuters <http://in.reuters.com/article/china-philippines/philippines-duterte-says-s-china-sea-arbitration-case-to-take-back-seat-idINKCN12J1QK>; "Philippines' Duterte Praises China on Beijing Visit", *Channel NewsAsia* (19 October 2016), online: Channel NewsAsia <http://www.channelnewsasia.com/news/asiapacific/philippines-duterte-praises-china-on-beijing-visit/3219034.html>.

2. "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", *Xinhua* (12 July 2016), online: Xinhua <http://news.xinhuanet.com/english/2016-07/12/c_135507744.htm>.

3. See Stefan TALMON, "The South China Sea Arbitration and the Finality of 'Final' Awards" (2017) 1 Journal of International Dispute Settlement 1; Graham ALLISON, "Heresy to Say Great Powers Don't Bow to Tribunals on Law of the Sea?", *The Straits Times* (16 July 2016), online: The Straits Times <http://www.straitstimes.com/opinion/heresy-to-say-great-powers-dont-bow-to-international-courts>; Graham ALLISON, "Of Course China, Like All Great Powers, Will Ignore an International Legal Verdict", *The Diplomat* (11 July 2016), online: The Diplomat <http://thediplomat.com/2016/07/of-course-china-like-all-great-powers-will-ignore-an-international-legal-verdict/>; Julian KU, "China's Ridiculously Weak Legal Argument Against Complying with the South China Sea Arbitration Award", *Lawfare* (6 June 2016), online: Lawfare <https://www.lawfareblog.com/chinas-ridiculously-weak-legal-argument-against-complying-south-china-sea-arbitration-award>; Julian KU, "Why 'Lawfare' Won't Deter China in the South China Sea", *Opinio Juris* (13 July 2014), online: Opinio Juris <http://opiniojuris.org/2014/07/13/lawfare-wont-deter-china-south-china-sea/>; Paterno ESMAQUEL II, "Q and A: Case vs China 'Not Enough,' Expert Says", *Rappler* (19 August 2014), online: Rappler <http://www.rappler.com/nation/66676-philippines-china-case-sovereignty-patrols>.

The negotiating history of Article 296 indicates that although the earlier drafts of this Article distinguished between the decisions of different courts and tribunals under Article 287, the final version of Article 296 was adopted with the understanding that no difference was to be made between these courts and tribunals so long as they have jurisdiction to hear the case. The text which emerged from the deliberations during the Third Conference on the Law of the Sea "emphasizes the finality of decisions and the obligation of the parties to the dispute to comply with them".[4]

The binding and final nature of an arbitral award is reaffirmed under Article 11 of Annex VII, which states that "[t]he award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute". Article 11 of Annex VII thus essentially reiterates the content of Article 296, except for the added possibility of an appellate procedure.[5]

The bindingness and finality of decisions rendered by an Annex VII arbitral tribunal under Article 296 of UNCLOS closely follow the content of Articles 59 and 60 of the International Court of Justice [ICJ] Statute and Article 94(1) of the United Nations [UN] Charter. Article 59 of the ICJ Statute provides that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case", and the latter that "[t]he judgment is final and without appeal". Article 94(1) of the UN Charter complements these Articles by stating that "[e]ach Member of the [UN] undertakes to comply with the decision of the [ICJ] in any case to which it is a party". In fact, an earlier draft of UNCLOS did not contain a provision similar to Article 296. UNCLOS Article 296 was only introduced "in order to take account of a complaint that by omitting such a provision the earlier drafts departed conspicuously from Article 59 of the [ICJ] Statute".[6] Moreover, as Article 296 of UNCLOS has not been examined in the case-law of UNCLOS dispute settlement bodies, it seems appropriate to examine how Articles 59 and 60 of the ICJ Statute have been interpreted in order to draw some guidance with respect to the meaning and application of UNCLOS Article 296.

Articles 59 and 60 of the ICJ Statute succeeded Articles 59 and 60 of the Statute of the Permanent Court of International Justice [PCIJ], respectively. In explaining the rationale of Article 59, the PCIJ stated that "it would be incompatible with the Statute, and with its position as the Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties".[7] In the *Monetary Gold* case, the ICJ also observed that "[i]t is true that under Article 59 of the Statute, the decision of the Court in a given case only binds the parties to it and in respect of that particular case. This rule, however, rests on the assumption that the Court is at least

4. Myron H. NORDQUIST, Shabtai ROSENNE, and Louis B. SOHN, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. V (Dordrect/Boston/London: Martinus Nijhoff, 1985) at 84.

5. For decisions of the International Tribunal for the Law of the Sea [ITLOS], art. 33 Annex VI of UNCLOS provides that "[t]he decision of the Tribunal is final and shall be complied with by all the parties to the dispute" and "[t]he decision shall have no binding force except between the parties in respect of that particular dispute".

6. Nordquist *et al.*, *supra* note 4 at 83.

7. *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland)* [1932] P.C.I.J. Series A/B, No. 46, 97 at 161.

able to render a binding decision."[8] In the *La Grand* case, the ICJ held that "the object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute".[9] The holdings of both the PCIJ and the ICJ affirm that the binding nature of their decisions is closely tied to the basic functions that the Court is set up to perform, which is to settle international disputes between parties by applying rules and principles of international law.[10]

The ICJ further explained in the *Application of the Genocide Convention* case that Article 60 of its Statute means that decisions of the Court, whether on jurisdiction or on the merits, are final "in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose" (principle of *res judicata*).[11] The Court determined that a case has to come to an end and its decision to be final to ensure two main purposes, namely (1) the legal relations between the parties are stable, and (2) an issue which has already been adjudicated will not be argued again. As stated by the Court, depriving a party of such benefits would be seen as "a breach of the principles governing the legal settlement of disputes".[12]

Turning to Article 94(1) of the UN Charter, this Article specifies the obligation for parties to the case to comply with decisions rendered by the ICJ irrespective of whether or not they agree with those decisions. As the PCIJ alluded to in the *Free Zones* case, the role of an international court as an independent body operating on the basis of applicable law will be seriously hampered if the parties to every case are free to decide for themselves whether to comply with the decision or not. Under international law, states are free to select a means to resolve their disputes. However, once a state has consented to the jurisdiction of an international dispute settlement body, that consent becomes the basis for the binding nature of the decision to be rendered.[13]

8. *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)* [1954] I.C.J. Rep. 19 at 33.

9. *La Grand Case (Germany v. United States)* [2001] I.C.J. Rep. 466 at 502–3. Although the Court was examining art. 59 of the ICJ Statute with regard to the binding nature of its provisional measures, the Court's conclusion can arguably be extended to other types of decisions of the Court, including its judgments.

10. Abdul G. KOROMA, "The Binding Nature of the Decisions of the International Court of Justice" in Marcelo KOHEN and Laurence BOISSON DE CHAZOURNES, eds., *International Law and the Quest for its Implementation / Le droit international et la quête de sa mise en oeuvre: Liber Amicorum Vera Gowland-Debbas* (Leiden/Boston: Brill, 2010) at 436–9.

11. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] I.C.J. Rep. 43 at 115, 117. Art. 61 of the ICJ Statute states that "[a]n application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence". In relation to arbitral awards, arts. 35 to 37 of the Model Rules on Arbitral Procedure adopted by the International Law Commission in 1958 provide for the grounds for the parties to challenge the validity of an arbitral award. See further J.G. MERRILLS, *International Dispute Settlement*, 5th edn. (Cambridge: Cambridge University Press, 2011) 103–6.

12. *Application of the Genocide Convention*, *supra* note 11 at 116.

13. Koroma, *supra* note 10 at 435.

The interpretations of Articles 59 and 60 of the ICJ Statute and Article 94(1) of the UN Charter by both the PCIJ and the ICJ suggest that the binding and final nature of the decisions of international courts and tribunals is grounded in the independent role of an international court or tribunal to settle disputes brought before it and the consent to jurisdiction that states have given to the court or tribunal in question. These two grounds also apply to explain the binding and final nature of the decisions of UNCLOS dispute settlement bodies, including those of Annex VII arbitral tribunals.

UNCLOS is the outcome of lengthy negotiations to accommodate the demands of different states and thus contains a large number of delicately balanced provisions.[14] To preserve this balance and to guard the hard-fought compromises against unilateral interpretations which threaten the integrity and stability of the Convention, a compulsory dispute settlement system was put in place. The role of UNCLOS tribunals therefore extends beyond settling disputes to also include maintaining the object and purposes of the Convention. For this role to be fulfilled, UNCLOS tribunals must be able to render decisions that are binding and final upon the parties to the case and that the parties have an obligation to comply with the decisions. Otherwise, disputes brought before UNCLOS tribunals could remain unresolved. The delicate balance the tribunals were tasked to preserve would also be disrupted and the compulsory dispute settlement system that the drafters of the Convention had painstakingly negotiated and carefully set up could be in jeopardy. Furthermore, Part XV of UNCLOS on Settlement of Disputes sets out compulsory dispute settlement procedures which are an integral part of UNCLOS.[15] A state consents to the jurisdiction of at least one UNCLOS dispute settlement body stipulated under Article 287 of UNCLOS simply by virtue of becoming a party to the Convention. The State Party's consent to the compulsory jurisdiction of UNCLOS dispute settlement bodies serves as the second basis for the binding nature of their decisions.

II. THE BINDINGNESS AND FINALITY OF THE ARBITRAL AWARDS IN THE SOUTH CHINA SEA CASE

China has repeatedly dismissed the award of the Arbitral Tribunal in the *South China Sea* case. Official statements of the Chinese government suggest three main arguments against the bindingness of the award, including (1) the arbitration was illegally constituted without China's consent and participation; (2) the Arbitral Tribunal had no jurisdiction; and (3) the Arbitral Tribunal was not a legitimate "international court".[16] A close examination reveals holes in these three arguments.

14. A.O. ADEDE, *The System for Settlement of Disputes Under the United Nations Convention on the Law of the Sea: A Drafting History and a Commentary* (Dordrecht: Martinus Nijhoff, 1987) at 89.

15. The 1958 Geneva Conventions for law of the sea merely relegate the settlement of disputes to an optional protocol. See *Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes Arising from the Law of the Sea Conventions*, 29 April 1958, 450 U.N.T.S. 169 (entered into force 30 September 1962).

16. See Ministry of Foreign Affairs of the People's Republic of China, "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" (7 December 2014), online: Ministry of Foreign Affairs of the PRC

First, China's non-appearance is not synonymous to a lack of consent to the Tribunal's jurisdiction. Nor does it make the arbitration process "illegal". Article 9 of Annex VII of UNCLOS provides that "absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings". Despite its refusal to participate in the proceedings, China remains a party to the case and was treated by the Arbitral Tribunal as such.[17] As the ICJ practice further indicates, the question of whether a state is party to a case does not depend upon whether that state appears before the dispute settlement body but rather on whether the state in question has given consent to the jurisdiction of the dispute settlement body.[18]

As discussed above, an innovative and unique feature of the UNCLOS dispute settlement system is that it is an integral part of the Convention. The jurisdiction of the dispute settlement bodies established thereunder is compulsory and automatic once a state becomes a party to the Convention. China ratified the Convention in 1996 as "a free exercise of [its] sovereignty".[19] As China was actively involved in the negotiations of UNCLOS, it was fully aware of the commitments into which it was entering. It follows, therefore, that as a State Party to UNCLOS, China has given its consent to the jurisdiction of the Convention's compulsory dispute settlement regime, including Annex VII arbitral tribunal, and remains a party to the case notwithstanding its non-appearance.

It is worth recalling that the ICJ in the *Nicaragua* case, in which the US refused to appear before the Court as the respondent during the merits phase, held that "[a] State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; [it] remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute".[20] Judges Wolfrum and Kelly of the International Tribunal for the Law of the Sea [ITLOS] in their Joint Separate Opinion in the *Arctic Sunrise* case took the same

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<http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>; Ministry of Foreign Affairs of the People's Republic of China, "Veil of the Arbitral Tribunal Must Be Tore Down—Vice Foreign Minister Liu Zhenmin Answers Journalists' Questions on the So-called Binding Force of the Award Rendered by the Arbitral Tribunal of the South China Sea Arbitration Case" (13 July 2016), online: Ministry of Foreign Affairs of the PRC <http://www.fmprc.gov.cn/mfa_eng/wjbxw/t1381879.shtml>.

17. The Arbitral Tribunal made several attempts to engage with China and gave China numerous opportunities to present its views on the procedural and jurisdictional aspects of the arbitration and the merits of the Philippines' submissions.

18. Examples of partial and full non-participation before the ICJ include: *Corfu Channel (United Kingdom v. Albania)*, Assessment of the Amount of Compensation Due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, [1949] I.C.J Rep. 244 at 248; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)* [1952] I.C.J. Rep 9; *Nottebohm (Liechtenstein v. Guatemala)* [1955] I.C.J. Rep 4; *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Jurisdiction, [1973] I.C.J Rep. 3 at 12; *Fisheries Jurisdiction (Germany v. Iceland)*, Jurisdiction, [1973] I.C.J Rep. 3 at 12; *Nuclear Test Cases (Australia v. France)* [1974] I.C.J. Rep. 457 at 15; *Nuclear Test Cases (New Zealand v. France)* [1974] I.C.J. Rep 457 at 15; *Aegean Sea Continental Shelf (Greece v. Turkey)* [1978] I.C.J. Rep. 3 at 15; *US Diplomatic and Consular Staff in Tehran (United States v. Iran)* [1980] I.C.J. Rep. 3 at 33; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, [1986] I.C.J. Rep. 14 at 27; *Maritime Delimitation and Territorial Questions Case (Qatar v. Bahrain)*, Jurisdiction and Admissibility, [1995] I.C.J. Rep. 6 at 14.

19. Jerome A. COHEN, "Like It or Not, UNCLOS Arbitration is Legally Binding for China" *East Asia Forum* (11 July 2016), online: East Asia Forum <http://www.eastasiaforum.org/2016/07/11/like-it-or-not-unclos-arbitration-is-legally-binding-for-china/>.

20. *Nicaragua v. United States*, *supra* note 18 at 28.

view, opining that "as stated in article 28 of the Statute of the Tribunal, the non-appearing State remains a party to the proceedings and is bound by the decisions taken".[21] Article 28 of the ITLOS Statute and Article 9 of UNCLOS Annex VII are substantially identical.

Second, in respect of the argument relating to the Tribunal's jurisdiction, it is true that the compulsory jurisdiction of UNCLOS tribunals is subject to several exceptions and limitations. It is not uncommon for a respondent to raise objections to a court's or a tribunal's jurisdiction in international adjudication or arbitration; albeit in the vast majority of cases, these objections are presented before the court or tribunal in written and oral proceedings. China's objection was made known from the beginning of the arbitral process through various out-of-court channels and has been the topic of much discussion.[22] Under Article 288 of UNCLOS, if there is a dispute regarding the tribunal's jurisdiction, the matter shall be settled by the tribunal. The Tribunal in this case actually went to great lengths to deal with China's objections as well as to address other jurisdictional issues not raised by China before establishing its jurisdiction over any of the Philippines' submissions. It is also worth noting that Article 9 of Annex VII UNCLOS, while allowing the arbitration to proceed in the absence of one party, imposes on the Arbitral Tribunal the obligation to "satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law". When considering substantive issues of the case, the Tribunal also made great efforts to gather and examine historical and scientific evidence to establish that "the claim is founded in fact". The Tribunal has also been commended for consulting with independent scientific experts in order to fulfil the requirement of Article 9 of Annex VII.[23]

Finally, in considering whether the Arbitral Tribunal was a "legitimate court", it is pertinent to determine whether the constitution of the Tribunal was consistent with the procedures set out under Annex VII. China has questioned whether the Arbitral Tribunal was a "legitimate court" for various reasons: (1) the Arbitral Tribunal was not an "international court"; (2) the establishment of the Arbitral Tribunal was political in nature due to the involvement of the then ITLOS President, Judge Yanai, a Japanese national; (3) the Tribunal did not have any arbitrators from Asia, which

21. *"Arctic Sunrise" (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, [2013] I.T.L.O.S. Rep. 230, Joint Separate Opinion of Judge Wolfrum and Judge Kelly, at 6.

22. The Chinese Journal of International Law dedicated the whole of Volume 15, Issue 2, to the South China Sea arbitration. See e.g. Sienho YEE, "The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns" (2016) 15 Chinese Journal of International Law 219; Chris WHOMERSLEY, "The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Critique" (2016) 15 Chinese Journal of International Law 239; Sreenivasa Rao PEMMARAJU, "The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility" (2016) 15 Chinese Journal of International Law 265; Stefan TALMON, "The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility" (2016) 15 Chinese Journal of International Law 309.

23. Makane Moïse MBENGUE, "The South China Sea Arbitration: Innovations in Marine Environmental Fact-Finding and Due Diligence Obligations" *AJIL Unbound* (12 December 2016), online: AJIL Unbound <https://www.asil.org/blogs/symposium-south-china-sea-arbitration-south-china-sea-arbitration-innovations-marine#_ftnref19>.

meant that the arbitrators might not have been aware of the Asian culture as well as the South China Sea issues; and (4) the arbitrators were paid for by the Philippines.[24]

It is true that an Annex VII arbitral tribunal is not a permanent institution similar to the ICJ or the ITLOS. This, however, has no bearing on the authority of the arbitral tribunal. Arbitration has long been used to settle international disputes, even prior to permanent judicial institutions. It has also been recognized as a legitimate means of peaceful dispute resolution under Article 33(1) of the UN Charter. Article 287 of UNCLOS explicitly provides for arbitration under Annex VII as one of the four choices of procedure for States Parties. China's doubts regarding the status of ad hoc arbitral tribunals contradicts its own position and actual involvement in resolving investment or commercial disputes in the past.

With respect to the establishment of the Arbitral Tribunal, in line with its policy of non-participation, China did not select the arbitrators or attempt to engage in discussion with the Philippines regarding the selection of members of the Tribunal. As a result, under Article 3(e) of Annex VII, the appointment of arbitrators necessarily fell upon the then ITLOS President, Judge Yanai. The invocation of Article 3(e) of Annex VII to confer appointment power to a third-party was to pre-empt "the possible frustration of the arbitral proceedings through the failure of a party to take the requisite action".[25] The task of the ITLOS President is confined to appointing arbitrators. Other than that, he had no other role in the arbitral process. China could have challenged any arbitrators "if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence".[26] China decided against that option. Nor did it provide any evidence to substantiate the allegation that Judge Yanai "exerted his influence on the proceedings of the Arbitral Tribunal afterwards",[27] or to question his independence and impartiality in selecting the arbitrators.

The fact that none of the arbitrators in the case, four of whom are current or former ITLOS judges, is from Asia is irrelevant to the functioning of the Tribunal or its ability to render a decision consistent with the law and procedures specified under UNCLOS. Article 4 of Annex VII requires that the arbitral tribunal "shall function in accordance with this Annex and the other provisions of the Convention". In deciding the case, the Arbitral Tribunal is under the obligation to only apply "this Convention and other rules of international law not incompatible with this Convention" in accordance with Article 293 of UNCLOS. Political, historical, or any other non-legal considerations are only relevant to the case insofar as they relate to or serve as legal arguments founded on the basis of international law.

In relation to the finances of the Tribunal, according to Article 7 of Annex VII, "the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares". This is not peculiar to Annex VII arbitral tribunals but is a common feature of ad hoc arbitration, whether interstate or private. It is also a feature that distinguishes arbitral proceedings from permanent judicial

24. "Veil of the Arbitral Tribunal Must Be Tore Down", *supra* note 16. See also Sienho YEE, "The South China Sea Arbitration Decisions on Jurisdiction and Rule of Law Concerns" (2016) 15 Chinese Journal of International Law 219 at 224.

25. Nordquist *et al.*, *supra* note 4 at 427.

26. The Arbitral Tribunal Rules of Procedure, art. 7(1).

27. "Veil of the Arbitral Tribunal Must Be Tore Down", *supra* note 16.

institutions whose expenses are paid by members of the organization or States Parties to the Convention under which these institutions are established. Since China refused to participate in the arbitration, the Philippines was the only party to fulfil its obligation under Article 7. The fact that the expenses of ad hoc arbitral tribunals are borne by the parties to the case does not provide any indication for or impact the way in which the tribunal decides the case.

The awards of the Arbitral Tribunal in the *South China Sea* case are, in short, binding. As provided in Article 11 of Annex VII, they are also final. They remain final and binding upon the parties to the case even when one of them fails to appear in the proceedings, subsequently denounces, or refuses to comply with the decisions. Similarly, in the event that an international court or tribunal in a future case adopts a different interpretation of relevant UNCLOS provisions, including Article 121(3), or that a future treaty provides for a different definition of "rocks", the final and binding nature of the *South China Sea* awards on the Philippines and China in relation to this case would not be terminated. An example in this regard is the interpretation and application of Articles 74 and 83 on the delimitation of the EEZ and continental shelf. Even though, in applying these Articles, the ICJ initially rejected the priority given to the equidistance principle in delimitation,[28] the case-law subsequently took a gradual turn to acknowledge the primacy of equidistance as the starting point in the delimitation process.[29] The development of international jurisprudence and state practice in the method of delimitation, however, does not render the maritime boundaries drawn in the initial cases non-binding on the concerned parties. The fact that a few states interpret and apply UNCLOS differently does not make the awards non-final upon the Philippines and China. A subsequent reopening of the case is not permitted under Article 11 of Annex VII "unless the parties to the dispute have agreed in advance to an appellate procedure". In the *South China Sea* arbitration, no such agreement was reached in advance by the Philippines and China.

III. COMPLIANCE WITH UNCLOS DISPUTE SETTLEMENT DECISIONS

Like many international courts and tribunals, UNCLOS does not have an enforcement mechanism. Political bodies such as the United Nations Security Council, the World Trade Organization's [WTO] Dispute Settlement Body, and the Committee of Ministers of the Council of Europe can and do monitor state compliance with decisions by the ICJ, the WTO, and the European Court of Human Rights, respectively. But even

28. *Continental Shelf (Tunisia/Libya)* [1982] I.C.J. Rep. 18 at 70; *Continental Shelf (Libya/Malta)*, [1985] I.C.J. Rep. 13 at 45.

29. See e.g. *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)* [1993] I.C.J. Rep. 38 at 64; *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)* [2002] I.C.J. Rep. 303 at 288; *Delimitation of the Exclusive Economic Zone and the Continental Shelf (Barbados v. Trinidad and Tobago)*, Decision of 11 April 2006, XXVII RIAA 147–251 at 242–4; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, [2009] I.C.J. Rep. 61 at 118; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* [2002] I.T.L.O.S. Rep. 4 at 240.

their roles are limited. They tend not to play the role of a policeman or enforcement agency at the international level.[30]

The fact that there is no enforcement mechanism, however, does not mean that judicial and arbitral decisions under UNCLOS are generally ignored. On the contrary, a review of state practice that follows suggests that the vast majority of decisions by UNCLOS dispute settlement bodies have been implemented. It is not only small states, but also major powers that have complied with UNCLOS dispute settlement decisions even when they "lost" and the proceedings were unilaterally submitted against them. These cases were initiated under different procedures, such as prompt release and provisional measures proceedings, and concerned various aspects of the law of the sea, including environmental protection and maritime delimitation.

In the *M/V Saiga* case that Saint Vincent and the Grenadines submitted against Guinea, the ITLOS concluded in 1999 that Guinea had violated the rights of Saint Vincent under UNCLOS in arresting and detaining the Saiga. The Tribunal also ordered Guinea to pay a compensation to Saint Vincent.[31] In 2000, Saint Vincent sent a communication to the Tribunal, complaining that it had not received the compensation.[32] Guinea paid the compensation as ordered by the ITLOS in 2001.[33]

In the *Camouco* case and the *Monte Confurco* case that Panama and the Seychelles, respectively, submitted against France, the ITLOS concluded that the bond imposed by France was too high. It ordered that France promptly release the vessels upon the posting of a much lower bond.[34] The decisions were not in France's favour. In the proceedings, France argued that the applications were not admissible and the bond could not be lowered. Upon the ITLOS's decision, however, France immediately released the vessels after Panama and the Seychelles posted the bond as fixed by the ITLOS.[35] Similarly, in the *Hoshinmaru* case that Japan filed against Russia, the ITLOS decided that the amount of bond imposed by Russia was not reasonable.[36] Ten days after the ITLOS ruling, Japan posted the bond as determined by the ITLOS and Russia immediately released the ship.[37]

30. For a discussion on the effectiveness of international adjudication in encouraging compliance with international law, see Karen ALTER, "Do International Courts Enhance Compliance with International Law?" (2003) 25 Review of Asian and Pacific Studies 51–78; Eric POSNER and John YOO, "Judicial Independence in International Tribunals" (2005) 93 California Law Review 1–74; Laurence HELFER and Anne-Marie SLAUGHTER, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93 California Law Review 899–956; Eric A. POSNER and John C. YOO, "Reply to Helfer and Slaughter" (2005) 93 California Law Review 957–73.

31. *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, [1999] I.T.L.O.S. Rep. 10 at 183.

32. ITLOS, *Yearbook 2000*, Vol. 4 (The Hague/London/New York: Kluwer International, 2002) at 149.

33. ITLOS, *Yearbook 2001*, Vol. 5 (The Hague/London/New York: Kluwer International, 2003) at 156.

34. *"Camouco" (Panama v. France)*, Prompt Release, Judgment, [2000] I.T.L.O.S. Rep. 10 at 78; *"Monte Confurco" (Seychelles v. France)*, Prompt Release, Judgment, [2000] I.T.L.O.S. Rep. 86 at 96.

35. ITLOS, *Yearbook 2000*, Vol. 4 (The Hague/London/New York: Kluwer International, 2002) 150; ITLOS, *Yearbook 2001*, Vol. 5 (The Hague/London/New York: Kluwer International, 2003) 156.

36. *"Hoshinmaru" (Japan v. Russian Federation)*, Prompt Release, Judgment, [2005–2007] I.T.L.O.S. Rep. 18 at 102.

37. Helmut TUERK, *Reflections on the Contemporary Law of the Sea*, Vol. 6 (Leiden/Boston: Martinus Nijhoff, 2012) at 145.

In 2001, Ireland initiated arbitral proceedings under Annex VII against the UK in a dispute concerning the MOX plant. It also applied to the ITLOS for provisional measures restraining the UK from commissioning the plant. The ITLOS rejected the UK's objection on jurisdiction and issued an order of provisional measures.[38] Two weeks after the ITLOS's order, Ireland and the UK submitted their reports, indicating that they were co-operating in accordance with the Tribunal's provisional measures.[39] In 2007, Ireland notified the Arbitral Tribunal under Annex VII that it withdrew its claim against the UK and the proceedings were terminated.[40]

Similarly, in the *Land Reclamation* case in 2003, Malaysia initiated arbitral proceedings under Annex VII against Singapore regarding the latter's land reclamation activities, and submitted to the ITLOS a request for provisional measures. The ITLOS ordered the two parties to establish a group of independent experts to conduct a study on the effects of Singapore's activities.[41] The group submitted its report in 2004 and the two governments accepted the experts' recommendations.[42] The Annex VII arbitral proceedings were terminated in 2005 after the two governments signed an agreement ending the dispute.[43]

The track record in terms of state compliance with UNCLOS maritime delimitation decisions has also been encouraging. Both Guyana and Suriname accepted the Annex VII arbitral award regarding the delimitation of their maritime boundary.[44] Bangladesh and Myanmar also announced that they would comply with the ITLOS judgment in the dispute concerning their maritime boundary delimitation.[45] Bangladesh and India also welcomed the Annex VII arbitral award regarding the delimitation of their maritime boundary.[46]

Even when delimitation disputes are brought before a conciliation commission, whose reports are not binding in nature, the states in question have also pledged

38. *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, [2001] I.T.L.O.S. Rep. 95 at 89.

39. ITLOS, *Yearbook 2002*, Vol. 6 (The Hague/London/New York: Kluwer International, 2002) at 138.

40. "MOX Plant Arbitral Tribunal Issues Order No. 6 Terminating Proceedings", Press Release (6 June 2008), online: Permanent Court of Arbitration <https://www.pcacases.com/web/sendAttach/876>.

41. *Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, [2003] I.T.L.O.S. Rep. 10 at 106.

42. Tommy KOH and Jolene LIN, "The Land Reclamation Case: Thoughts and Reflections" (2006) 10 Singapore Yearbook of International Law 1 at 5.

43. *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malaysia v. Singapore)*, Decision of 1 September 2005, [2007] XXVII Reports of International Arbitral Awards 133.

44. "Address to the Nation by His Excellency Bharrat Jagdeo, President of the Republic of Guyana, on the Award of the Guyana-Suriname Arbitral Tribunal, 20 September 2007" *Guyana News and Information* (22 September 2007), online: <http://www.guyana.org/guysur/jagdeo_tribunal_award.html>.

45. Michael HOGAN and Gareth JONES, "Bangladesh Hails UN Ruling in Myanmar Border Dispute" *Reuters* (14 March 2012), online: Reuters <http://uk.reuters.com/article/bangladesh-myanmar-maritime-idUKL5E8EE40F20120314>. Following the judgment, Myanmar amended its Submission to the United Nations Commission on the Limits of the Continental Shelf for the extension of its continental shelf in the Bay of Bengal. "The Republic of the Union of Myanmar Continental Shelf Submission—Executive Summary Amended July 2015" (30 July 2015), at 1, online: United Nations <http://www.un.org/depts/los/clcs_new/submissions_files/mmr08/Myanmar_Amended_Ex_Summary.pdf>.

46. Ruma PAUL, "U.N. Tribunal Rules for Bangladesh in Sea Border Dispute with India" *Reuters* (8 July 104), online: Reuters <http://uk.reuters.com/article/2014/07/08/uk-bangladesh-india-seaborder-idUKKBN0FD15N20140708>; Rupak BHATTACHARJEE, "Delimitation of Indo-Bangladesh Maritime Boundary" Institute for Defence Studies and Analyses (19 August 2014), online: IDSA <http://www.idsa.in/idsacomments/DelimitationofIndo-Bangladesh_rbhattacharjee_190814>.

compliance with the recommendation of the Commission. Australia declared that it accepted the decision on competence of the Conciliation Commission constituted under Annex V of UNCLOS at the request of Timor-Leste.[47] Both parties have also confirmed their commitment to negotiate permanent maritime boundaries under the auspices of the Commission.[48]

While the majority of decisions by UNCLOS dispute settlement bodies have been complied with, there are two cases that did not attain the same level of state compliance. The first one is the *Arctic Sunrise* case brought by the Netherlands in the absence of Russia's participation before both the ITLOS and Annex VII Arbitral Tribunal. When it released the vessel *Arctic Sunrise* and its crew members following the ITLOS's order for provisional measures to that effect, Russia claimed that it was merely following a domestic decision rather than the ITLOS's order.[49] On 14 August 2015, the Arbitral Tribunal established under Annex VII of UNCLOS issued its award, finding that the Netherlands was entitled to compensation for material damage to the *Arctic Sunrise*.[50] Russia, in response to the award, expressed its concern that "the verdict, in effect, encourages less than peaceful protest activities at sea, which hampers completely legitimate activities in the exclusive economic zone and continental shelf", and made no reference to whether it would pay the compensation determined by the Tribunal.[51] In the *South China Sea* case, China has repeatedly said that it would not comply with the awards. It has been found to be in violation of at least three of the Tribunal's rulings.[52] It still imposes the fishing moratorium, occupies Mischief Reef, and continues its construction activities.

There are several mechanisms under UNCLOS to promote compliance with the Convention's dispute settlement decisions. Article 33, paragraph (3) of Annex VI closely follows Article 60 of the ICJ Statute in allowing the ITLOS to construe "the meaning or scope" of its decisions at the request of any party to the original case.

47. "Timor Sea Conciliation" *Joint Media Release by the Hon. Julie Bishop, Minister for Foreign Affairs and Senator the Hon. George Brandis QC, Attorney-General* (26 September 2016), online: Minister for Foreign Affairs <http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160926.aspx>. The parties reached an agreement on the text of a settlement treaty in October 2017. See *Conciliation between the Democratic Republic of Timor-Leste and the Commonwealth of Australia*, Press Release (15 October 2017), online: <https://www.pcacases.com/web/sendAttach/2240>.

48. "Conciliation Proceedings Between the Government of the Democratic Republic of Timor-Leste and the Government of the Commonwealth of Australia Pursuant to Article 298 and Annex V of the UN Convention on the Law of the Sea", *Trilateral Joint Statement* (9 January 2017), online: <https://pca-cpa.org/wp-content/uploads/sites/175/2017/01/20170109-Trilateral-Joint-Statement.pdf>.

49. Pavel BANDAKOV, "Russia Parliament Approves Amnesty for Prisoners" *BBC* (18 December 2013), online: BBC <http://www.bbc.com/news/world-europe-25433426>; John VIDAL, "Arctic 30: Russia Releases Greenpeace Ship" *The Guardian* (6 June 2014), online: The Guardian <https://www.theguardian.com/environment/2014/jun/06/arctic-30-sunrise-russia-to-release-greenpeace-ship>.

50. *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on Merits, [14 August 2015] at 401, online: Permanent Court of Arbitration <http://www.pcacases.com/web/sendAttach/1438>. The Tribunal reserved questions of the quantum of compensation and interest to a later phase of the proceedings.

51. The Ministry of Foreign Affairs of the Russian Federation, "Comment by Foreign Ministry Spokesperson Maria Zakharova on the International Arbitration Court Ruling in the Arctic Sunrise Case" (25 August 2015), online: <http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/1707214>.

52. Julian KU and Chris MIRASOLA, "Tracking China's Compliance with the South China Sea Arbitral Award" *Lawfare* (3 October 2016), online: Lawfare <https://www.lawfareblog.com/tracking-chinas-compliance-south-china-sea-arbitral-award>.

As indicated in the few requests that have been submitted to the ICJ in accordance with Article 60 of its Statute, a dispute over "the meaning or scope of a judgment" can be "concretized as a dispute over the manner of implementation of a judgment".[53] In the *Preah Vihear Temple* case, Cambodia went back to the ICJ in 2011 to request an interpretation of the Court's 1962 original judgment in which the Court found that "Thailand is under an obligation to withdraw any military [...] stationed by her at the Temple, or in *its vicinity* on Cambodian territory".[54] Cambodia argued that Thailand had not fully implemented the 1962 judgment by erecting a barbed wire fence on the ground and having troops present in the "vicinity of the Temple".[55] The Court accepted Cambodia's request and later issued a provisional order and a follow-up judgment that were eventually implemented by both parties. The *Preah Vihear Temple* case is certainly different from the *South China Sea* case in many respects. Nevertheless, the outcome of Cambodia's request for interpretation does suggest that bringing a dispute concerning implementation back to the body that made the original decision can help promote compliance.[56]

For arbitral awards, UNCLOS specifically confers on Annex VII arbitral tribunals the authority to verify the parties' implementation of their awards.[57] Article 12 of Annex VII provides that "[a]ny controversy which may arise between the parties to the dispute as regards the interpretation or *manner of implementation* of the award may be submitted by *either* party for decision to the arbitral tribunal which made the award" (emphasis added). No such request has so far been submitted to any UNCLOS arbitral tribunal, but the possibility of further proceedings on award implementation and a follow-up decision by the arbitral tribunal in this regard could create additional pressure on the parties to adhere to the initial award.

In addition, parties to the disputes may consider raising issues pertaining to the implementation of UNCLOS dispute settlement decisions at certain political or technical fora including, among others, UNCLOS Meeting of States Parties, the United Nations General Assembly's meetings on Ocean and Law of the Sea or, in the *South China Sea* case, even regional organizations such as the Association of Southeast Asian Nations [ASEAN]. Employing international and regional political mechanisms may not always succeed, but it can add another layer of pressure on the parties. Nicaragua, for example, was able to persuade the General Assembly to pass a resolution calling for compliance by the US with the ICJ judgment in the *Nicaragua* case.[58] Nigeria initially rejected the ICJ judgment in the *Land and Maritime Boundary* case. Under diplomatic

53. Nordquist *et al.*, *supra* note 4 at 436.

54. *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)* [2013] I.C.J. Rep. 281 at 21 (emphasis added).

55. *Ibid.*, at 38.

56. In 2008, Mexico also requested the ICJ to interpret its judgment in the *Avena* case. The request, in effect, concerned the implementation of the judgment. See *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* [2009] I.C.J Rep. 3 at 10.

57. Nordquist *et al.*, *supra* note 4 at 437.

58. *Judgment of the International Court of Justice of 27 June 1986 Concerning Military and Paramilitary Activities in and Against Nicaragua: Need for Immediate Compliance*, GA Res A/RES/41/31 (1986). The dispute between the two states was eventually resolved when Nicaragua withdrew its claim for compensation, "[t]aking into consideration that the Government of Nicaragua and the Government of the United States of America have reached agreements aimed at enhancing Nicaragua's economic, commercial and

pressures at the UN, however, it eventually agreed to work with Cameroon under a UN commission to implement the ICJ judgment.[59]

IV. CONCLUSION: SIGNIFICANCE OF THE AWARD IN THE ABSENCE OF AN ENFORCEMENT MECHANISM

Decisions by a court or tribunal having jurisdiction under UNCLOS, including the arbitral awards in the *South China Sea* case, are final and binding. The binding and final nature of these decisions is provided for under UNCLOS and is further underscored by the compulsory jurisdiction built into the dispute settlement system. As a result, parties to a dispute have an obligation to comply with these decisions. Non-compliance means UNCLOS is violated, UNCLOS dispute settlement bodies are disregarded, the delicate compromises implied in the Convention are upset, and international law is disrespected. Non-compliance also makes the legal relations between the concerned parties unstable and creates obstacles for the parties to move towards peaceful and lawful uses of the oceans.

For the South China Sea dispute, China's failure to comply with the Arbitral Tribunal's decisions results in a continued violation of the Philippines' sovereign rights and jurisdiction in the latter's EEZ. Its reputation will likely be negatively affected as China risks being seen as a rising power with little respect or patience for international law. Moreover, the South China Sea dispute is a matter of concern for many other states. If one party's action is inconsistent with the awards and international law in general, the other party or major powers might take measures to challenge that action. Ultimately that would not be in the interest of China and the Philippines and of peace, stability, and security in the region.

In any case, the fact that China has not, and potentially will not, fully comply with the arbitral awards does not negate the significance of the South China Sea arbitration. First, the case demonstrates the functionality of UNCLOS dispute settlement mechanisms. It reinforces the compulsory nature of the UNCLOS dispute settlement regime and highlights the role of UNCLOS in providing a level playing field for all States Parties, big or small, to settle their disputes and protect their legal rights. Even if compliance may not be immediately observed in a limited number of cases, the generally high compliance rate in the case-law of the UNCLOS dispute settlement system strengthens the confidence among states, particularly smaller ones, that UNCLOS dispute settlement mechanisms are indeed a fruitful means to resolve disputes and help protect their rights under the Convention.

Second, together with other UNCLOS cases, the South China Sea arbitration indicates that unilateral submission of a dispute to an UNCLOS settlement mechanism has increasingly become a normal, accepted practice. During the last decades, nine maritime disputes in Asia alone have been unilaterally submitted to UNCLOS dispute

technical development to the maximum extent possible". See Letter of the Agent of Nicaragua to the Registrar (12 September 1991), online: <http://www.icj-cij.org/files/case-related/70/9635.pdf>.

59. Cameroon-Nigeria Mixed Commission, online: United Nations Office for West Africa <https://unowa.unmissions.org/cameroon-nigeria-mixed-commission-0>.

settlement bodies, including the *Southern Bluefin Tuna* cases (*New Zealand v. Japan; Australia v. Japan*), the *Land Reclamation* case in and around the Straits of Johor (*Malaysia v. Singapore*), the *"Hoshinmaru"* case (*Japan v. Russia*), the *"Tomimaru"* case (*Japan v. Russia*), the dispute concerning the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (*Bangladesh v. Myanmar*),[60] the Bay of Bengal Maritime Boundary Arbitration (*Bangladesh v. India*), the *South China Sea* case (the *Philippines v. China*), and the Timor Sea dispute (*Timor-Leste v. Australia*).

Third, the South China Sea arbitration upholds the rule of law in the oceans and helps answer several legal questions regarding the interpretation and application of UNCLOS. The arbitral award protected the EEZ regime, which is essential to UNCLOS. It confirmed that claims of historic rights to the natural resources in the EEZ of other coastal states are incompatible with the EEZ regime provided for in the Convention. It also offered for the first time an authoritative interpretation of Article 121(3). As a result, the scope of the South China Sea disputes has been narrowed down. The overlapping areas in the Spratlys are now limited to only twelve nautical miles from the disputed rocks. As the awards strengthen the position of the Philippines and other ASEAN claimants, it will potentially influence their negotiation directions and strategies. The space for compromise in their EEZ will decrease, but their incentives to engage in fishing co-operation, protection of the marine environment, and co-operation on maritime security and marine scientific research in the newly defined overlapping areas will likely increase. Overall, the arbitration will hopefully lay out the legal framework for future negotiations and settlement of the underlying maritime boundary and sovereignty disputes and will contribute to peace, security, and development in the region.

60. Arbitral proceedings were unilaterally initiated by Bangladesh on 8 October 2009. On 4 November 2009, Myanmar made a declaration in accordance with art. 287 selecting the ITLOS as the forum for the dispute. Bangladesh did the same thing on 12 December 2009. On 13 December 2009, Bangladesh invited the ITLOS to settle the dispute, given that the two parties selected the same procedure for the dispute. See ITLOS Press Release No. 140: Proceedings Instituted in the Dispute Concerning Maritime Boundary of Bangladesh and Myanmar in the Bay of Bengal (16 December 2009), online: International Tribunal for the Law of the Sea <https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR.140-E.pdf>.