

Nonparticipation and Perceptions of Legitimacy

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The view that participation by the respondent state enhances the perceived legitimacy of international judicial or arbitral proceedings may play a significant role in a decision not to participate. Such a decision may be prompted by political rather than legal considerations. The object of nonparticipation may be to facilitate exercise of a political option of noncompliance with the judgment or award, notwithstanding prior agreement that it is legally binding. If so, then the basic issue is not nonparticipation as such, but rather noncompliance with a legally binding award or judgment, as well as a legally binding commitment to arbitrate or adjudicate disputes. This raises fundamental questions regarding the role of legitimacy, and indeed the rule of law, in international affairs.

International law requires the consent of the respondent state to the submission of a dispute to international arbitration or adjudication resulting in an award or judgment that is binding upon the states party to the case. Such consent may be granted before or after a dispute arises. This essay examines the role of perceptions of legitimacy in a respondent's decision not to participate in state-to-state arbitration or adjudication, notwithstanding the fact that such consent was granted in advance by treaty.

In his influential book, *The Power of Legitimacy Among Nations*, Thomas Franck analyzed the role of perceptions of legitimacy in what he styled the "compliance pull" of rules in an international setting.¹ As between states, that

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1. Thomas M. Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* 42 (1990).

setting generally lacks the elements of compulsion found in municipal legal systems. In this regard, Franck observed, “Someday, perhaps, the international system will come to have law and legal institutions that resemble their domestic counterparts, although a world of five billion persons could (and should) never have a centralized legal system mirroring that of the nations.”² Franck added, “In any event, that is not the condition of the global rule system now, and it is not likely to be in the foreseeable future.”³

David Caron’s penetrating analysis of particular aspects of legitimacy expressly acknowledged the contribution made by Franck’s seminal study.⁴ Caron was not alone in citing Franck’s research. The group includes even those who, like me, are not entirely persuaded by a sharp dichotomy in which compulsion accounts for obedience to law in the municipal system while perceptions of legitimacy account for the compliance pull of rules in the international system: they too are likely to recognize the significance of Franck’s insights on the role of legitimacy in the functioning of the international system itself.

For my part, I take my cue from David Caron and try to focus the object of my inquiry more sharply. That object is participation in dispute settlement proceedings between states—or to be more precise, nonparticipation and perceptions of legitimacy.

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The classic model of binding third-party settlements between states is one in which they agree to submit a particular dispute to such settlement after the dispute has arisen.⁵ Under that model, the time between the compromissory

2. *Id.* at 39–40.

3. *Id.* at 40.

4. David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 556 n.19 (1993) (describing Franck’s book, *supra* note 3, as “[a] central part of the recent international law discussion”). Caron’s article is directed to the question of perceptions of legitimacy concerning a political organ, namely the UN Security Council. The fact that the Council is endowed by the UN Charter with the authority to make decisions that are binding on all UN member states raises issues that are in some respects analogous to those addressed in this essay, and that are of no less importance to the international system.

5. Citations to such a case may use a “/” between the parties’ names rather than the letter “v” to signal that both parties have submitted the dispute and, in that sense, there is no applicant or respondent. In this situation, there is often a period of months or years during which the parties have attempted to resolve a legal dispute through negotiation, but have failed to do so. Then, if they are both in agreement on this course of action, they may submit the dispute to a “third party” that may be a particular individual or group or institution. Article 33 of the Charter of the United Nations spells out a wide range of choices. The agreement may seek assistance (such as mediation) or nonbinding recommendations (such as conciliation). Where the parties agree to seek a binding decision, the “third party” may be a standing international court or tribunal such as the International Court of Justice (ICJ) (the principal judicial organ of the United Nations, whose members are elected by the UN General Assembly and Security Council) or the International Tribunal for the Law of the Sea (ITLOS) (established by the UN Convention on the Law of the Sea, whose members are elected by the parties to the Convention). *See* Statute of the International Court of Justice, arts. 92–96; U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982,

agreement and the proceedings is typically brief, and buyer's remorse, if any, might be expected to emerge only after the judgment or award.

The practice of affording an aggrieved party a unilateral right of access to binding third-party dispute settlement processes finds its origin in municipal law.⁶ In statecraft if you will. Among the many reasons for affording such a right of access is perhaps the most basic one of maintaining public order. Unresolved disputes and accumulation of grievances can disrupt public order and undermine social cohesion.

Maintenance of public order is of course relevant to the international system as well. The UN Charter expressly acknowledges the link to settlement of disputes between states.⁷ While the desirability of promoting resolution of disputes between states did yield a new norm requiring peaceful settlement of disputes, no general international norm of conduct emerged requiring arbitration or adjudication of unresolved disputes between states at the request of either party.⁸ Rather, the technique used to effect the latter change is expressly consensual and specific, namely a treaty that affords one party the right to submit

1833 U.N.T.S. 397, Part XV, sec. 2; U.N. Convention on the Law of the Sea, Annex VI. Alternatively, it may be an *ad hoc* arbitral tribunal comprised of a member or members selected by the parties or a designee pursuant to agreed rules, for which a standing institution such as the Permanent Court of Arbitration may perform registry functions. The World Trade Organization's Dispute Settlement Body utilizes a combination of an *ad hoc* panel and a standing appellate body. See World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, art 1; Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1867 U.N.T.S. 154.

6. See, e.g., LEGES DUODECIM TABULARUM, tbl. I, law I, available at http://avalon.law.yale.edu/ancient/twelve_tables.asp (stating "[i]f the plaintiff summons the defendant to court the defendant shall go. If the defendant does not go the plaintiff shall call a witness thereto. Only then the plaintiff shall seize the defendant").

7. Article 2, paragraph 3, of the Charter of the United Nations requires all UN members to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Article 33 of the Charter obliges the parties to seek a solution of "any dispute, the continuance of which is likely to endanger the maintenance of international peace and security." Well before the drafting of the UN Charter, there were prominent Americans who believed that creating a new standing international court to settle disputes between states would help avert war. In 1916, Charles Evans Hughes argued,

We know the recurrence of war is not to be prevented by pious wishes. If the conflict of national interests is not to be brought to the final test of force, there must be the development of international organization in order to provide international justice and to safeguard so far as practicable the peace of the world. . . . There should be an international tribunal to decide controversies susceptible of judicial determination, thus affording the advantage of judicial standards in the settlement of particular disputes and the gradual growth of a body of judicial precedents.

Charles Evans Hughes, *Address in Accepting the Republican Nomination for President (July 31, 1916)*, ADDRESSES OF CHARLES EVANS HUGHES, 1906–1916, pp. 8, 33–34 (2d ed. 1916).

8. Neither Article 2, paragraph 3, nor Article 33 of the UN Charter requires arbitration or adjudication as such. Article 33 requires the parties to seek a solution to the dispute "by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." U.N. Charter art. 33.

certain future disputes with another party to a specified tribunal whose decision is accepted in advance as binding.

There is nothing novel or unusual about using contract or treaty to make advance commitments. In this regard it is presumably understood that a legal regime rooted in consent can function only if consent has consequences.

Yet the notion has persisted that arbitration or adjudication of disputes between states is best used where the parties agree to do so after the dispute arises.⁹ This classic perception rears its head most obviously when a state is sued, and deploys its lawyers to suggest that submission of the dispute to arbitration or adjudication against the current will of the respondent is inappropriate, and indeed, illegitimate.¹⁰

Arguments in support of that conclusion can be, and typically are, presented before the tribunal itself in the form of objections to jurisdiction and admissibility. The best known cases of refusal to participate contain something more: the basis of jurisdiction asserted by the applicant is an instrument in which advance consent to jurisdiction was granted by the respondent well before the particular dispute ripened.¹¹

9. See Shigeru Oda, *The Compulsory Jurisdiction of the International Court of Justice: A Myth?*, 49 INT'L & COMP. L.Q. 251, 257 (2000).

10. For example, in the context of publicly explaining its decision not to participate in the *South China Sea* arbitration, a Chinese Foreign Ministry spokesperson stated, *inter alia*, "China always stands that, with regard to the relevant disputes between China and the Philippines in the South China Sea, a true solution can only be sought through bilateral negotiation and consultation." That statement was enclosed with a letter from the Chinese Ambassador to the Netherlands reiterating that, "China does not accept or participate in this arbitration." The letter was delivered by the Chinese embassy to the registry of the arbitral tribunal (the Permanent Court of Arbitration in The Hague). *S. China Sea Arb. (Phil. v. China)*, Award, Perm. Ct. Arb. Case No. 2013-19, ¶ 97 (July 12, 2016), available at <https://pca-cpa.org/en/cases/7/> (visited Dec. 22, 2018).

11. In the original *Nuclear Tests* cases, in which France declined to appear, the alternative bases of jurisdiction invoked by Australia were the General Act of 1928 as well as the Australian and French declarations under Article 36(2) of the ICJ Statute. *Nuclear Tests (Austl. v. Fr.)*, Interim Protection, 1973 I.C.J. Rep. 99, ¶ 14 (June 22). The Australian and French declarations cited by Australia were registered respectively on February 6, 1954 and May 20, 1966. See Declaration recognizing as compulsory the jurisdiction of the International Court of Justice, Austl., 186 U.N.T.S. 77 (Feb. 6, 1954); Declaration recognizing as compulsory the jurisdiction of the International Court of Justice, Fr., 562 U.N.T.S. 71 (May 16, 1966). In the *South China Sea* and *Arctic Sunrise* arbitrations, in which China and Russia respectively declined to appear, the basis of jurisdiction was section 2 of Part XV of UNCLOS, notably Articles 286 to 288. *S. China Sea Arb.*, Award, *supra* note 10, at ¶ 60; *Arctic Sunrise (Neth. v. Russ.)*, Case No. 22, Provisional Measures Order, 2013 ITLOS REP. 230, ¶ 36 (Nov. 22, 2013) available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf; *Arctic Sunrise (Neth. v. Russ.)*, Award on Jurisdiction, PCA Case No. 2014-02, ¶ 49 (Nov. 26, 2014) available at <https://pcacases.com/web/sendAttach/1325> (last visited Dec. 22, 2018). The dates on which the parties to the respective arbitrations ratified UNCLOS are as follows:

South China Sea: Philippines - May 8, 1984, China - June 7, 1996;

Arctic Sunrise: Netherlands - June 28, 1996, Russia - March 12, 1997.

See U.N. Division for Ocean Affairs and the Law of the Sea, Status of the United Nations Conventions on the Law of the Sea [. . .] as at 31 March 2019, *Table recapitulating the status of the Convention and of the related Agreements*, http://www.un.org/Depts/los/reference_files/status2018.pdf.

Acceptance of such compromissory instruments used to be exceptional, but that is changing. The United Nations Convention on the Law of the Sea (UNCLOS) is one such compromissory instrument.¹² The Convention's substantive reach is very broad. The United Nations website now lists 168 parties.¹³ Since its entry into force in 1994, many cases have been arbitrated and adjudicated under the Convention's compulsory jurisdiction provisions with the participation of both parties to the case.¹⁴

This pattern of participation was interrupted in 2013. China declined to participate in the *South China Sea* arbitration initiated by the Philippines in January of that year.¹⁵ In the *South China Sea* arbitration, the Philippines asserted that there was no valid basis for China's claims that it was entitled to sovereign rights and jurisdiction over maritime areas off the Philippine coast, and that China's construction of artificial islands and installations and other actions pursuant to those claims violated Philippine sovereign rights and jurisdiction under UNCLOS as well as China's duties under UNCLOS with respect to navigation safety, fishing, and protection and preservation of the marine environment.¹⁶

Then Russia declined to participate in the *Arctic Sunrise* arbitration initiated by the Netherlands in October of the same year.¹⁷ In that case, the Netherlands asserted that the freedom of navigation guaranteed by UNCLOS was violated by Russia's boarding of a Netherlands flag vessel (the *Arctic Sunrise*) in its exclusive economic zone, and subsequent detention at Murmansk of the ship and

12. U.N. Convention on the Law of the Sea, *supra* note 5, at Part XV, sec. 2.

13. Status of United Nations Convention on the Law of the Sea, *supra* note 11, at 1–9.

14. As of December 2018, both parties had appeared in twenty-four cases before ITLOS and in eleven cases before arbitral tribunals constituted under Annex VII of UNCLOS. Five of the ITLOS cases concerned provisional measures pending the constitution of an arbitral tribunal under Annex VII. *See* CONTENTIOUS CASES, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (last visited Dec. 14, 2018), <https://www.itlos.org/en/cases/contentious-cases>; ARBITRATION SERVICES – UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, PERMANENT COURT OF ARBITRATION (last visited Dec. 14, 2018), <https://pca-cpa.org/en/services/arbitration-services/unclos/>; Southern Bluefin Tuna Case (Austl. & N.Z. v. Japan), Award on Jurisdiction and Admissibility, Aug. 4, 2000, Arbitral Tribunal constituted under Annex VII of the United Nations Convention for the Law of the Sea, at 2–4, *available at* [https://icsid.worldbank.org/en/Documents/icsiddocs/Award on Jurisdiction and Admissibility of August 4_2000.pdf](https://icsid.worldbank.org/en/Documents/icsiddocs/Award%20on%20Jurisdiction%20and%20Admissibility%20of%20August%204%202000.pdf) (last visited Dec. 14, 2018).

15. *S. China Sea Arb.*, Award on Jurisdiction and Admissibility, Perm. Ct. Arb. Case No. 2013-19, at ¶ 10, *available at* <https://pca-cpa.org/en/cases/7/> (visited Dec. 22, 2018).

16. *S. China Sea Arb.*, Award, *supra* note 10, at ¶¶ 7–10. I had the honor of serving as counsel for the Philippines in the *South China Sea* case. That relationship ended with the arbitration. I alone am responsible for the views expressed herein and for the summary of the lengthy award to be found in my previous article. *See* Bernard H. Oxman, *The South China Sea Arbitration Award*, 24 U. MIAMI INT'L & COMP. L. REV. 235 (2017) (discussing the award).

17. *Arctic Sunrise*, Award on Jurisdiction, *supra* note 11, at ¶¶ 2, 9, 43, 46, 65. Russia also declined to participate in the provisional measures proceedings instituted by the Netherlands before ITLOS pending constitution of the arbitral tribunal. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, 2013 ITLOS REP. ¶ 48.

the persons on board, against whom charges were filed.¹⁸ The ship was chartered by Greenpeace, and had carried out a protest at a Russian offshore oil platform before being boarded and detained.¹⁹

In both of these cases, the dispute submitted to arbitration arose after UNCLOS entered into force for the parties, the compulsory dispute settlement provisions of UNCLOS were the asserted basis of jurisdiction, and the nonparticipating respondent asserted that jurisdiction was lacking under UNCLOS for the reasons it indicated.²⁰

Then in 2018, asserting that “the Court manifestly lacks jurisdiction,” Venezuela declined to appear in the International Court of Justice (ICJ) in a case brought by Guyana regarding a territorial dispute over the area between the

18. *Arctic Sunrise* (Neth. v. Russ.), *supra* note 11, Provisional Measures Order, at ¶¶ 59, 90 (Nov. 22, 2013).

19. *Arctic Sunrise*, Award on the Merits, *supra* note 11, at ¶¶ 3, 4 (Aug. 14, 2015). Some observers may have found Russia’s failure to participate somewhat surprising because Russia had previously participated as both applicant and respondent in cases brought under the compulsory dispute settlement provisions of the Convention. *Volga* (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, 2002 ITLOS Rep. 10; *Hoshinmaru* (Japan v. Russ.), Case No. 14, Judgment of Aug. 6, 2007, 2005-2007 ITLOS Rep. 18; *Tomimaru* (Japan v. Russ.), Case No. 15, Judgment of Aug. 6, 2007, 2005-2007 ITLOS Rep. 74. Russia then resumed its earlier pattern of participation under the Convention. See Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), Case No. 2017-06, Procedural Order No. 3 (Perm. Ct. Arb. 2018), <https://pcacases.com/web/sendAttach/2446> (procedure for addressing Russia’s jurisdictional objections). However, in connection with Ukraine’s request to ITLOS for provisional measures pending the constitution of an arbitral tribunal under UNCLOS Annex VII in another case subsequently submitted by Ukraine, Russia informed ITLOS “of its decision not to participate in the hearing on provisional measures in the case initiated by Ukraine, without prejudice to the question of its participation in the subsequent arbitration if, despite the obvious lack of jurisdiction of the Annex VII tribunal whose constitution Ukraine is requesting, the matter proceeds further.” Case Concerning the Detention of Three Ukrainian Naval Vessels (Ukr. v. Russ.), Case No. 26, Provisional Measures Order, 2019 ITLOS Rep. at ¶ 8 (May 25, 2019) available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/C26_Order_25.05.pdf. Russia submitted written observations shortly thereafter on jurisdictional and other requirements for provisional measures. Memorandum of the Government of the Russian Federation, May 7, 2019, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_26/Memorandum.pdf. These were more detailed than the reasons communicated in *Arctic Sunrise*, *supra* note 11. (Reference to the *Detention of Three Ukrainian Naval Vessels* case was added only to certain footnotes because the relevant events in the case occurred when the processing of this manuscript was at an advanced stage.)

20. Russia’s concise communication of its jurisdictional reasons for not participating was delivered at the outset of provisional measures proceedings. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, at ¶ 9. In the *South China Sea* case, China’s jurisdictional arguments were spelled out in detail in a position paper that the foreign ministry made public and transmitted to the arbitrators shortly before the deadline for submission of a counter-memorial. *S. China Sea Arb.*, Award, *supra* note 10, at ¶ 13. In both cases the respective arbitral tribunals treated the jurisdictional positions presented by the nonparticipants as pleas on jurisdiction. *Id.* at ¶¶ 14–15; *Arctic Sunrise*, Award on Jurisdiction, *supra* note 11, at ¶¶ 5–6. Both tribunals considered and ruled on the respondents’ jurisdictional objections before proceeding to the merits, although certain jurisdictional issues were deferred for consideration in connection with the merits in the *South China Sea* arbitration. *S. China Sea Arb.*, Award, *supra* note 10, at ¶¶ 45, 60 (H), (I); *Arctic Sunrise*, Award on Jurisdiction, *supra* note 11, at sec. V. Years earlier, in the *Nuclear Tests* cases, France had spelled out the basis for its jurisdictional conclusions in a letter informing the Court of its reasons for declining to participate. *Nuclear Tests*, Interim Protection, *supra* note 11, at ¶ 15.

Essequibo River and the boundary drawn by an 1899 arbitral award.²¹ Albeit with some temporary lapses, such nonappearance has not occurred in the ICJ in many years.²² Guyana predicates jurisdiction in the case on a decision choosing the ICJ as the next means for settlement of the dispute that was made by the UN Secretary-General in January 2018 in the exercise of his functions under a 1966 agreement to which Guyana and Venezuela are party.²³ One difference between this case and the other recent cases is that, although the asserted basis for the respondent's consent to jurisdiction is an agreement concluded over one half-century earlier, this agreement was reached after the dispute had arisen and for the specific purpose of finding means to resolve it.²⁴

In considering the motivations for a state's decision not to appear in proceedings instituted by another state, an interesting underlying question is whether the reasons for nonparticipation are legal or political. As previously noted, the respondent may assert that it declines to appear because the court or tribunal lacks jurisdiction. But in a case between states in an international tribunal, the jurisdictional requirement is consent, which is typically manifested by prior agreement and does not depend on actual appearance. Indeed, procedural rules may specifically contemplate the respondent's absence.²⁵ Moreover, a liberal position on the right of a state to decline to appear may facilitate its acceptance of compulsory jurisdiction in the first place. There may be reasons for nonparticipation in a particular case that are not necessarily anticipated or made known. With this in mind, let us take a closer look at what may be the objectives of nonparticipation in many situations, albeit not all.

Where a dispute between states has been submitted by one party to an international court or tribunal, the respondent that believes there is no jurisdiction may be concerned that an appearance to contest jurisdiction legitimates the

21. See *Arbitral Award of 3 October 1899 (Guy. v. Ven.)*, Order, 2018 I.C.J. Rep. (June 19), available at <https://www.icj-cij.org/en/case/171> (visited Dec. 18, 2018).

22. France declined to appear in the original Nuclear Tests cases, which were concluded in 1974. *Nuclear Tests*, *supra* note 11, Judgment, 1974 I.C.J. Rep. 253, at ¶ 14 (Dec. 20). The United States, after participating in the provisional measures and jurisdictional phases, withdrew in January 1985 from further participation in the case brought against it by Nicaragua. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶¶ 10–11, 17 (June 27).

23. *Arbitral Award of 3 October 1899*, *supra* note 21, Application, paras. 14–25; see also Statement attributable to the Spokesman for the Secretary-General on the border controversy between Guyana and Venezuela (Jan. 30, 2018), <https://www.un.org/sg/en/content/sg/statement/2018-01-30/statement-attributable-spokesman-secretary-general-border>.

24. *Agreement to Resolve the Controversy Between Venezuela and the United Kingdom of Great Britain and Northern Ireland Over the Frontier Between Venezuela and British Guiana*, Feb. 17, 1966, 561 U.N.T.S. 323. The agreement's object is solution "of the controversy between Venezuela and the United Kingdom which has arisen as the result of the Venezuelan contention that the Arbitral Award of 1899 about the frontier between British Guiana and Venezuela is null and void." *Id.*, art. I. The agreement was negotiated by the United Kingdom "in consultation with the Government of British Guiana." *Id.* at preamble. Upon attainment of independence, Guyana became a party to the agreement. *Id.*, art. VIII.

25. See Statute of the International Court of Justice, art. 53; see also U.N. Convention on the Law of the Sea, *supra* note 5, at Annex VII, art. 9, Annex VIII, art. 4.

proceedings. While the respondent's jurisdictional arguments are doubtless legal in nature, the underlying concern prompting nonparticipation may be more political than legal. The respondent's appearance does not in itself concede jurisdictional objections. But the respondent's prior consent to jurisdiction may well have included consent to the jurisdiction of the court or tribunal to resolve a dispute as to its jurisdiction. Many compromissory agreements expressly or impliedly confer jurisdiction on a tribunal to determine its own jurisdiction, whether or not the respondent appears.²⁶

Another reason why parties may choose not to participate, or may withdraw at a later stage of proceedings, is that the time available to the respondent to make a decision as to participation may be limited, at least with respect to the initial phases of the process. This may in part explain the nature of early decisions on the matter. The United States withdrew from participation in the case brought against it by Nicaragua regarding military activities only after the ICJ had rendered its order on provisional measures and its judgment on jurisdiction.²⁷ On the other hand, in the *South China Sea* case, China took less than a month to reject the arbitration and return the notification and statement of claim to the Philippines.²⁸ Russia similarly rejected the submission of the *Arctic Sunrise* dispute to arbitration in less than a month; it did so a day after the Netherlands requested the International Tribunal for the Law of the Sea to prescribe provisional measures pending constitution of the arbitral tribunal.²⁹

The right of an applicant to request provisional measures pending a final judgment or award may influence a decision to decline participation. The fact that urgency is a typical characteristic of such situations has important consequences. Commencement of proceedings in respect of a request for provisional measures may be all but simultaneous with submission of the dispute.³⁰ And a decision on provisional measures is not dependent upon a

26. Statute of the International Court of Justice, art. 53; *Id.* at art. 36, ¶ 6; U.N. Convention on the Law of the Sea, *supra* note 5, at art. 288, ¶ 4. "This power, known as the principle of 'Kompetenz-Kompetenz' in German or 'la compétence de la compétence' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction.' It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done." Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

27. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 10–11, 17 (June 27).

28. *S. China Sea Arb.*, Award, *supra* note 10, Perm. Ct. Arb. Case No. 2013-19 at ¶ 29 (July 12, 2016).

29. *Arctic Sunrise*, *supra* note 11, at 11; Provisional Measures Order, at ¶ 9.

30. In the Military and Paramilitary Activities case, Nicaragua's request for provisional measures was simultaneous with the submission of the case on April 9, 1984. The United States participated in the provisional measures and jurisdictional phases of the proceedings, but withdrew from participation following the Court's determination that it had jurisdiction and did not participate in the proceedings on the merits. *Military and Paramilitary Activities*, *supra* note 22, at ¶¶ 10, 11, 17. In the *Nuclear Tests* cases, Australia filed its application on May 9, 1973 and its request for provisional measures on the same day.

definitive determination of jurisdiction by the tribunal; the existence of an instrument that appears, *prima facie*, to afford a possible basis on which jurisdiction might be founded may be sufficient.³¹ While decisions on provisional measures, as a legal matter, are without prejudice to adjudication of issues of jurisdiction or the merits, provisional measures ordered by an international tribunal are legally binding under the express text of UNCLOS³² and under the Statute of the ICJ as interpreted by the Court.³³

Accordingly, a provisional measures order presents the respondent with a choice between compliance with a tribunal decision and breach of a legal obligation to comply. As a legal matter, the order is binding whether or not the respondent participates in the proceedings. There is, moreover, little if any evidence that nonappearance reduces the risk that a tribunal will order provisional measures.³⁴ We may therefore conclude that, to the extent nonappearance is rooted in concerns regarding provisional measures, those concerns also may be more political than legal.

Even where provisional measures are not sought, the question of participation may arise quickly for the respondent. If the dispute has been submitted to arbitration, the parties typically have a limited period of time in which to appoint arbitrators, after which the arbitrators are named by the appointing authority specified in the compromissory instrument.³⁵ While participation in the appointment process does not imply acceptance of jurisdiction, it may be perceived as conferring legitimacy on the submission of the dispute to arbitration. Moreover, there may be a perception that, as a political matter, it is more difficult to decline to comply with a decision by a panel if one participates in its appointment. In both the *South China Sea* arbitration and the

Nuclear Tests, Interim Protection, *supra* note 11, at ¶ 1. In the *Arctic Sunrise* case, the Netherlands submitted the dispute to arbitration on October 4, 2014 and submitted its request for provisional measures to ITLOS on October 21, a few days more than the two-week minimum specified in UNCLOS art. 290, para. 5. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, at ¶¶ 36–38. Similarly, the respective dates were March 31 and April 16, 2019 in the *Detention of Three Ukrainian Naval Vessels* case, *supra* note 19, at preamble, ¶ 1. There was no request for provisional measures in the *South China Sea* arbitration, although the Notification and Statement of Claim expressly reserved the right to request such measures. See *S. China Sea Arb.*, *supra* note 10, Phil. Mem'l Vol. 3, Annex 1, ¶ 43, Annex 5, ¶ 46; see also *S. China Sea Arb.*, Award on Jurisdiction and Admissibility, *supra* note 15, at ¶ 44.

31. Fisheries Jurisdiction (U.K. v. Ice.), Interim Protection Order, 1972 I.C.J. 12, ¶ 17 (Aug. 17).

32. U.N. Convention on the Law of the Sea, *supra* note 5, at art. 290, para. 6.

33. LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶¶ 99–109 (June 27). See *Fisheries Jurisdiction*, *supra* note 31, at ¶ 20.

34. Provisional measures were sought and ordered in the *Nuclear Tests*, *Arctic Sunrise* and *Detention of Three Ukrainian Naval Vessels* cases. *Nuclear Tests*, Interim Protection, *supra* note 11, 1973 I.C.J. Rep. at 106; *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, 2013 ITLOS Rep. at ¶ 105; *Detention of Three Ukrainian Naval Vessels*, Provisional Measures Order, *supra* note 19, 2019 ITLOS Rep. at ¶ 124. The United States participated at the provisional measures stage of the *Military and Paramilitary Activities* case. See *Military and Paramilitary Activities in and Against Nicaragua*, *supra* note 30, at ¶ 17.

35. See U.N. Convention on the Law of the Sea, *supra* note 5, Annex VII, art. 3.

Arctic Sunrise arbitration, the respondents did not participate in the appointment of the members of the respective arbitral tribunals.³⁶

Reasons for nonparticipation in a case are of course not limited to jurisdictional concerns. The respondent's main concern may be losing on the merits. It may be tempting to suppose that nonparticipation reduces the likelihood or severity of an adverse outcome on the merits. While it is of course difficult to know what would have happened had the respondent participated fully in the proceedings, this argument does not appear to find a great deal of support in the results of the two recent cases of nonparticipation. The applicant prevailed in both cases. This suggests that the underlying objective of nonparticipation in many circumstances may be to strengthen the option of noncompliance with an adverse judgment or award on the merits. Since the judgment or award is legally binding under the compromissory instrument to which the nonparticipating party adhered, here too the reason for nonparticipation may be more political than legal.³⁷

Are there perhaps procedural advantages that may suggest nonparticipation? It is evident that nonparticipation by the respondent, even if it does not alter the burden of proof as legal matter, may increase the burdens on the applicant³⁸ and the tribunal as practical matter.³⁹ Like the ICJ Statute,

36. U.N. Convention on the Law of the Sea Annex VII provides that appointments not made by the parties within the specified time period are to be made by the ITLOS president. *Id.* In both the *Arctic Sunrise* and *South China Sea* arbitrations, the applicant appointed one arbitrator and the ITLOS president appointed the remaining four. A few Chinese critics complained that the ITLOS president who made those appointments in the *South China Sea* case was a former Japanese diplomat. See Jesse Johnson, *Beijing Turns on Japanese Judge as Hague Tribunal Ruling Over South China Seas Nears*, JAPAN TIMES (July 8, 2016), <https://www.japantimes.co.jp/news/2016/07/08/national/politics-diplomacy/beijing-turns-japanese-judge-hague-tribunal-ruling-south-china-sea-nears/#.XO88uS2ZM5h>. Of course any discomfort within China in this regard might have been avoided by participation in the appointment process. See U.N. Convention on the Law of the Sea, *supra* note 5, at Annex VII, art. 3(c)–(e).

37. The fact that the respondent's government may be under internal pressure to decline to participate does not in itself alter the analysis. That said, in some cases internal constitutional constraints may complicate the calculus. It might be noted in this regard that great care was taken to minimize the risk of noncompliance with an ultimate judgment or award in the *Gulf of Maine* case (in which I participated on the U.S. side). The United States Senate was actively engaged in the formulation of the final text of the treaty with Canada submitting the Gulf of Maine maritime boundary dispute to a chamber of the ICJ constituted for that purpose (the first time this was done) or to arbitration in the event that a chamber whose composition was satisfactory to the parties was not established. Maritime Boundary Settlement Treaty, Can.-U.S., Mar. 29, 1979, 33 U.S.T. 2797; see also S. REP. NO. 96-1, at 4 (1981).

38. See Oscar Schachter, INTERNATIONAL LAW IN THEORY AND PRACTICE 230–31 (1991). The principal burdens relate to the conduct of the arbitration or adjudication. In the case of an arbitration, the costs of the arbitral tribunal itself may be implicated as well. Unless otherwise agreed by the parties or specified by the tribunal, remuneration and expenses of an arbitral tribunal are ordinarily borne equally by the states parties, as are the advance deposits. However, the nonparticipating respondents in the two recent arbitrations did not pay their deposits. As a result, in order to cover the costs of the tribunal, each applicant had to pay the deposits due from both parties, with uncertain prospects for recouping the respondent's share later pursuant to the final award.

39. The preamble of a 1991 resolution of the Institute of International Law noted:

UNCLOS does not provide for default judgments: it specifies that, in the absence of the respondent, the 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.”⁴⁰ There is however little, if any, evidence that the shift of burdens to the applicant and the tribunal inures to the ultimate benefit of the nonparticipant. Even if nonparticipation forces one’s opponent and the tribunal to work much harder, the end result may be a more thorough and persuasive opinion rejecting the nonparticipant’s position. Once again, the reasons for nonparticipation would appear to be political, not legal.

Nonparticipation also presents an issue regarding duties of the parties that is arguably independent of the question of nonparticipation as such.⁴¹ The *South China Sea* award acknowledges the respondent’s option not to appear and articulates its duties as a party to the case in the following terms:

China has been free to represent itself in these proceedings in the manner it considered most appropriate, including by refraining from any formal appearance, as it has in fact done. The decision of how best to represent China’s position is a matter for China, not the Tribunal. China is not free, however, to act to undermine the integrity of these proceedings or to frustrate the effectiveness of the Tribunal’s decisions. The Convention and general

the difficulties that non-appearance of a party may present in some circumstances for the other party or parties and for the Court itself, especially with regard to:

- a) the full implementation of the principle of the equality of the parties; and
- b) the acquisition by the Court of knowledge of facts which may be relevant for the Court’s pronouncements on interim measures, preliminary objections or the merits.

Institute of International Law, *Non-Appearance Before the International Court of Justice*, at 2 (1991), http://www.idi-ii.org/app/uploads/2017/06/1991_bal_01_en.pdf.

40. U.N. Convention on the Law of the Sea, *supra* note 5, at Annex VI, art. 28; *see also id.* at Annex VII, art. 9, Annex VIII, art. 4. These provisions are based on Article 53, paragraph 2, of the ICJ Statute. In the *Arctic Sunrise* arbitration, Russia’s nonparticipation deprived the tribunal of potentially important information and perspectives regarding Russia’s interpretation of its laws and the measures it took. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, at ¶¶ 19, 54. In the *South China Sea* arbitration, both the applicant and the tribunal went to great lengths to identify and probe all potential legal and factual issues. The Award expressly addresses the legal and practical consequences of China’s nonparticipation. *S. China Sea Arb.*, Award, *supra* note 11, at ¶¶ 116–144.

41. In the United States, the defendant’s decision on whether to appear in a civil action to defend the case is ordinarily addressed strictly in terms of the defendant’s interests, if any, in risking a default judgment, with little if any suggestion of a duty to appear to defend. Students of international law learn that France under Napoleon refused to appear to defend an action in a U.S. court regarding a French warship detained in a civil action. Writing for the Supreme Court, Chief Justice Marshall ruled on grounds of immunity from jurisdiction that the ship must be released, with no suggestion that France was under a duty to appear. *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 143 (1812). While modern statutes on sovereign immunity have added considerable nuance to the applicable law and procedure, it remains doubtful that a foreign sovereign is considered to be under a duty to appear in a municipal court. The restrictions on default judgments in the U.S. Foreign Sovereign Immunities Act suggest that nonappearance is not regarded as improper. 28 U.S.C. § 1608(e) (2018).

international law limit the actions a party may take in the course of ongoing dispute resolution proceedings.⁴²

Judges and arbitrators have not always taken such a liberal view of the right of the respondent to decline to appear. Some years earlier, in their joint separate opinion with respect to the provisional measures prescribed by International Tribunal for the Law of the Sea in the *Arctic Sunrise* case, Judges Wolfrum and Kelly linked the question of nonparticipation with the question of the duties of a party to the case. They wrote:

[N]on-appearance is contrary to the object and purpose of the dispute settlement system under Part XV of the Convention. . . . Judicial proceedings are based on a legal discourse between the parties and the co-operation of both parties with the international court or tribunal in question. Non-appearance cripples this process. As Sir Gerald Fitzmaurice put it in his article on “The Problem of the ‘Non-Appearing’ Defendant Government” (BYIL (1980), vol. 51 (1), p. 89 at 115), non-appearance leaves the “outward shell” of the dispute settlement system intact but washes away the “core.”⁴³

It is evident that in many if not most instances, nonparticipation by the respondent is focused on the question of the legitimacy of the proceedings. At a minimum it is designed to avoid enhancing that legitimacy.⁴⁴ But to what end? It is by no means clear that nonparticipation is likely to produce an outcome in the proceedings that is more favorable to the respondent.

* * *

The foregoing analysis suggests that nonparticipation may be a way of signaling to one’s opponent, other governments, the tribunal, and the public not to expect compliance. The object is to avoid prejudicing the option to refuse to comply with a legally binding judgment or award, and perhaps to discourage other states from exercising their right to sue the respondent. Those objectives in turn require us to think hard about visions of the international system that render such tactics plausible.

The fundamental issue is not nonparticipation. Nor is it agreement or disagreement with a tribunal’s reasoning or decision. The issue is noncompliance with a legally binding judgment or award, and with a legally binding commitment to afford an aggrieved party the right to seek such a judgment or award. Whether we articulate the principle at stake as the rule of law in

42. *S. China Sea Arb.*, Award, *supra* note 10, Perm. Ct. Arb. Case No. 2013-19 at ¶ 1180 (July 12, 2016).

43. *Arctic Sunrise*, Provisional Measures Order, *supra* note 11, Sep. Op. Wolfrum & Kelly, JJ., at para. 6. Since Judge Wolfrum subsequently served as a member of the arbitral tribunal in the *South China Sea* case, it is interesting to consider whether his views on the subject evolved. See *supra* note 42 and accompanying text.

44. In this connection, one might wonder what prompted the decision of the United Kingdom to decline to send an observer to the proceedings in the *South China Sea* arbitration after the Tribunal granted its request for “neutral observer status” at the hearing on the merits. See *S. China Sea Arb.*, Award, *supra* note 10, at ¶¶ 67–68.

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international affairs, or we deploy the conceptual vocabulary of Thomas Franck, the question is the same: What do we need to do to encourage behavior that is consistent with the kind of international order under which we would like to live?

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