
NOTE & COMMENT

Russian Absence at the *Arctic Sunrise* Case: A Comparison with the Chinese Position in the South China Sea Arbitration

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The MV Arctic Sunrise, a vessel bearing the flag of the Netherlands, was detained by Russian authorities. The Netherlands instituted Annex VII arbitral proceedings against the Russian Federation and requested the International Tribunal for the Law of the Sea to prescribe provisional measures for the immediate release of the vessel and its crewmembers. On January 22, 2013, the Philippines instituted arbitral proceedings to challenge China's claims over the South China Sea and the underlying seabed. Both China and Russia claim that the tribunal in question does not have jurisdiction, and neither of them appeared before the tribunal. This article offers an analysis of the facts and reasoning in the Arctic Sunrise case concerning Russia's declaration and its non-appearance. Furthermore, this article explores the relevant provisions of UNCLOS and relevant views, as well as attitudes of ITLOS towards certain issues.

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1. Overview

The *MV Arctic Sunrise* (hereinafter *Arctic Sunrise*) is a ship bearing the flag of the Netherlands; she was used by Greenpeace International activists to protest against Russia's oil platform.¹ Later, the vessel and her crewmembers were detained by Russia in its EEZ.² In a subsequent exchange of *note verbale*, Russia asserted that the actions taken against the vessel and her crewmembers were in conformity with the UNCLOS.³ However, the Netherlands contended otherwise.⁴ Based on the different views of the two States and the urgent situation,⁵ on October 4, 2013, the Netherlands initiated arbitration proceedings against Russia under Annex VII of UNCLOS.⁶

On October 21, 2013, pending the constitution of the Annex VII arbitral tribunal, the Netherlands requested the ITLOS to prescribe provisional measures for the immediate release of the vessel and her crewmembers.⁷ In its *note verbale* sent to the ITLOS, on October 22, 2013, Russia, rejecting the arbitral proceedings brought against her, declared that she would not take part in the ITLOS proceedings.⁸

The primary purpose of this research is to compare the Russian stance in *Arctic Sunrise* case to that of China in the South China Sea Arbitration. The authors will mainly try to analyze the Russian Declaration on the ratification of the UNCLOS as laid down under Part XV, Section 2 of the UNCLOS and the default of

¹ Request for the Prescription of Provisional Measures under Article 290, Paragraph 5 of the United Nations Convention on the Law of the Sea, IV Statement of Facts, 6, ¶ 20, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Request_provisional_measures_en_withtranslations.pdf (last visited on Oct. 30, 2015).

² *Id.* at 7, ¶ 21.

³ *Id.* at 8, ¶ 26.

⁴ *Id.*

⁵ *Id.* at 9, ¶ 27.

⁶ International Tribunal for the Law of the Sea, Press Release 201, Request for Provisional Measures Submitted Today to the Tribunal in the Arctic Sunrise Case (Oct. 21, 2013), available at https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_201_E.pdf (last visited on Oct. 19, 2015).

⁷ *Id.*

⁸ Arctic Sunrise (Neth. v. Russ.), ITLOS Case No. 22 (2013), Order of Nov. 22, 2013, at 12 ¶ 46, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf (last visited on Oct. 19, 2015).

appearance. This paper is composed of eight parts including a short Introduction and Conclusion. Each part will try to identify implications of their non-appearance before the tribunals.

2. The Significance of Arctic Sunrise Case

The invocation of the declaration and the non-appearance of Russia are quite similar to the actions taken by China in the South China Sea Arbitration. On January 22, 2013, the Philippines instituted arbitration proceedings against China pursuant to Article 287 and Annex VII of UNCLOS to challenge China's claims over the South China Sea and the underlying seabed.⁹ According to China, however, the arbitral tribunal does not have jurisdiction over the Philippines' claims.¹⁰ In China's view, even if the dispute is to be characterized as being related to the interpretation or application of the UNCLOS, the subject matter of the dispute was involved in maritime delimitation.¹¹ In 2006, China made a declaration under Article 298 of the UNCLOS, stating that China "does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in Paragraph 1 (a) (b) and (c) of Article 298 of the Convention."¹² Therefore, the current dispute is excluded by China's 2006 declaration.¹³ Together, China has claimed that the arbitral tribunal does not have jurisdiction over the claims raised by the Philippines.¹⁴ In these two cases, both China and Russia have denied the jurisdiction of the arbitral tribunal with their declarations. However, the two States rely on it differently.

In the South China Sea arbitration, China did not appear before the arbitral tribunal, either. On February 19, 2013, China rejected the Philippines' Notification

⁹ Department of Foreign Affairs of Republic of the Philippines, Notification and Statement of Claims, issued to the Embassy of the People's Republic of China in Manila, serial no 13-0211, Jan. 22, 2013, available at <https://seasresearch.files.wordpress.com/2014/12/notification-and-statement-of-claim-on-west-philippine-sea.pdf> (last visited on Oct. 19, 2015).

¹⁰ PRC Ministry of Foreign Affairs, 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, Dec. 7, 2014, available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml (last visited on Oct. 19, 2015).

¹¹ *Id.* ¶ 3 & pt. IV.

¹² UN Treaty Collection, available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (last visited on Oct. 19, 2015).

¹³ *Supra* note 10.

¹⁴ *Id.*

and Statement of Claims, expressing that she would not accept the arbitration.¹⁵ In a *note verbale* sent to the Permanent Court of Arbitration (“PCA”) dated August 1, 2013, China restated not to participate in the arbitral proceedings instituted by the Philippines.¹⁶ Russia has the same position in the *Arctic Sunrise* case.

3. The Order of *Arctic Sunrise* case

On November 22, 2013, the ITLOS issued its Order, requiring Russia to release the vessel and her crewmembers immediately, upon the posting of a bond by the Netherlands.¹⁷

A. The Russian Declaration to Exclude the Procedures in Section 2 of Part XV of the UNCLOS

In the *Arctic Sunrise* case, the ITLOS was concerned as to whether the limitations and exceptions contained in Section 3 of Part XV of the UNCLOS would exclude the *prima facie* jurisdiction of the arbitral tribunal.¹⁸ The Tribunal examined the declaration of Russia upon the ratification of the UNCLOS in 1997. The Russian declaration reads as follows:

The Russian Federation declares that, in accordance with Article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in Section 2 of Part XV of the Convention, entailing binding decisions with respect to [...] disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction [...].

The Russian Federation, bearing in mind Articles 309 and 310 of the Convention, declares that it objects to any declarations and statements made in the past or which may be made in future when signing, ratifying or acceding to the Convention, or

¹⁵ PRC Ministry of Foreign Affairs, Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference (Feb. 19, 2013), available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1015317.shtml (last visited on Oct. 19, 2015).

¹⁶ PCA, Arbitration between the Republic of the Philippines and the People’s Republic of China: Arbitral Tribunal Established Rules of Procedure and Initial Timetable, Aug. 27, 2013, available at [http://www.pca-cpa.org/PH-CN%20-%20Press%20Release%20\(ENG\)%2020130827e141.pdf?fil_id=2311](http://www.pca-cpa.org/PH-CN%20-%20Press%20Release%20(ENG)%2020130827e141.pdf?fil_id=2311) (last visited on Oct. 19, 2015).

¹⁷ *Supra* note 8, at 23, ¶ 105.

¹⁸ N. KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 62 (2005).

made for any other reason in connection with the Convention, that are not in keeping with the provisions of Article 310 of the Convention. The Russian Federation believes that such declarations and statements, however phrased or named, cannot exclude or modify the legal effect of the provisions of the Convention in their application to the party to the Convention that made such declarations or statements, and for this reason they shall not be taken into account by the Russian Federation in its relations with that party to the Convention.¹⁹

Based on this declaration, on October 22, 2013, Russia informed the ITLOS Registry that she would neither accept the Annex VII arbitral proceedings, nor does she intend to participate in the ITLOS procedures.²⁰

A close examination of the 1997 Russian declaration and Article 298 of the UNCLOS show that they are different in their wording.²¹ Article 298, Paragraph 1(b) reads:

when signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under Section 1, declare in writing that it does not accept any one or more of the procedures provided for in Section 2 with respect to [...] disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, Paragraph 2 or 3 [...].

It can be seen from the wording of Article 298, paragraph 1(b) that there are limitations on the types of law-enforcement activities that a State could exclude.²² States are only permitted to exclude disputes concerning law enforcement activities with respect to marine scientific research and fisheries.²³ Nonetheless, it could be seen from the Russian declaration and the *note verbale*, that Russia intended to exclude disputes relating to all law enforcement activities, instead of limiting her to disputes concerning marine scientific research or fisheries.²⁴ As a result, in Russia's view, the Annex VII arbitral tribunal does not have jurisdiction owing to its declaration. However, this was rejected by the Netherlands, as not being allowed by

¹⁹ *Supra* note 8, at 11, ¶ 41.

²⁰ *Id.* at 4, ¶ 9.

²¹ *Id.* at 5, ¶ 10 (Separate Opinions of Judge Wolfrum and Judge Kelly).

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 4, ¶ 9.

the UNCLOS.²⁵

Another objection of the Netherlands is that allowing the application of the Russian declaration to other types of disputes would be inconsistent with Article 309 of the UNCLOS.²⁶ This would also be contrary to Russia's own declaration, which states that Russia "objects to any declarations [...] that are not in keeping with the provisions of Article 310 of the Convention [...]" According to Russia, even if a State has made such declaration, this cannot exempt the State from the application of the UNCLOS provisions.²⁷

The ITLOS ruled in favor of the Netherlands that the Russian Declaration could only exclude disputes with respect to marine scientific research and fisheries so that Annex VII tribunal would have *prima facie* jurisdiction over the dispute.²⁸

The *Arctic Sunrise* case shows that the declaration made by States under the UNCLOS can only take effect within the framework permitted by the Convention.

B. The Non-Appearence of Russia

From the beginning, Russia informed the ITLOS of her intention not to participate in the proceedings of the *Arctic Sunrise* case.²⁹ Russia is the first respondent State refusing to participate in proceedings before the ITLOS.³⁰ In dealing with this situation, the Tribunal referred to the case law of the International Court of Justice ("ICJ") in its previous cases involving non-appearance to support its position.³¹ First, non-appearance is not a frustration to the proceedings and it was entitled to proceed to prescribe provisional measures, as long as it has afforded the parties an opportunity to submit their views.³²

Second, non-appearance does not affect the party status of the non-appearing State and the binding character of the decision.³³

Third, in fulfilling its obligations, the Tribunal has to bear in mind the principle of equality.³⁴ This means that in the event where one of the parties is absent, deriving

²⁵ *Id.* at 12, ¶ 43.

²⁶ *Id.* at 12, ¶ 44.

²⁷ *Id.* at 11, ¶ 41.

²⁸ *Id.* at 12, ¶ 45.

²⁹ *Id.* at 12, ¶ 46.

³⁰ *Id.* at 1, ¶ 1 (Separate Opinion of Judge Paik).

³¹ *Id.*

³² *Id.* at 13, ¶ 48.

³³ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 24, ¶ 28 (June 27).

³⁴ *Id.* at 26, ¶ 31.

benefits from this situation by either party is prohibited.³⁵ In addition, the Tribunal mentioned that the absence of Russia “hinder[s] the regular conduct of the proceedings and affect[s] the good administration of justice.”³⁶ Had Russia appeared before the Tribunal, it could have provided the Tribunal with more materials on the facts of the case, as well as on the applicable law.³⁷ The task of the Tribunal became more difficult because of Russia’s absence.³⁸

Several judges also addressed this point in their separate opinions. Declaration of Judge *Ad Hoc* Anderson mentions that:

The Tribunal did not have the benefit of receiving the Russian Federation’s account of the facts, notably the events occurring on 18 and 19 September 2013 prior to the arrest of the Arctic Sunrise, as well as the Russian Federation’s arguments on points of law.³⁹

Judges Wolfrum and Kelly stated that the Tribunal only had access to the facts and arguments submitted by the Netherlands.⁴⁰ It could not have had the assistance of Russia.⁴¹ Therefore, the Tribunal had to obtain information from other sources, including Russia’s diplomatic communications, legislation and the decision of Russian courts, which were neither complete nor consistent.⁴² Moreover, although the Tribunal could obtain information from these materials, they cannot make up the absence of Russia.⁴³ In his dissenting opinion, Judge Kulyk also stated that Russia unfortunately did not submit to the Tribunal its account of facts of the case.⁴⁴ In addition to the difficulties caused to the Tribunal, there are other consequences of non-appearance that Russia “weakens its own position concerning the legal dispute.”⁴⁵ It also posed difficulties to the Netherlands in the proceedings.⁴⁶

In their Joint Separate Opinion, Judges Wolfrum and Kelly went beyond the consequences of non-appearance on the non-appearing State, the Applicant State and the Tribunal. They held that non-appearance brought up a more fundamental

³⁵ *Id.*

³⁶ *Supra* note 8, at 14, ¶ 53.

³⁷ *Id.* at 14, ¶ 54.

³⁸ *Id.* at 14, ¶ 55.

³⁹ *Id.* at 1, ¶ 2 (Declaration of Judge *Ad Hoc* Anderson).

⁴⁰ *Id.* at 2, ¶ 5 (Joint Separate Opinion of Judge Wolfrum and Judge Kelly).

⁴¹ *Id.* at 2-3, ¶ 5.

⁴² *Id.* at 1, ¶ 2 (Declaration of Judge *Ad Hoc* Anderson).

⁴³ *Id.* at 3, ¶ 5 (Joint Separate Opinion of Judge Wolfrum and Judge Kelly).

⁴⁴ *Id.* at 4, ¶ 10 (Dissenting Opinion of Judge Kulyk).

⁴⁵ *Id.* at 2, ¶ 5 (Joint Separate Opinion of Judge Wolfrum and Judge Kelly).

⁴⁶ *Id.*

question.⁴⁷ When States become parties to the UNCLOS, they have consented to the UNCLOS dispute settlement mechanisms.⁴⁸ If States cannot settle their disputes through Section 1 of Part XV of the UNCLOS, they undertake to submit their disputes to the dispute settlement mechanisms established by the Convention.⁴⁹ Therefore, failure to appear is incompatible with the aim of the UNCLOS dispute settlement mechanisms.⁵⁰ In the view of the two judges, the presence of the parties to be engaged in discussions with each other as well as the tribunal is the core to the procedures of international tribunals.⁵¹ Non-appearance is thus inconsistent with this process.⁵² Citing Gerald Fitzmaurice's words, they describe non-appearance as damaging the 'core' of UNCLOS dispute settlement mechanisms.⁵³ Judge *Ad Hoc* Anderson also views that non-appearance does not contribute to the functioning of UNCLOS dispute settlement mechanisms.⁵⁴ Nor does non-appearance "serve ... the rule of law in international relations."⁵⁵ It seems that the judges of the Tribunal are concerned that non-appearance will damage the UNCLOS dispute settlement mechanisms and the rule of law in the international community.

4. Implications of the South China Sea Arbitration

A. China's 2006 Declaration on the Jurisdiction of the Arbitral Tribunal

In the South China Sea Arbitration, China's 2006 declaration should be considered first. As for China, even if the arbitral tribunal finds out that the dispute is related to the interpretation or application of the UNCLOS, the subject matter would be concerned with maritime delimitation, which is excluded by China's declaration.⁵⁶ The Philippines is aware of China's 2006 declaration, but in order to submit the dispute to arbitration, she divided the dispute into several separate issues, and then

⁴⁷ *Id.* at 3, ¶ 6.

⁴⁸ United Nations Convention of the Law of the Sea art. 287, 1833 U.N.T.S. 397.

⁴⁹ *Id.* art. 286.

⁵⁰ *Supra* note 8, at 3, ¶ 6 (Joint Separate Opinion of Judge Wolfrum and Judge Kelly).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1, ¶ 2 (Declaration of Judge *Ad Hoc* Anderson).

⁵⁵ *Id.*

⁵⁶ *Supra* note 10, pt. IV.

submitted some of these issues to arbitration to avoid the application of China's declaration.⁵⁷ These issues are essential to the delimitation of maritime boundaries.⁵⁸ If invoking the 2006 Declaration positively, China's non-acceptance of the arbitration is well founded, which is fundamentally different from that of Russia.

B. Non-Appearance

Under the UNCLOS dispute settlement mechanisms, the South China Sea Arbitration is the first case where the respondent State was absent.⁵⁹ China is the first State choosing not to appear in an Annex VII arbitral proceeding,⁶⁰ while Russia was the first State refusing to take part in an ITLOS proceeding.⁶¹ As noted by members of the ITLOS, non-appearance is contrary to the UNCLOS dispute settlement mechanisms⁶² and even to the rule of law of the global society.⁶³ What is then, the legal nature of non-appearance? Will non-appearance hinder the function of the tribunal? Would one-party arbitration be futile in the end?

5. The Legal Nature of Non-Appearance

Considering the UNCLOS dispute settlement mechanisms, do States have the right to non-appearance or is there a duty to appear regardless? Within the dispute settlement mechanisms established specifically by the UNCLOS - the ITLOS Annex VII arbitral tribunal and Annex VIII arbitral tribunal - there are provisions for non-appearance, namely Article 9 of Annex VII, and Article 28 of Annex VI.

Article 9 of Annex VII and Article 28 of Annex VI of UNCLOS are quite similar. The UNCLOS drafting history shows that Article 28 of the ITLOS Statute and Article 9 of Annex VII are parallel to Article 53 of the ICJ Statute.⁶⁴ Moreover, the ITLOS

⁵⁷ *Id.* ¶ 65.

⁵⁸ *Id.* ¶ 66.

⁵⁹ S. Talmon, *The South China Sea Arbitration: Is There a Case to Answer?*, in *THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE* 19 (S. Talmon & Bing Bing Jia eds., 2014).

⁶⁰ *Id.*

⁶¹ *Supra* note 8, at 1, ¶ 1 (Separate Opinion of Judge Paik).

⁶² *Id.* at 3, ¶ 6 (Joint Separate Opinion of Judge Wolfrum and Judge Kelly).

⁶³ *Id.* at 1, ¶ 2 (Declaration of Judge *Ad Hoc* Anderson).

⁶⁴ M. NORDQUIST, S. ROSENNE & L. SOHN (EDS.), *V UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY* 389 (1989).

referred to the case law of the ICJ in its previous decisions.⁶⁵ Thus, Article 53 of the ICJ Statute and the case law of the Court could help to understand the default provisions in the ITLOS Statute and Annex VII.⁶⁶ Take Article 9 of Annex VII of UNCLOS as an example. Article 9 reads:

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

Article 53 of the ICJ Statute and the practice of the Court lead the following conclusions. First, the ICJ usually expresses its regret in the situation of non-appearance of one party.⁶⁷ This is because non-appearance “obviously has a negative impact on the sound administration of justice.”⁶⁸ When a court or tribunal expresses its regret over a particular action, it is difficult to characterize the action as a ‘right.’ However, although non-appearance brings difficulties to the tribunal which may feel regret over a party’s absence, non-appearance itself should not generate any negative outcomes to the non-appearing State.⁶⁹ Non-appearance does not mean that the non-appearing State accepts the facts or arguments submitted by the appearing party or has “no, or no convincing, counter-argument.”⁷⁰ Article 9 of Annex VII and Article 28 of Annex VI ensure that, in the situation of non-appearance, the tribunal should make its decision following both jurisdiction and merits;⁷¹ it guarantees that an automatic judgment sustaining the claims of the Applicant State will not happen as a result of non-appearance.⁷² As Talmon comments,

⁶⁵ Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), ITLOS Case No. 16, Order of Mar. 14, 2012, ITLOS Rep. 61, 184.

⁶⁶ A. Pellet, *The Case Law of the ICJ in Investment Arbitration*, 28 ICSID REV. 227 (2013).

⁶⁷ Fisheries Jurisdiction (FRG v. Iceland), Merits, 1974 I.C.J. 181, ¶ 18 (July 25); Fisheries Jurisdiction (U.K. v. Iceland), Merits, 1974 I.C.J. 9, ¶ 17 (July 25); Nuclear Tests (NZLR v. Fr.), Judgment, 1974 I.C.J. 461, ¶ 15 (Dec. 20); Nuclear Tests (Australia v. Fr.), Judgment, 1974 I.C.J. 257, ¶ 15 (Dec. 20); Aegean Sea Continental Shelf Case (Greece v. Turk.), Judgment, 1978 I.C.J. 7, ¶ 15 (Dec. 19). *See also supra* note 33, at 23, ¶ 27.

⁶⁸ *Id.*

⁶⁹ *Supra* note 59, at 16.

⁷⁰ *Id.*

⁷¹ *Supra* note 48, annex VI, art. 28; annex VII, art 9.

⁷² *Supra* note 33, at 24, ¶ 28.

The intention of this article is to protect both parties: the appearing party against any attempts at frustrating the arbitral proceedings and the non-appearing party against any unjustified and frivolous claims.⁷³

Second, like the ICJ Statute, the UNCLOS sets no sanctions for the non-appearing State. In its previous decisions, the ICJ has never punished a State for its non-appearance.⁷⁴ This may be justified on the basis that: “A State is free to decide how it will conduct its case, and in the nature of litigation between States this includes a decision not to appear.”⁷⁵ There is thus no obligation to appear under Article 9 of Annex VII or Article 28 of Annex VI.

In conclusion, non-appearance is not a right. However, there is also no indication that there is a duty to appear within the UNCLOS dispute settlement mechanisms.

6. Will Non-Appearance Hinder the Functioning of the Tribunal?

The ICJ ruled, in the *Nicaragua* case, that existing proceedings would not be frustrated because of one party’s absence.⁷⁶ Article 9 of Annex VII and Article 28 of Annex VI of the UNCLOS also provides that when one party does not appear, the Applicant State is entitled to request the Tribunal to proceed with its award.

When a party does not appear, the tribunal also has to make sure that the Applicant’s claim is grounded in fact and law.⁷⁷ As to the jurisdictional issues, the tribunal is obliged to establish its own jurisdiction.⁷⁸ Article 288(4) of the UNCLOS provides that when there is a dispute over the jurisdiction of the tribunal, the tribunal has the competence to decide its own jurisdiction.⁷⁹ As to law applicable, the principle of *iura novit curia* shall apply.⁸⁰ Therefore, it is incumbent on the tribunal to find and apply the law to the dispute.⁸¹ The tribunal will not entirely rely on the

⁷³ *Supra* note 59, at 19.

⁷⁴ S. Alexandrov, *Non-Appearance before the International Court of Justice*, 33 COLUM. J. TRANSNAT’L L. 46 (1995).

⁷⁵ S. ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 79 (6th ed. 2003).

⁷⁶ *Supra* note 33, at 24, ¶ 28.

⁷⁷ *Supra* note 71.

⁷⁸ *Grand Prince (Belize v. Fr.)*, ITLOS Case No. 8, Judgment of April 20, 2001, ITLOS Rep. 41, at 77.

⁷⁹ *Supra* note 48, art. 288(4).

⁸⁰ *Supra* note 33, at 24, ¶ 29.

⁸¹ *Fisheries Jurisdiction (FRG v. Iceland)*, Merits, 1974 I.C.J. 181, ¶ 18 (July 25); *Fisheries Jurisdiction (U.K. v. Iceland)*,

parties to find the law.⁸²

As to facts, in the *Nuclear Tests* case, the ICJ was required to satisfy itself that the Court already had all the facts that it could obtain, particularly when one of the parties was absent.⁸³ Therefore, the tribunal could extend its considerations to information that are from other sources.⁸⁴ It is, however, unrealistic for the tribunal, entirely on its own efforts, to investigate all the relevant facts to the degree as if the respondent State participated.⁸⁵ Moreover, the tribunal is not required to ensure all the elements of the materials submitted by the appearing party are accurate.⁸⁶ As long as the tribunal is persuaded, by using appropriate means, that the appearing party's arguments are well established, then this is adequate.⁸⁷ In the *Arctic Sunrise* case, the tribunal encountered difficulties in the evaluation of facts as discussed above.⁸⁸

However, the negative impacts brought by non-appearance may be lessened by the practice frequently adopted by the non-appearing State. The non-appearing State often chooses to send informal materials to the tribunal.⁸⁹ In the *Aegean Sea Continental Shelf* case, the ICJ stated that if it did not take the Turkish reservation into account, the Court would not "discharge its duty under Article 53 of the Statute."⁹⁰ Within the UNCLOS dispute settlement mechanisms, in *Arctic Sunrise* case, the ITLOS stated that before the Tribunal concluded the hearing, Russia could furnish it with her comments, which would be accepted by the Tribunal.⁹¹ In the South China Sea Arbitration, the arbitral tribunal also took into account China's Position Paper, considering that this could be regarded as a plea against the jurisdiction of the arbitral tribunal.⁹² It could be seen from the case law that the tribunal or court will consider informal communications submitted by the non-appearing States in order to perform its duty.

Merits, 1974 I.C.J. 9, ¶ 17 (July 25).

⁸² *Supra* note 33, at 24, ¶ 29.

⁸³ *Nuclear Tests (Australia v. Fr.)*, Judgment, 1974 I.C.J. 263, ¶ 31 (Dec. 20).

⁸⁴ *Supra* note 33, at 24, ¶ 30.

⁸⁵ *Id.*

⁸⁶ *Corfu Channel Case (U.K. v. Albania)*, Judgment, 1949 I.C.J. 248 (Apr. 9).

⁸⁷ *Id.*

⁸⁸ *Supra* note 8, at 14, ¶ 54; at 1, ¶ 2 (Declaration of Judge *Ad Hoc* Anderson); at 4, ¶ 10 (Dissenting Opinion of Judge Kulyk).

⁸⁹ *Supra* note 33, at 25, ¶ 31.

⁹⁰ *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Judgment, 1978 I.C.J. 20, ¶ 47 (Dec. 19).

⁹¹ *Supra* note 8, at 5, ¶ 13.

⁹² PCA, Arbitration between the Republic of the Philippines and the People's Republic of China, Apr. 22, 2015, available at <http://www.pcacases.com/web/sendAttach/1298> (last visited on Oct. 19, 2015).

Nonetheless, the materials provided by the non-appearing State through informal means generates additional difficulties for the Applicant State and the tribunal.⁹³ If the non-appearing State sends materials to the tribunal at a very late stage, the appearing State may not have enough time to prepare and comment on it.⁹⁴ The tribunal also has to guarantee equality between the parties.⁹⁵ The behavior of the non-appearing State should not bring it benefits.⁹⁶ Some commentators pointed out that this is an additional burden imposed on the tribunal, as the tribunal has to strike a balance between the two parties under this circumstance.⁹⁷ Moreover, when the tribunal is considering these information, it may be deprived of the opportunity to acknowledge the facts in a more organized and systematic way.

7. Would a One-Party Arbitration be Futile?

Non-appearing States often claim that they reject the proceedings brought against them; they assert or indicate not to comply with the decision of the tribunal or court.⁹⁸ This is observed in the *Arctic Sunrise* case where Russia rejected the arbitration instituted by the Netherlands⁹⁹ and did not conform to the Order of the Tribunal.¹⁰⁰ In the situation of non-appearance, would the award issued by the tribunal be meaningless? Will non-appearance inevitably lead to non-compliance?

In the *Nicaragua* case, the ICJ held that non-appearance does not exempt a State from the obligation to comply with the judgment.¹⁰¹ Moreover, whether or not the parties accept the decision of the tribunal does not affect the binding force of the decision, either.¹⁰²

⁹³ *Supra* note 74, at 54-5.

⁹⁴ I. Sinclair, *Some Procedural Aspects of Recent International Litigation*, 30 INT'L & COMP. L. Q. 353 (1981).

⁹⁵ *Supra* note 33, at 26, ¶ 31.

⁹⁶ *Id.*

⁹⁷ J. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, in THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 290 (L. Damrosch ed., 1987); J. Fry, *Non-participation in the International Court of Justice Revisited: Change or Plus Ca Change?*, 49 COLUM. J. TRANSNAT'L L. 63 (2010-2011).

⁹⁸ *Supra* note 74, at 64.

⁹⁹ *Supra* note 8, at 4, ¶ 9.

¹⁰⁰ In the Matter of the Arctic Sunrise Arbitration (Neth. v. Russ.), ITLOS Case No. 22 (2013) Award on Jurisdiction at 1, ¶¶ 3-4, 2014, available at http://www.pca-cpa.org/showpage2a83.html?pag_id=1556 (last visited on Oct. 19, 2015).

¹⁰¹ *Supra* note 33, at 23, ¶ 27.

¹⁰² *Id.* at 23-4.

Non-appearance does not inevitably lead to non-compliance. Conversely, appearance is not a guarantee of compliance. Today, the most severe challenge against the UNCLOS dispute settlement mechanisms or other international judicial system is not ‘non-appearance,’ but ‘non-compliance.’ Improving the effectiveness of the enforcement of decisions is thus the key issue.

In the South China Sea Arbitration, what brought China not to participate in the proceeding? If China loses the case, would her continued actions in the South China Sea lose legal grounds?¹⁰³ The answer may be negative.¹⁰⁴ The fundamental dispute between China and the Philippines is a territorial dispute, which is beyond the jurisdiction of the arbitral tribunal; the claims and actions on the territorial ground after the decision is released will not be thus affected by the decision.¹⁰⁵ Therefore, China’s possible actions after the end of the arbitration may be different from non-compliance.¹⁰⁶ Some questions come to mind at this stage: Will the arbitration achieve its purpose in this situation? If not, does China have to participate just so it is not accused of damaging the UNCLOS dispute settlement mechanisms?; and initiating the arbitration in a way to avoid the application of China’s declaration, is this an abuse of the UNCLOS dispute settlement mechanisms?

8. Conclusion

In the *Arctic Sunrise* case and the South China Sea Arbitration, both Russia and China chose not to appear before the tribunals because, they thought, the relevant tribunal does not have jurisdiction owing to their declarations pursuant to the UNCLOS. While Russia’s declaration cannot exclude the jurisdiction of the tribunal, China’s declaration could exclude the tribunal’s jurisdiction. As to non-appearance, there is no legal duty to appear before the tribunal, nor is there a right to non-appearance. Non-appearance will not frustrate the proceedings, nor will it affect the binding character of the decision. Non-compliance is the key issue that should be considered. However, when faced with the situation of non-compliance, the reasons behind the non-compliance should be explored.

¹⁰³ Michael Sheng-ti Gau, *The Prospects for the Sino-Philippine Arbitration and the Territorial Disputes in the South China Sea*, 7 J. EAST ASIA & INT’L L. 563 (2014).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 566.