

BIFURCATION IN INTER-STATE CASES

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ABSTRACT

In the South China Sea Arbitration, China resolutely decided to not appear, without even appointing its own arbitrator to an arbitration under Annex VII of the 1982 UN Convention on the Law of the Sea (UNCLOS). Many criticized this decision as unwise, and argued that the conventional litigation wisdom of contesting jurisdiction exclusively at the preliminary phase serves to better China's interests, since it would not prejudice its decision of non-appearance at the subsequent proceedings over merits.

The validity of such a "wise" tactic rests upon bifurcation—the division of the proceedings into determination of jurisdiction and determination of merits. Bifurcation has been routinely practiced by the International Court of Justice (ICJ) but has not been used much in other forums of inter-state dispute settlement. The author undertakes the first investigation of 14 cases which eventually went to the UNCLOS arbitration (as of 2018). It finds that the majority of tribunals adopted ad hoc Rules of Procedures by which the tribunals retained discretion on the matter of bifurcation (discretionary bifurcation), and in practice the tribunal's flexibility terminates upon the rejection of the request to bifurcate. In contrast, Article 79 of the ICJ's Rules of Court, allows the Court to adjudicate on questions raised within a duly submitted preliminary objection,

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with no proceedings on the matter of bifurcation (rule-based bifurcation).

This paper traces issues of bifurcation to the Permanent Court of International Justice (PCIJ), to evaluate why and how in the ICJ bifurcation becomes a procedural right, finding that when rule-based bifurcation was added to the article governing preliminary objections in 1926, they believed jurisdictional objections deserved special treatment in the Rules of Court, allowing the Court to better handle jurisdiction of inter-state disputes which was confined by the consent of the parties. The subsequent revisions of the Rules of Court in 1936, 1946, 1972, 1978, and 2001 gradually but solidly provide that a party is entitled to bifurcation, notwithstanding a general belief that bifurcation reduces the Court's efficiency.

The divergence in practice may be determined by the distinctive nature of the two forums (adjudicative/standing court and arbitral/ad hoc tribunal), as judges/arbitrators balance jurisdictional sensitivity with procedural efficiency to decide the issue of bifurcation. This paper finds that the handling of bifurcation in the UNCLOS arbitrations puts unwilling respondents in an untenable situation: participation (with appointment of its own arbitrator) means less jurisdictional sensitivity and probably results in a negative decision on bifurcation; only non-appearance of the unwilling respondent is thought to deserve bifurcation in which it can fight exclusively on jurisdiction, yet the unwilling respondent must deprive itself of such opportunities. This paper argues that the value of rule-based bifurcation should be carefully considered, by which an unwilling respondent is entitled to bifurcation, thus allowing it to contest jurisdiction at the first place. An UNCLOS arbitral tribunal may ensure the legitimacy of its judgments for the settlement of inter-state disputes by adhering to the best practice firmly rooted in the PCIJ and ICJ since the 1920s.

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1. INTRODUCTION

In the 1986 International Court of Justice (ICJ) *Nicaragua* case, the United States participated in the preliminary proceedings to defend its positions on jurisdiction and admissibility but withdrew its participation from the proceedings on the merits.¹ Recently, in *South China Sea Arbitration*,² an arbitration under Annex VII of the 1982 UN Convention on the Law of the Sea (UNCLOS),³ China's non-appearance was debated, and scholars argued that China should participate in the initial proceedings concerning the constitution of the tribunal and raise issues of jurisdiction at the preliminary objection stage.⁴ This view is predicated on the belief that China's participation to challenge jurisdiction, like what the United States did in the *Nicaragua* case, would not prejudice its non-appearance at the subsequent proceedings over merits.⁵ However, the validity of this tactic rests upon bifurcation—a term commonly used in the field of procedure to mean the division of the proceedings into determination of jurisdiction and determination of merits.⁶

¹ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, para. 10 (June 27).

² *South China Sea Arbitration* (Phil. v. China), Case No. 2013-19, Award (Perm. Ct. Arb. 2016).

³ U.N. Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁴ See Jiangyu Wang, 国际法、国际关系与国家利益视角下的南海仲裁案 [The International Law, International Relations and National Interest Concerns from Chinese Perspective], 6 ASIA-PAC. SEC. & MAR. AFF., 1, 13 (2016); see also Bing Ling, Speech at Fudan University: Why China's Rejection is Against Its Own Interests (Dec. 2016), http://www.uscnpm.com/model_item.html?action=view&table=article&id=7961 [https://perma.cc/LP6G-GGQN]. See generally Julian Ku, *China's Legal Scholars Are Less Credible After South China Sea Ruling*, FOREIGN POL'Y (July 14, 2016), <http://foreignpolicy.com/2016/07/14/south-china-sea-lawyers-unclos-beijing-legal-tribunal/> [https://perma.cc/F97P-SGJ6] (providing an overview of Chinese academics' opinions on China's non-appearance and possible participation in the initial arbitration proceedings).

⁵ See Jiangyu Wang, *Legitimacy, Jurisdiction and Merits in the South China Sea Arbitration: Chinese Perspectives and International Law*, 22 J. CHINESE POL. SCI. 185, 200 (2017) (arguing that China "would have been in a much better position on the legal front had it formally participated in the case from the jurisdictional stage").

⁶ See Rules of Court, I.C.J. Acts & Docs, [hereinafter Rules of Court] <https://www.icj-cij.org/en/rules> [https://perma.cc/DI7C-2XH6]. Bifurcation may also involve determination of liability and determination of quantum of compensation or damages award. Bifurcation in this paper refers to the former concept of division of the proceedings, in which an international judicial organ

Bifurcation is a procedural response to questions of jurisdiction and/or admissibility, normally raised in the form of the preliminary objection. With bifurcation, the said questions will be adjudicated in a separate proceeding with a judgement or award at its closure.

The word bifurcation does not appear in the ICJ Statute or its Rules of Court.⁷ However, upon receipt of a duly submitted preliminary objection, Article 79 of the Rules of Court on preliminary objections explicitly provides for suspension of the proceedings on the merits,⁸ and instead sets up a written proceeding addressing objections.⁹ It is followed by a default oral hearing on the preliminary objection.¹⁰ Eventually, the preliminary objection is disposed of in the form of judgment.¹¹ Thus, a party in front of the ICJ is entitled to obtain self-contained proceedings on jurisdiction and admissibility under the Rules of Court.¹² Indeed, the party's procedural right to bifurcation has been gradually affirmed since the era of the Permanent Court of Justice (PCIJ, the predecessor of the ICJ), notwithstanding that the Court retains an inherent power to handle its own procedure regarding jurisdiction,¹³ and in practice the Court exercises its inherent power in no derogation of such a right.¹⁴

treats jurisdiction and admissibility of claims as discrete issues in a distinct or separate proceeding before further resolution of the merits of claims.

⁷ *See id.*

⁸ *Id.* art. 79(5).

⁹ *Id.* art. 79(5).

¹⁰ *Id.* art. 79(6).

¹¹ *Id.* art. 79(9).

¹² *Id.* art. 79.

¹³ Statute of the Court, I.C.J. Acts & Docs. (I.C.J. Statute), <http://www.icj-cij.org/en/statute> [<https://perma.cc/DR4L-D97A>]. The procedure concerning preliminary objections as whole (and the matter of bifurcation being part of it) in principle falls into the inherent power of the Court as part of the management of the legal proceedings, by virtue of the necessity to determine issues of jurisdiction based on the principle of *la compétence de la compétence* (art. 36(6)) and its power to "make orders for the conduct of the case" (art. 48). *See also* SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2005* 810 (4th ed. 2006) (concluding that "through those two provisions of the Statute the Court can deal with any matter that might arise as to whether it has jurisdiction in a case or whether the case as a whole or a particular claim is admissible.").

¹⁴ Indeed, in the *Nicaragua* case, the Court decided to bifurcate proceedings without waiting for further submission of a preliminary objection. For further discussion on this point, *see infra* note 92 and accompanying text.

Many of the law of the sea disputes were brought pursuant to the “default” arbitration under UNCLOS Annex VII¹⁵ and have made it one of the important legal battlefields for inter-state dispute since the UNCLOS entered into force in 1994.¹⁶ In these cases, we see the word “bifurcation” has been invariably used in ad hoc tribunals’ Rules of Procedure. However, by the time this paper was written, there were 14 Annex VII arbitral cases; the proceedings were bifurcated in only four of them.¹⁷ The tribunals’ Rules of Procedure in the majority of Annex VII arbitrations were developed by ad hoc tribunals under the influence of the Model Rules of Procedure of the Permanent Court of Arbitration (PCA, serving as Registrar in these cases but more frequently used by international commercial arbitrations), by which the tribunal retains discretion on the matter of bifurcation (discretionary bifurcation).¹⁸

Unfortunately, in this very important forum for inter-state dispute settlement we see the resurgence of non-appearance by responding states¹⁹ –apart from the aforesaid China’s non-

¹⁵ See UNCLOS, 1833 U.N.T.S. 397 at art. 287(3) (noting that when no preference has been stated regarding the means of dispute resolution under art. 287(1), the other two default forums are the ICJ ITLOS); see also *id.* art. 287(5) (noting the default if the Parties have not accepted the same procedure available under art. 287(1)).

¹⁶ Since UNCLOS came into force in 1994 to 2018, 14 cases have been referred to Annex VII arbitration and adjudicated, making it the most common means of resolution of key UNCLOS disputes. In contrast, 15 out of the 23 ITLOS contentious cases are requests for prompt release or requests for provisional measures pending the constitution of an Annex VII arbitral tribunal under UNCLOS art. 290(5). In the remaining seven “normal” cases, five are those initiated by a Party State under Annex VII but subsequently transferred to the ITLOS under “Special Agreement” reached by the Parties.

¹⁷ See *Southern Bluefin Tuna (Austl. v. Japan)*, 23 R.I.A.A. 1, Award on Jurisdiction and Admissibility (Aug. 4, 2000); *The Arctic Sunrise Arbitration (Neth. v. Russ.)*, Case No. 2014-02, Award on Jurisdiction (Perm. Ct. Arb. 2014); *South China Sea Arbitration*, Case No. 2013-19 (bifurcation was decided by the tribunals without the participation of the respondent states); *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 Regarding Bifurcation of the Proceedings, 3 (Perm. Ct. Arb. 2017). For details, see *infra* Part 3.

¹⁸ See UNCLOS, 1833 U.N.T.S. 397 at Annex VII, art. 5 (“Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case”). For discretionary bifurcation stipulated in the Annex VII tribunals’ Rules of Procedure and influence from Model Rules of Procedure of PCA, see *infra* note 117 and accompanying text.

¹⁹ Non-appearance of the respondent state occurred frequently in the 1970s and 1980s in the ICJ Cases of non-appearance (except for non-appearance only at Provisional Measures) include: *Icelandic Fisheries (U.K. v. Ice.; Germ. v. Ice.)*,

appearance in *South China Sea Arbitration*, Russia also declined to participate into the proceedings of the *Arctic Sunrise* arbitration.²⁰

A less heeded phenomenon that indicates unwillingness of the respondents vis-à-vis Annex VII arbitration is the moderate rate of deviation to this “default” procedure—besides the 14 cases which eventually went to the Annex VII arbitration, there were five cases initiated under Annex VII arbitration that were subsequently transferred by “Special Agreement” to the International Tribunal for the Law of the Sea (ITLOS), or its special chamber.²¹ Significantly, ITLOS introduced the rule-based bifurcation into its Rules of the Tribunal.²²

Nuclear Tests (NZ v. Austl.; Austl. v. Fr.), Aegean Sea Continental Shelf (Greece v. Turkey), United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) and Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) (the United States refused to appear in the merits phase). In the 1950s there were two cases of non-appearance: Corfu Channel (U.K. of Gr. Brit. & N. Ir. v. Alb.) (Albania did not appear at the stage on reparation); Nottebohm (Liech. v. Guat.) (the respondent did not appear in the preliminary phase). *See generally* J.B. ELKIND, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (1985); H.W.A. THIRLWAY, NON-APPEARANCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (1985) (exploring the concept, procedure, and remedies for non-appearances); Ian Sinclair, *Some Procedural Aspects of Recent International Litigation* 30 INT’L & COMP. L. Q. 338 (1981) (reviewing historical and contemporary instances of non-appearance); James D. Fry, *Non-Participation in the International Court of Justice Revisited: Change or Plus Ça Change?* 49 COLUM. J. TRANSNAT’L L. 35 (2011) (challenging the notion that the *Nicaragua* case was the last instance of non-appearance at the I.C.J.); Jonathan I. 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 (Lori Fisler Damrosch ed., 1987) 288 (expanding on the problems faced by international tribunals with respect to non-appearance by recalcitrant states); S.A. Alexandrov, *Non-Appearance before the International Court of Justice* 33 COLUM. J. TRANSNAT’L L. 41 (1995) (asserting that the reason for Article 53 of the I.C.J. Statute is to allow the court to function in the event of non-appearance).

²⁰ Chao Zhang & Yen-Chiang Chang, *The Russian Federation Refuses to Appear Before the ITLOS and the Annex VII Arbitral Tribunal*, 14 CHINESE J. INT’L L. 405 (2015).

²¹ M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Order of July 1, 1999, 2 ITLOS Rep. 17, para. 5; Conservation and Sustainable Exploitation of Swordfish Stocks (Chile v. European Cmty.), Case No. 7, Order of Dec. 20, 2000, ITLOS Rep. 153, para. 6 (transferred to the ITLOS Special Chamber); M/V “Virginia G” (Pan. v. Guinea-Bissau), Case No. 19, Judgment of Apr. 14, 2014, ITLOS Rep. 9, para. 6; Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.), Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 12, para. 5; Delimitation of the Maritime Boundary between Ghana and Côte d’Ivoire in the Atlantic Ocean (Ghana v. Côte d’Ivoire), Case No. 23, Judgment of Sept. 23, 2017, para. 11 (transferred to the ITLOS Special Chamber), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23_merits/C23_Judgment_23.09.2017_corr.pdf [<https://perma.cc/U6M9-W6AQ>].

²² Rules of the Tribunal (ITLOS/8), as adopted on Oct. 28, 1997 and amended on Mar. 15, 2001, Sept. 21, 2001 and Mar. 17, 2009, art. 97,

In this regard, it is of interest to observe Russia's position in the pending *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, the second case in which Russia was brought to Annex VII arbitration.²³ Notwithstanding Russia's non-appearance in *Arctic Sunrise* and speculation that Russia might not appear in the case at hand,²⁴ Russia elected to appoint arbitrator(s) for the purpose of disputing jurisdiction.²⁵ Presently, it appears that Russia will participate and contest jurisdiction in a preliminary proceeding. Significantly, the tribunal's Rules of Procedure applied in that case, unlike those employed by the majority of Annex VII tribunals, contain a provision on preliminary objection incorporating elements of Article 79 of the ICJ Rules of Court, under which Russia is allegedly entitled to bifurcation.²⁶

All of which seem to suggest that, notwithstanding their position that refusal to appear is political in nature,²⁷ there is a space for

https://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf [<https://perma.cc/Q3C5-EK3G>]. This Article on Preliminary Objections retains the major elements of Article 79 of the ICJ Rules of Court (suspension of proceedings on the merits, written and oral proceedings on preliminary objections and a wrap-up judgement). However, it requires that the objections shall be made "within 90 days from the institution of proceedings" – which is a much shorter time frame than the ICJ's requirement of "three months after the delivery of the Memorial." Presently, 15 out of the 23 contentious ITLOS cases are requests for prompt release or requests for provisional measures pending the constitution of an Annex VII arbitral tribunal under UNCLOS art. 290(5). In the other seven cases in which art. 97 of Rules of the Tribunal (ITLOS/8) may be applied, five were transferred to the ITLOS by "Special Agreement", under which circumstance a party is less likely to raise preliminary objections. So far only in the unilaterally initiated M/V "Norstar" (Pan. v. Italy) has the respondent filed objections within 90 days from the institution of proceedings and the ITLOS bifurcated the proceedings according to art. 97. See M/V "Norstar" (Pan. v. It.), Case No. 25, Preliminary Objections, Judgement of Nov. 4, 2016, paras. 15-16, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Judgment/C25_Judgment_04.11.16_orig.pdf [<https://perma.cc/UG9U-RU2R>].

²³ *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukr. v. Russ.), Case No. 2017-06 (Perm. Ct. Arb., pending since 2016).

²⁴ Julian Ku, *As Ukraine Prepares to Take Russia to UNCLOS Arbitration Over Crimea, I Predict Russia's Likely Reaction*, OPINIOJURIS (Jan. 2, 2016), <http://opiniojuris.org/2016/02/01/ukraine-prepares-to-take-russia-to-unclos-arbitration> [<https://perma.cc/YLJ3-5QKU>].

²⁵ PCA Press Release, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukr. v. Russ.), First Procedural Meeting in Arbitration Under the Law of Sea Convention, (May 22, 2017).

²⁶ For details, see *infra* Part 3.

²⁷ SHABTAI ROSENNE, *WORLD COURT: WHAT IT IS AND HOW IT WORKS* 94-95 (1989).

unwilling states to exercise conventional litigation tactics as the United States did in the *Nicaragua* case (and possibly for Russia to follow in the pending *Black Sea, Sea of Azov, and Kerch Strait* case). Since the validity rests upon bifurcation, it requires a thorough investigation of the practice and the judicial policy behind it. A comparison of the ICJ's Rules of Court and Annex VII tribunals' Rules of Procedure, as well as their practice on the matter of bifurcation, should be of interest to international lawyers.

This Paper contains three parts. Part Two will observe the evolution of the rule-based bifurcation in the PCIJ and ICJ, concluding that under Article 79 of the Rules of Court, this rule-based approach to bifurcation is clearly resolved in the modern Rules of Court. Part Three lays out all 14 cases of the Annex VII Arbitration (as of 2018), putting them into three categories of practice to bifurcation. It compares circumstances in each category of the cases and explains how the tribunals would in general maintain flexibility with respect to bifurcation under the Rules of Procedure. It then demonstrates how non-bifurcation became the routine practice, but bifurcation is possible under certain circumstances of non-appearance and agreement. Part Four explores the policy behind the divergence of bifurcation practice between ICJ and Annex VII arbitral tribunals. The divergence in practice may be determined by the distinctive nature of the two forums (adjudicative and arbitral) as they decide the issue of bifurcation, balancing jurisdictional sensitivity against procedural efficiency. It concludes that the value of rule-based bifurcation should be carefully considered, by which an Annex VII arbitral tribunal may ensure the legitimacy of its judgments for the settlement of inter-state disputes by adhering to the best practice firmly established by the PCIJ and ICJ.

2. BIFURCATION AS A PROCEDURAL RIGHT FOR THE PARTY RAISING PRELIMINARY OBJECTIONS: THE EVALUATION OF RULES ON PRELIMINARY OBJECTION IN THE PCIJ AND THE ICJ

In the preparation of the Rules of Court in early 1922, the Court discussed various issues surrounding the draft article on

preliminary objections with regard to jurisdiction. A vote was taken, and this draft article was omitted in the second reading of the draft.²⁸

2.1. *Early practice of the Permanent Court and the making of the rule on "preliminary objections" in Article 38 of the Rules of Court (1926)*

Although the 1922 Rules contain no provisions on preliminary objections, in the 1924 *Mavrommatis Palestine Concessions* case, the respondent, the United Kingdom, informed the Court that it intended to raise preliminary objections to the Court's jurisdiction immediately after the applicant, Greece, filed its case (Memorial) with the Court.²⁹ In agreement with the respondent, the President fixed the date for the filing of the objection.³⁰ The applicant requested permission to make a written reply to this objection, which was permitted, and the date for filing the reply was fixed. In a separate jurisdictional judgment, the Court upheld the preliminary objection relating to the claim in respect of the works at Jaffa, and dismissed objections relating to the claim in respect of the works at Jerusalem.³¹

The second instance in which preliminary objections were raised when the Rules of Court were silent on the matter occurred in the 1925 *Certain German Interests in Polish Upper Silesia* case.³² There, the respondent, the Polish government, filed its case (Memorial), raising certain preliminary objections in anticipation of the applicant German government's first pleading.³³ The applicant then on the fixed date filed a "Counter-Case" (Counter-memorial) in reply to the Polish preliminary objections.³⁴ Public hearings relating to the

²⁸ Preparation of the Rules of Court of January 30th, 1922 P.C.I.J. (ser. D) No. 2, at 213-14, http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_02_preparation_reglement.pdf [<https://perma.cc/P8BN-UQJS>].

²⁹ *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. B) No. 3 (Aug. 30), at 9.

³⁰ *Id.*

³¹ *Id.* at 36.

³² *Certain German Interests in Polish Upper Silesia* (Germ. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25).

³³ *Id.* at 6-7.

³⁴ *Id.* at 7.

question of jurisdiction were arranged accordingly.³⁵ The Court in a separate jurisdictional judgment dismissed Poland's preliminary objections.³⁶

Based on the experience in these two cases, the Permanent Court adopted a new Article 38 concerning preliminary objections in the Rules of Court of 1926, which contains four paragraphs.³⁷ The first two paragraphs set out the timing for submission and the contents of preliminary objections. These two basic elements of qualification for "preliminary objections" have been maintained but subsequently modified as a result of the practice of the Court.³⁸ Once the preliminary objections are submitted, the Court establishes deadlines for response and oral arguments on the preliminary objection, as set out in paragraphs 3 and 4:

(3) Upon receipt by the Registrar of the document submitting the objection, the Court, or the President if the Court is not sitting, shall fix the time within which the party against whom the plea is directed may submit a written statement of its observations and conclusions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.

(4) Further proceedings shall be oral unless otherwise decided by the Court. The provisions of paragraphs 4 and 5 of Article 69 of the Rules shall apply.³⁹

No explicit reference is made to the preliminary objection resolution's impact on the underlying proceeding. Moreover, there is no provision in the Rules governing how the Court will dispose of preliminary objections. However, in the course of discussing the drafting of Article 38, the possibility that the Court might join the question of jurisdiction to the merits was widely contemplated.⁴⁰ In

³⁵ *Id.* at 7.

³⁶ *Id.* at 27.

³⁷ Statute and Rules of Court, 1926 P.C.I.J. (ser. D) No. 1, at 50-51, http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_01_1e_edition.pdf [<https://perma.cc/Y45Z-JMT8>].

³⁸ See *infra* notes 73-75 and accompanying text.

³⁹ Statute and Rules of Court, 1926 P.C.I.J. (ser. D) No. 1. *supra* note 37. The last sentence of paragraph 4 refers to the Chamber of Summary Procedure, which was omitted in 1936.

⁴⁰ Annual Report from 1926-1927, 1927 P.C.I.J. (ser. D) No. 3, at 199, http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_E/English/E_03_en.pdf [<https://perma.cc/7EP4-7PE2>].

the 1933 *Prince von Pless Administration* case, applying this new Article 38, the Court in the form of an order did in fact join the preliminary objection to the merits.⁴¹ This issue was addressed in the subsequent revision of the Rules of Court.

2.2. *Further indication of the consequence of preliminary objections:
Rules of Court 1936/1946/1972/1978 and the 2001 Modification*

In the “general revision” of the Rules of Court from 1931 to 1936, Article 38 was revised and adopted as Article 62 in the Rules of Court of 1936.⁴² The draft article prepared by the Coordination Committee introduced a new paragraph 5 to reflect the past practice of the Permanent Court in the disposal of the preliminary objection, stating “[w]hen the parties have been heard, the Court may decide on the objection, or may join the objection to the merits, or may take such other decision in regard to it as it considers just.”⁴³

In the first reading, the last clause “or may take such other decision . . .” was deleted as it could be misunderstood that the Court needed not to consider the objection,⁴⁴ and the word “may” was substituted by “shall.”⁴⁵ Indeed, in the course of discussion on the drafting of Article 38 of the 1926 Rules, Judge Anzilotti had already suggested that unwarranted confusion should be avoided.⁴⁶ In the last reading of Article 62 (March 5, 1936), it was noted that in order to implement paragraph 5, a decision to overrule preliminary objections or to join consideration of these objections to the merits would require the Court to reset the time limit for the main

⁴¹ *Prince von Pless Administration* (Ger. v. Pol.), Order of 4 February, 1933 P.C.I.J. (ser. A/B) No. 52, at 16.

⁴² Revised Statute and Rules of Court, 1940 P.C.I.J. (ser. D) No. 1, at 53, https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_01_4e_edition.pdf [<https://perma.cc/XJK8-YBXU>].

⁴³ Elaboration of the Rules of Court of March 11, 1936 P.C.I.J. (ser. D) third addendum to No. 2, at 85, http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_02_3e_addendum.pdf [<https://perma.cc/N6X2-NGNU>].

⁴⁴ *Id.* at 95.

⁴⁵ *Id.* at 150.

⁴⁶ Acts and Documents concerning the Organization of the Court, 1926 P.C.I.J. (ser. D) Addendum to No. 2, at 83, http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_D/D_02_acts_and_doc_serie_d_add_to_n2.pdf.

proceedings.⁴⁷ This revealed a gap in Article 62 regarding the procedural response to the submission of preliminary objections. Accordingly, “the proceedings on the merits shall be suspended” was inserted into paragraph 3, and the newly added paragraph 5, as rephrased, reads:

After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings.⁴⁸

In the practice of the Court, the decision envisaged in paragraph 5 may be rendered in the form of a judgment either to uphold or overrule the preliminary objections,⁴⁹ or in the form of an order to join the consideration of the preliminary objection to the merits.⁵⁰ The Court gave individual case numbers to these judgments and orders. In doing so, the Court was clearly of the view that the proceedings on an objection should be treated as an entirely separate case.⁵¹

The 1946 Rules retained Article 62 of the 1936 Rules with slight refinements in language.⁵² The ICJ’s post-1946 practice led to a major revision in 1972, in which the article on “preliminary objections” was renumbered as Article 67,⁵³ with paragraphs

⁴⁷ Elaboration of the Rules of Court of March 11, 1936 P.C.I.J. (ser. D) third addendum to No. 2.

⁴⁸ *Id.* at 707-708.

⁴⁹ Phosphates in Morocco (Italy v. Fr.), 1938 P.C.I.J. (ser. A/B) No. 74 (June 14); Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 77 (Order of Apr. 4); Borchgrave (Spain v. Belg.) 1937 P.C.I.J. (ser. A/B) No. 72 (Nov. 6).

⁵⁰ Pajzs, Csáky, Esterhazy (Hung. v. Yugo.), 1936 P.C.I.J. (ser. A/B) No. 66 (Order of May 23); Losinger & Co. (Switz. v. Yugo.), 1936 P.C.I.J. (ser. A/B) No. 67 (Order of June 27); Panevezys-Saldutiskis Railway (Est. v. Lith.), 1938 P.C.I.J. (ser. A/B) No. 75 (Order of June 30).

⁵¹ Annual Report from 1939-1945, 1945 P.C.I.J. (ser. E) No. 16, at 190, http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_E/English/E_16_en.pdf [https://perma.cc/DJR5-JRD2] (“It was held that the proceedings on an objection, even when resulting in the joinder of the objection to the merits, could be regarded as a separate case, no matter they were terminated by a judgement or by an order.”).

⁵² Rules of Court adopted on 6 May 1946. I.C.J. Acts & Docs. No. 1 (second ed.), at 74-75.

⁵³ Rules of Court came into force on 1 September 1972. I.C.J. Acts & Docs. No. 3, at 133-135.

revised and added.⁵⁴ Paragraph 5 of Article 62 of the 1946 Rules was revised and renumbered as paragraph 7 of Article 67:

After hearing the parties, the Court shall give its decision in the form of judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character joins it to the merits, it shall once more fix time-limits for the further proceedings.⁵⁵

This new rule for disposal of preliminary objections made two fundamental changes. First, it excludes the option of “shall join the objection to the merits” and instead forces the Court to rule on the matter for or against, or alternatively declare that “the objection does not possess an exclusively preliminary character.”⁵⁶ Second, it explicitly requires that the Court dispose of the objection in the form of a judgment.⁵⁷ The rendering of a judgment is said to correspond to the practice of the ICJ and is commonly regarded as appropriate in view of the importance of such a decision on the preliminary objection.⁵⁸ Although the ICJ’s post-1946 practice no longer offers an individual case number in disposing of a preliminary objection, the 1972 revision rather enhanced the Court’s procedure that the preliminary objection is to be dealt with as an entirely separate case distinct from the proceeding on the merits.

The eight paragraphs in Article 67 of the 1972 Rules were retained with minor drafting changes in Article 79 of the Rules of 1978.⁵⁹ In the modification of Article 79 in 2001, paragraph 1 was replaced by new paragraphs 1 to 3, and the former paragraphs 2 to 8 were retained unchanged and renumbered as paragraphs 4 to 10.⁶⁰ In the application of Article 79, the Court held that “by raising

⁵⁴ See *id.* (rewriting paragraph 1 (timing, etc.), retaining paragraph 2 (contents), retaining paragraphs 3 and 4 except for technical changes, and adding new paragraphs 5, 6 and 8).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Eduardo Jimenez de Arechaga, *The Amendments to the Rules of Procedure of the International Court of Justice* 67 AM. J. INT’L L. 1, 20 (1973) (stating the appropriateness of the requirement for the final decision on the preliminary objection to be in the form of a judgment).

⁵⁹ Rules of Court, I.C.J. Acts & Docs.

⁶⁰ *Id.*

preliminary objections, it has made a procedural choice the effect of which, according to the express terms of Article 79, paragraph 3 [Rules of 1978], is to suspend the proceedings on the merits.”⁶¹

Although the procedural choice suspends proceedings on the merits, the choice to object carries its own requirements that proceedings on the objection must be submitted timely and in accordance with the Rules. The content and form of preliminary objection were first specified in Paragraph 2 of Article 38 of the 1926 Rules,⁶² and the provision has been retained in subsequent revisions with only technical changes.⁶³ In the practice of the PCIJ, the Court admitted that the preliminary objection was to be submitted in a counter-memorial addressing both the preliminary objection and points of argument on merits;⁶⁴ it declined to condition the validity of the objection on adherence to rigid formality.⁶⁵

In the *Nottebohm* case, the non-appearing respondent sent a communication, prior to its time limit for the filing of a counter-memorial, challenging the jurisdiction of the Court.⁶⁶ The Court, without invoking the Rules of Court on the preliminary objection, nevertheless determined that a preliminary objection had been raised in the aforesaid communication. Consequently, the Court proceeded to examine only this preliminary objection and rendered a judgment concerning it alone.⁶⁷ In the second application of the *Barcelona Traction* case, the Court clarified the effect of the filing of the preliminary objection under the Rules as it gave “broad powers”

⁶¹ Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.S.), Preliminary Objections, Judgment, 1998 I.C.J. Rep. 134-35, para. 51.

⁶² Statute and Rules of Court, 1926 P.C.I.J. (ser. D) No. 1, at 51 (“The document submitting the objection shall contain a statement of facts and of law on which the plea is based, a statement of conclusions and a list of the documents in support; these documents shall be attached; it shall mention the evidence which the party may desire to produce.”).

⁶³ Rules of Court, I.C.J. Acts & Docs, Paragraph 4, art. 79 of the 2001. Amendment states, “The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; it shall mention any evidence which the party may desire to produce. Copies of the supporting documents shall be attached.”

⁶⁴ *Pajzs, Csáky, Esterházy* (Preliminary Objection: Order of 23 May 1936), *supra* note 50, at 7.

⁶⁵ *Losinger* (Preliminary Objection: Order of 27 June 1936), *supra* note 50, at 18-19.

⁶⁶ *Nottebohm* (Liech. v. Guat.), Preliminary Objection, 1953 I.C.J. Rep. 118 (Nov. 18).

⁶⁷ *Id.*

to the respondents, stating that “merely by labelling and filing a plea as a preliminary objection they automatically bring about the suspension of the proceedings on the merits.”⁶⁸ The consequence is that the Court will set a hearing under paragraph 5 of Article 62 of the 1946 Rules and give consideration to its objection before requiring a response on the merits.⁶⁹

In contrast to form, timing is the defining factor as to whether a plea constitutes a “preliminary” objection. The timing issue was recognized as early as the drafting of the Rules of Court in 1922.⁷⁰ Although the drafting judges failed to adopt any proposal for a rule on the preliminary objection, there was a consensus among the judges that objections to jurisdiction should be made as soon as possible.⁷¹ The article on the preliminary objection (Article 38) of the 1926 Rules requires that a preliminary objection shall be filed after the filing of the case (memorial) by the applicant and within the time fixed for the filing of the counter-case (counter-memorial).⁷² In the revised Rules of 1936, the starting point, “the filing of the Case [Memorial]” was omitted, and the rule simply stated that preliminary objection must be filed before the deadline for the counter-memorial.⁷³ The issue of whether preliminary objections can be submitted before the applicant files a memorial is less controversial and appears to be settled in the affirmative.⁷⁴ The time

⁶⁸ *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, Preliminary Objections, Judgment, 1964 I.C.J. Rep. 6 (July 24) (citing paragraph 3 of Article 62).

⁶⁹ *Id.* at paras. 9-10.

⁷⁰ Preparation of the Rules of Court of January 30th, 1922 P.C.I.J. (ser. D) No. 2, at 78, 149, 151, 202.

⁷¹ *Id.*

⁷² Statute and Rules of Court, 1926 P.C.I.J. (ser. D) No. 1, at 50. (“When proceedings are begun by means of an application, any preliminary objection shall be filed after the filing of the Case [Memorial] by the applicant and within the time fixed for the filing of the Counter-Case [Counter-Memorial].”).

⁷³ Elaboration of the Rules of Court of March 11, 1936 P.C.I.J. (ser. D) third addendum to No. 2, at 1015. Paragraph 1 of Article 62 of the 1936 Rules states, “A preliminary objection must be filed at the latest before the expiry of the time-limit fixed for the filing by the party submitting the objection of the first document of the written proceedings to be filed by that party.” It is noted that in the practice of PCIJ prior to the 1926 Rules of Court, the jurisdictional objections were raised in the early stage in both the *Mavrommatis Palestine Concessions* case, *supra* note 29, and *Certain German Interests in Polish Upper Silesia* case, *supra* note 32, with a difference that objection was made subsequent to the filing of Memorial in the former case but before in the latter case.

⁷⁴ In the ICJ, the early submission of a preliminary objection is absolutely proper. See *Aerial Incident of 3 July 1988 (Iran v. U.S.)*, Order of 13 December 1989,

limit for the submission of a preliminary objection has been redefined in the subsequent revision of the Rules of Court; the latest modification of Article 79 (2001) defines the closing point to be three months after the delivery of the Memorial or the delivery of a party's first pleading.⁷⁵

Objections submitted after the time limit, under the Rules of Court in force at the time, could not be accepted as properly submitted preliminary objections, and would not have suspensory effect on the main proceedings.⁷⁶ Objections submitted before the filing of the memorial—no longer a matter of restriction since the Revision of Rules of Court in 1936—literally will also not have the effect of suspension of the main proceedings since the latter has not commenced.⁷⁷ However, the word suspension may be used invariably as the Court did in the *Certain German Interests in Polish Upper Silesia* case;⁷⁸ the real meaning in this context is to indicate that there will be an immediate and separate stage for the examination of preliminary objections.⁷⁹

The Court's attention to jurisdiction may also be caught at the very early stage, e.g., simultaneously with the request for

I.C.J. Rep. 134 (“Whereas, in accordance with Article 79, paragraph 1, of the Rules of Court, while a respondent which wishes to submit a preliminary objection is entitled before doing so to be informed as to the nature of the claim by the submission of a Memorial by the Applicant, it may nevertheless file its objection earlier.”).

⁷⁵ Rules of Court, I.C.J. Acts & Docs, art. 79.

⁷⁶ *Avena and Other Mexican Nationals (Mexico v. U.S.)*, Judgment, 2004 I.C.J. Rep. 29, para. 24 (Mar. 31) (stating that the respondent filed its “preliminary objections” more than four months after Mexico’s filing of its Memorial, and therefore raised an issue concerning the three-month rule under art. 79(1) (2001 Modification). The Court was of the view that “a party failing to avail itself of the Article 79 procedure may forfeit the right to bring about a suspension of the proceedings.”). See also *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.)*, Judgment, 1972 I.C.J. Rep. 53, para. 13 (Aug. 18) (stating no preliminary procedure in this case, as “the objections were not put forward . . . as ‘preliminary’ objections under Article 62 of the Court’s Rules (1946 edition).”). The Court was of the view that “[i]t is certainly to be desired that objections to the jurisdiction of the Court should be put forward as preliminary objections for a separate decision in advance of the proceedings on the merits.”).

⁷⁷ ROSENNE, *supra* note 13, at 805. See also *Fisheries Jurisdiction (U.K. v. Ice.)*, Interim Protection Order, 1972 I.C.J. Rep. 12 (Aug. 17) (joint dissenting opinion of Judges Bengzon and Jiménez de Aréchag).

⁷⁸ See *Certain German Interests in Polish Upper Silesia (Preliminary Objections: Judgement)*, *supra* note 32, at 15 (indicating that the consequence of the objection was to suspend the proceedings on the merits of the suit, therefore it must proceed to the preliminary objection).

⁷⁹ ROSENNE, *supra* note 13, at 805.

provisional measures, as the respondent challenges *prima facie* jurisdiction on the merits of the dispute. However, it is not required, and the respondent states would not be able to formulate a formal preliminary objection due to urgency for such a request. In the *Interhandel* case, the respondent (United States) in the provisional measure phase filed a one-page brief titled "Preliminary Objection," referencing Article 62 of the 1946 Rules of Court governing preliminary objections, and reserved its right to file separate further preliminary objections.⁸⁰ This filing did not, however, have the effect of automatically suspending the main proceedings until the United States further submitted four preliminary objections with appendices containing supporting exhibits.⁸¹

More challenging for the Court are cases of non-appearance in which the Court's attention to jurisdiction was caught by objections raised in the provisional measure phase through so-called extra-procedural communications.⁸² This occurred in several cases of non-appearance in the 1970s and 1980s. In the case of *United States Diplomatic and Consular Staff in Tehran*, the Court found in the provisional measures phase that it was manifest from the information before the Court that the jurisdiction of the Court could

⁸⁰ *Interhandel* (Switz. v. U.S.), Interim Measures, 1957 I.C.J. Rep.107 (Oct. 24).

⁸¹ See *id.* at 123 (failing to mention Article 62 of the Rules of Court, the Court fixed time limits for the filing of the memorial, counter memorial or any preliminary objections of the United States. The United States filed within the time limit four preliminary objections with appendices of a list of exhibits); see also *Interhandel* (Switz. v. U.S.), Order, 1958 I.C.J. Rep. 32 (June 26) (referencing Article 62 of the Rules of Court, fixed the time limit for the applicant to present a written statement of its observations and submissions in regard to the preliminary objections). Two reasons may be considered as to why the initial one-page filing in the stage of provisional measures did not trigger immediate suspension: (1) the main proceeding has not commenced and (2) the United States explicitly reserved the right to file separate further preliminary objections.

⁸² See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, para. 27 (June 27) (announcing in each and every case that non-appearance was regretful. In no case did the Court declare extra-procedural communications invalid, or sanction the act of non-appearance); see also *Aegean Sea Continental Shelf* (Greece v. Turkey), Judgment, 1978 I.C.J. Rep. 18, para. 42 (Dec. 19) (stating that the Court must take into account all the elements before it, including the non-appearing party's extra-procedural communication. In doing so the Court explicitly referred to Article 53 of the Statute of the Court.); but cf. Sir G. Fitzmaurice, *The Problem of the "Non-Appearing" Defendant Government* 51 BRITISH YEARBOOK INT'L L. 89, 120-21 (1980) (examining the problem of the "non-appearing" defendant through ICJ cases and concluding that it may bring the court's obligatory jurisdiction into disrepute; speaking against the practice of non-appearance and suggesting that in managing procedural matters the Court shall not take judicial cognizance of extra-procedural communications).

be established.⁸³ In *Fisheries Jurisdiction, Trial of Pakistani Prisoners of War, Nuclear Tests, and Aegean Sea Continental Shelf*, the Court determined in its orders that the first pleadings should be addressed to the question of the jurisdiction of the Court to entertain the dispute, with fixed time-limits for the submission of pleadings for that purpose.⁸⁴

In these orders, no reference was made to the article governing preliminary objections in the Rules of Court then in force, similar to the practice of the court in the *Nottebohm* case.⁸⁵ The first order of this kind was made in the 1972 *Fisheries Jurisdiction* case, when the then applicable Article 62 in the 1946 Rules of Court was undergoing a modification during the course of the adjudication to require the submission of objections to be made in the form of “pleadings.”⁸⁶ The Court later ruled in its Judgments on Preliminary Objections that a non-appearing party’s extra-procedural communications could not be treated as a “pleading” under the Rules of Court.⁸⁷ While in the *Nottebohm* case, the extra-procedural communication was submitted prior to its time limit for the filing of a counter-memorial and the Court recognized that preliminary objection had

⁸³ See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Provisional Measures, 1979 I.C.J. Rep. 14, para. 18 (Dec. 15) (stating that the Court only ordered that the case should proceed according to its normal course, *i.e.*, memorial of the United States is to be filed first and the counter-memorial of Iran second); see also *U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, Judgment, 1980 I.C.J. Rep. 24, para. 45 (May 24) (discussing how the objections from Iran were examined in the main proceedings and decided in the judgment on merits).

⁸⁴ See generally *Fisheries Jurisdiction (U.K. v. Ice.)*, Order, 1972, I.C.J. Rep. 182 (Aug. 18); *Fisheries Jurisdiction (Ger. v. Ice.)*, Order, 1972, I.C.J. Rep. 189 (Aug. 18); *Trial of Pakistani Prisoners of War (Pak. v. India)*, Order, 1973 I.C.J. Rep. 330 (July 13); *Nuclear Tests (Aust. v. Fr.)*, Order, 1973 I.C.J. Rep. 106 (June 22); *Nuclear Tests (N.Z. v. Fr.)*, Order, 1973 I.C.J. Rep. 142 (June 22); *Aegean Sea Continental Shelf (Greece v. Turkey)*, Order, 1976 I.C.J. Rep. 14 (Sept. 11); *Aegean Sea Continental Shelf (Greece v. Turkey)* Order, 1976 I.C.J. Rep. 43 (Oct. 14) (providing in its orders that the first pleadings should first address the Court’s own jurisdiction within certain time limits).

⁸⁵ *Nottebohm*, *supra* note 66 and accompanying text.

⁸⁶ See *supra* note 53, (quoting Article 67 (5) of the 1972 Rules of Court: “The statements of fact and law in the pleadings referred to in paragraphs 2 and 3 above, and the statements and evidence presented at the hearings contemplated by paragraph 4, shall be confined to those matters that are relevant to the objection.”).

⁸⁷ See *Fisheries Jurisdiction (U.K. v. Ice.)*, Jurisdiction of the Court, 1973 I.C.J. Rep. 6, ¶ 10 (Feb. 2); *Fisheries Jurisdiction (Ger. v. Ice.)*, Jurisdiction of the Court, 1973 I.C.J. Rep. 54, ¶ 13 (Feb. 2). The Court affirmed this point in a subsequent case of non-appearance; see also *Aegean Sea Continental Shelf (Greece v. Turkey)*, Questions of Jurisdiction and/or Admissibility, 1978 I.C.J. Rep. 7, ¶ 14 (Dec. 19).

been raised in the said communication, under the revised 1972 Rules, there is no space for the Court to recognize that preliminary objections can be properly raised by extra-procedural communications.⁸⁸ In all these cases, the respondent states presented such communications in the provisional measures stage in which the Court may simply grant bifurcation.

In these cases, the Court offered a *post facto* justification of its decision to consider the matter of jurisdiction on its own initiative, reasoning that it was supported by a statutory duty under Article 53 of the Statute of the Court, which requires the Court to “satisfy itself” that it has jurisdiction if a party fails to appear.⁸⁹ However, Article 53 was not referenced in the aforementioned orders. Indeed, the Court’s reliance on Article 53 does not appear proper at this stage in the proceedings since the respondent’s non-appearance has yet to be ascertained until the time limit for submission of its first pleadings has passed.⁹⁰ In any event, Article 53 does not have pre-emptory effect on a procedural order issued at the stage of provisional measures even if it concerns jurisdiction. This point is quite clear by reference of the Court’s handling of the respondent’s objections raised in extra-communication in the merits in the case of *United States Diplomatic and Consular Staff in Tehran*.⁹¹

Therefore, an outstanding objection presented at the provisional measures stage—not necessarily limited to non-appearing party’s extra-procedural communications—may facilitate the Court’s decision to bifurcate proceedings without waiting for further submission of a preliminary objection, as occurred in the *Nicaragua* case.⁹² In such cases the Court exercised its inherent power to manage procedural issues to cope with circumstances not envisaged in the preliminary objection rule in force at the time.⁹³ Or, if the

⁸⁸ Rules of Court came into force on 1 September 1972, *supra* note 53.

⁸⁹ Fisheries Jurisdiction (U.K. v. Ice.), Jurisdiction of the Court, 1973 I.C.J. Rep. 7, para. 12 (Feb. 2); Aegean Sea Continental Shelf, Judgment (Greece v. Turkey), Questions of Jurisdiction and/or Admissibility, 1978 I.C.J. Rep. 7, paras. 14-15 (Dec. 19).

⁹⁰ ROSENNE, *supra* note 13, at 851.

⁹¹ U.S. Diplomatic and Consular Staff in Tehran, *supra* note 83.

⁹² Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Order, 1984 I.C.J. Rep. 187 (May 10).

⁹³ Nuclear Tests (Aust. v. Fr.), Questions of Jurisdiction and/or Admissibility, 1974 I.C.J. Rep. 253, ¶¶ 22-23 (Dec. 20). This practice was later reflected in the 2001 amendment to Article 79 of the Rules of Court. In paragraph 2 the Court states: “Notwithstanding paragraph 1 above, following the submission of the application and after the President has met and consulted with the parties, the Court may decide that any questions of jurisdiction and admissibility shall be determined

parties in the early stage of the proceedings, which in practice follows the submission of the application but precedes the first pleading, agree that the issues of jurisdiction and admissibility should be dealt with at a preliminary stage of the proceedings, the Court has in the past given effect to such agreements.⁹⁴

In these cases, prevalent since the 1970s, the Court has established a practice of evaluating jurisdiction issues separately from the main proceedings without the parties raising preliminary objections.⁹⁵ This practice of bifurcation was characterized by commentators as “isolation of jurisdiction.”⁹⁶

However, if the Court elects to wait to address jurisdictional issues, the respondent state is entitled to raise preliminary objections within the time limit prescribed under Article 79 of the Rules of Court.⁹⁷ Ultimately, a party has the privilege to secure a self-contained proceeding on jurisdiction and admissibility unless it decides not to do so by failing to raise a timely objection or agrees that preliminary objections be heard and determined within the proceedings on the merits.⁹⁸ From the 1972 Rules onwards, the

separately.” The new art. 79(2) was applied in the following two cases: Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Jurisdiction and Admissibility, Judgment, 2016 I.C.J. Rep. 255, and Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Islands v. Pak.), Jurisdiction and Admissibility, Judgment, 2016 I.C.J. Rep. 552.

⁹⁴ Border and Transborder Armed Actions (Nicar. v. Hond.), Order, 1986 I.C.J. Rep. 552; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Order, 1991 I.C.J. Rep. 50; Fisheries Jurisdiction (Spain v. Can.), Order, 1995 I.C.J. Rep. 87; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Burundi), Order, 1999 I.C.J. Rep. 1019; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), Order, 1999 I.C.J. Rep. 1026.

⁹⁵ See *supra* notes 84, 91-94.

⁹⁶ ROSENNE, *supra* note 13, at 856-62. In the case of “isolation of jurisdiction,” written pleadings are designated as “memorial” and “counter-memorial,” as opposed to the “Preliminary Objections” and the “Written Statement of Observations and Submissions.” See Dietmar W. Prager, *The 2001 Amendments to the Rules of Procedure of the International Court of Justice*, 1 L. & PRACTICE INT’L CTS. & TRIBUNALS 155, 168 (2002) (explaining that the new rule gives the Court the power to determine jurisdiction and admissibility before any proceedings on the merits).

⁹⁷ See Legality of Use of Force (Yugoslavia v. Belg.), Order, 1999 I.C.J. Rep. 989; Legality of Use of Force (Yugoslavia v. Belg.), Order, 2000 I.C.J. Rep. 149 (fixing time limit for filing of the preliminary objections).

⁹⁸ See Certain Norwegian Loans (Fr. v. Nor.), Order, 1956 I.C.J. Rep. 74 (May 29) (stating that preliminary objections were formally raised, but the parties subsequently agreed to have these objections decided together with the merits. The Court joined the objections the merits). A new provision that such an agreement “shall be given effect by the Court” was added to art. 67(8) of the Rules of Court

consequence of a preliminary objection submitted in due course is comprehensively described by Paragraph 3 (suspension of the main proceedings and a written proceeding addressing objections, now paragraph 5 of the 2001 Amendment), Paragraph 4 (a default oral hearing on preliminary objections, now Paragraph 6), and Paragraph 7 (disposal of preliminary objections in the form of judgement, now Paragraph 9).⁹⁹ This rule-based approach to bifurcation is clearly resolved in the modern Rules of Court.¹⁰⁰

3. THE MATTER OF BIFURCATION IN UNCLOS ANNEX VII ARBITRATION

Since UNCLOS entered into force in 1994, 14 cases have been adjudicated under Annex VII Arbitration.¹⁰¹ ICSID served as Registrar for the first case, the *Southern Bluefin Tuna* case, where the parties agreed that Japan's preliminary objections to jurisdiction would be addressed in one round of submissions in writing, followed by a hearing, all in accordance with the agreed schedule.¹⁰² This proceeding was disposed of by a separate award on jurisdiction and admissibility, in which the tribunal upheld an objection to jurisdiction and concluded that it lacked jurisdiction over the dispute.¹⁰³

(1972) and retained in the 1978 Revision and renumbered as art. 79 (10) (2001 Amendment); *Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.)*, 1987 I.C.J. Rep. 3 (Order of Mar. 2); *East Timor (Port. v. Austl.)*, 1995 I.C.J. Rep. 91 (Order of June 30), para. 4 (June 30); *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2000 I.C.J. Rep. 182 (Order of Dec. 8), 236. *But cf. id.* at 121 (explaining that this rule shall not be subject to unilateral modification).

⁹⁹ Rules of Court, I.C.J. Acts & Docs.

¹⁰⁰ *See, e.g., Maritime Delimitation in the Indian Ocean (Som. v. Kenya)*, Judgment, 2017 I.C.J. Rep. 3, para. 5 (Feb. 2017) (explaining that proceedings on the merits had been suspended until resolving jurisdictional objections).

¹⁰¹ *Southern Bluefin Tuna (Austl. v. Japan)*; *MOX Plant case*; *Barb. v. Trin. & Tobago*; *Guy. v. Surin.*; *Bay of Bengal Maritime Boundary Arb. (Bangl. v. India)*; *Chagos Marine Protected Area Arb.*; *"Enrica Lexie" Incident*; *Atlanto-Scandian Herring Arb.*; *Arctic Sunrise (Neth. v. Russ.)*; *South China Sea Arb. (Phil. v. China)*; *ARA Libertad Arb. (Arg. v. Ghana)*, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.)*; *Duzgit Integrity Arb.*; and *Land Reclamation by Singapore in and Around the Straits of Johor*.

¹⁰² *Southern Bluefin Tuna (Austl. v. Japan)*, Award on Jurisdiction and Admissibility (2004) 23 Rep. Int'l Arb. Awards 5, para. 7.

¹⁰³ *Id.* at para. 72.

The Permanent Court of Arbitration (PCA) served as Registrar in the remaining thirteen cases, publishing the tribunal's Rules of Procedure on the PCA website in 11 of these cases.¹⁰⁴ Provisions under the heading "Preliminary Objection" in these 11 published rules can be categorized into three types. Seven of these cases provide the tribunals with discretion on the matter of bifurcation.¹⁰⁵ Two of them are identical articles adopted by the tribunals in the two non-appearance cases, which are, in principle, in favor of bifurcation.¹⁰⁶ The final two cases incorporate key elements of Article 79 of the ICJ's Rules of Court (one is the pending *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*).¹⁰⁷ For the two cases in which Rules of Procedure were not published, proceedings were stayed while the parties reached a settlement and jointly requested the tribunal to deliver a final award binding upon the parties pursuant to their agreement.¹⁰⁸ In *Duzgit Integrity Arbitration*, the respondent submitted its preliminary objections and made a request for bifurcation.¹⁰⁹ The tribunal, after soliciting comments from the applicant and hearing the views of the parties, rejected this request.¹¹⁰ This mini-proceeding on bifurcation will be discussed throughout this Chapter.

Now we look at these rules and the practice of the tribunals on the matter of bifurcation. We consider each category of cases in turn, drawing on specific cases as examples.

¹⁰⁴ MOX Plant case; Barb. v. Trin. & Tobago; Guy. v. Surin.; Bay of Bengal Maritime Boundary Arb. (Bangl. v. India), Chagos Marine Protected Area Arb., "Enrica Lexie" Incident, Atlanto-Scandian Herring Arb., Arctic Sunrise (Neth. v. Russ); South China Sea Arbitration (Phil. v. China); ARA Libertad Arb. (Arg. v. Ghana), Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.). The Rules of Procedure were not published in *Duzgit Integrity Arb.* and *Land Reclamation by Singapore in and Around the Straits of Johor*.

¹⁰⁵ MOX Plant case; Barb. v. Trin. & Tobago; Guy. v. Surin.; Bay of Bengal Maritime Boundary Arb. (Bangl. v. India); Chagos Marine Protected Area Arb.; "Enrica Lexie" Incident; Atlanto-Scandian Herring Arb.

¹⁰⁶ The Arctic Sunrise case (Neth. v. Russ.); South China Sea Arb. (Phil. v. China).

¹⁰⁷ ARA Libertad Arb. (Arg. v. Ghana); Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.).

¹⁰⁸ See *Land Reclamation by Singapore in and Around the Straits of Johor* (Malay. v. Sing.), 45 I.L.M. (Perm. Ct. Arb. 2005) (deciding that in light of the joint request by the Parties that the Tribunal has jurisdiction to render the Award).

¹⁰⁹ *Duzgit Integrity Arb.* (Malta v. São Tomé & Príncipe), (Perm. Ct. Arb. 2016).

¹¹⁰ *Id.*

3.1. Discretionary bifurcation in the Rules of Procedure and no bifurcation in practice

The *MOX Plant* case was the first case initiated under Annex VII Arbitration that PCA served as Registrar. Article 11(3) of the Rules of Procedure provides: “The tribunal *may* rule on objections . . . as a preliminary question or it *may* proceed with the arbitration and rule on such an objection in its final award (emphasis added).”¹¹¹ The tribunals in the following five cases adopted the articles on preliminary objection corresponding *mutatis mutandis* to Article 11(3) of the *MOX Plant* Rules of Procedure: *Barbados v. Trinidad and Tobago*,¹¹² *Guyana v. Suriname*,¹¹³ *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*,¹¹⁴ *Chagos Marine Protected Area Arbitration*,¹¹⁵ and “*Enrica Lexie*” Incident.¹¹⁶ Significantly, the PAC’s Model Rules of Procedure also provide the same discretion to an arbitral tribunal on the matter of bifurcation.¹¹⁷

¹¹¹ *MOX Plant Case* (Ir. v. U.K.), Rules of Procedure, (Perm. Ct. Arb. 2001), art. 11(3).

¹¹² *Barb. v. Trin. & Tobago*, Rules of Procedure, (Perm. Ct. Arb. 2004), art. 10(3).

¹¹³ *Guy. v. Surin.*, Rules of Procedure, (Perm. Ct. Arb. 2004), art. 10(3).

¹¹⁴ *Bay of Bengal Maritime Boundary Arb.* (Bangl. v. India), Rules of Procedure, (Perm. Ct. Arb. 2009) art. 10(3).

¹¹⁵ *Chagos Marine Protected Area Arb.* (Mauritius v. U.K.), Rules of Procedures, (Perm. Ct. Arb. 2012), art. 11(3).

¹¹⁶ “*Enrica Lexie*” Incident, (It. v. India), Rules of Procedure, (Perm. Ct. Arb. 2016), art. 10(4) (Jan. 2016).

¹¹⁷ *Optional Rules for Arbitrating Disputes between Two States*, (Perm. Ct. Arb. 2012), art. 21(4), https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/Optional-Rules-for-Arbitrating-Disputes-between-Two-States_1992.pdf [<https://perma.cc/K8X4-FFXK>]; *Arbitration Rules* (effective Dec. 17, 2012), (Perm. Ct. Arb. 2012), art. 23(3), <https://pca-cpa.org/wp-content/uploads/sites/175/2015/11/PCA-Arbitration-Rules-2012.pdf> [<https://perma.cc/5P7M-Q59G>]. Since the P.C.A. is more frequently used for international commercial arbitrations, we may assume that the P.C.A.’s model Arbitration Rules reflect the practice of international commercial arbitrations. In this regard, we find the same provision also in Article 23(3) in the UNCITRAL Arbitration Rule, *see* UNCITRAL Arbitration Rule (as revised in 2010), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [<https://perma.cc/B4MU-SNUZ>]. In international commercial arbitrations, tribunals have the power to decide on the matter of bifurcation according to their rules of arbitration, or they shall have discretion on this matter in exercising their inherent judicial function in the absence of any explicit provision. *See generally* Vojtěch Trapl, *Thinking Big – Bifurcation of Arbitration Proceedings – To Bifurcate or Not To Bifurcate*, 4 CZECH YEARBOOK PUB. &

The Rules of Procedure of *Atlanto-Scandian Herring Arbitration* do not explicitly provide that the tribunal may either rule on objections as a preliminary issue or in its final award.¹¹⁸ However, Article 12, under the heading “Preliminary Objections and Stay of Proceedings,” provides in Paragraph 3:

Upon receipt of a preliminary objection under paragraph 2(a) the Arbitral Tribunal shall decide by a reasoned Procedural Order, promptly after having heard the Parties orally by way of a meeting, whether to order bifurcation or to decline to order bifurcation and to reserve the preliminary objections for the final Award.¹¹⁹

With this mini proceeding on the question of bifurcation (rather than on questions of jurisdiction or admissibility), the tribunal maintains discretionary power on the question of bifurcation. This matter will be dealt with subsequently.

In the abovementioned seven cases, the tribunals only had a chance to consider the issue of bifurcation in the *Guyana v. Suriname* case and *Chagos Marine Protected Area Arbitration*. In the other five cases, preliminary objections were either not raised (two cases),¹²⁰ or the issue of bifurcation did not come out as an issue for other reasons (three cases).¹²¹

PRIVATE INT’L L. 267 (2013); Massimo V. Benedettelli, *To Bifurcate or Not To Bifurcate? That is the (Ambiguous) Question*, 29 ARB. INT’L 493 (2013).

¹¹⁸ *Atlanto-Scandian Herring Arb. (Den. v. EU)*, Rules of Procedure, PCA Case Repository, art. 12(3) (Mar. 2014).

¹¹⁹ *Id.*

¹²⁰ See *Bay of Bengal Maritime Boundary Arb. (Bangl. v. India)*, PCA Case Repository (2014) (noting that India did not raise preliminary objections in its counter memorial); “*Enrica Lexie*” Incident (*It. v. India*), Case No. 2015-28, Procedural Order No. 3 (Perm. Ct. Arb. 2017), <https://pcacases.com/web/sendAttach/2145> [<https://perma.cc/VJ4N-FVXP>] (noting that India did not submit preliminary objections within the time limit).

¹²¹ See *MOX Plant Case (Ir. v. U.K.)*, Procedural Order No. 3, para. 29 (Perm. Ct. Arb. 2003), <https://pcacases.com/web/sendAttach/867> [<https://perma.cc/N9T5-XK3U>] (holding that it was unnecessary to decide whether to bifurcate the case at that time because the arbitration was being conducted under Article 8 of the Rules but not Article 11 on Preliminary Objection); *MOX Plant Case (Ir. v. U.K.)*, Procedural Order No. 6 (Perm. Ct. Arb. 2003), <https://pcacases.com/web/sendAttach/870> [<https://perma.cc/V583-M763>] (announcing that Ireland has withdrawn the case and the case was terminated); *Atlanto-Scandian Herring Arb. (Den. v. Eur.)*, Case No. 2013-30, Procedural Order No. 2 (Perm. Ct. Arb. 2014), <https://pcacases.com/web/sendAttach/784> [<https://perma.cc/9U6Z-WLZV>] (staying the proceedings at the early stage under the agreement of the parties); *Atlanto-Scandian Herring Arb. (Den. v. Eur.)*, Case No. 2013-30, Termination Order (Perm. Ct. Arb. 2014),

In *Guyana v. Suriname*, upon receiving the preliminary objection submitted by Suriname, the tribunal invited the parties to submit their views in writing and then arranged a two-day meeting to hear arguments on the issue of bifurcation.¹²² This informal proceeding on the matter of bifurcation was not specified in Article 10 of the tribunal's Rules of Procedure, but was rather initiated by the tribunal probably within the meaning of Article 10(3), directing the tribunal to ascertain the views of the parties before deciding whether to rule on objections to jurisdiction or admissibility issues as a preliminary determination or in its final award.¹²³ Therefore, the submissions in writing and a hearing in this mini-proceeding dealt with the question of whether the objections were "said to be preliminary (or exclusively preliminary) in character"; the tribunal, on the basis that "the objections are not of an exclusively preliminary character," decided in its No. 2 Order, in accordance with Article 10(3) of its Rules of Procedure, to rule on Suriname's preliminary objections to jurisdiction and admissibility in its final award.¹²⁴

In *Chagos Marine Protected Area Arbitration*, Article 11 (Preliminary Objection) of the tribunal's Rules of Procedure explicitly provided one round of submission in writing on the question of bifurcation, and a one-day hearing on the matter.¹²⁵ Under this mini-proceeding, the written submissions and the hearing are confined to the question of bifurcation and do not directly address jurisdiction or admissibility.¹²⁶ In its No. 2 Order, the tribunal rejected the United Kingdom's request for bifurcation

<https://pcases.com/web/sendAttach/781> [https://perma.cc/GBK7-5KWY] (terminating the stay by agreement of the parties); *Barb. v. Trin. & Tobago*, Case No. 2004-02, Award (Perm. Ct. Arb. 2006), <https://pcases.com/web/sendAttach/1116> [https://perma.cc/74VA-VG7E] (noting that the respondent State asked the tribunal to join its preliminary objections to the merits to be determined in the tribunal's final award).

¹²² See *Guy. v. Surin.*, Case No. 2004-04, Award, paras. 40-48 (Perm. Ct. Arb. 2007), <https://pcases.com/web/sendAttach/902> [https://perma.cc/D72Y-4YPQ].

¹²³ See *id.*

¹²⁴ See *Guy. v. Surin.*, Case No. 2004-04, Order No. 2 (Perm. Ct. Arb. 2005), <https://pcases.com/web/sendAttach/884> [https://perma.cc/C68K-8DMN].

¹²⁵ See *Chagos Marine Protected Area Arb. (Mauritius v. U.K.)*, *supra* note 115, Rules of Procedures, art. 11(4)-(5) (Perm. Ct. Arb. 2011).

¹²⁶ See *id.*

and decided that the preliminary objections would be considered with the proceedings on the merits.¹²⁷

This mini-proceeding on the question of bifurcation was also implemented by the tribunal in *Duzgit Integrity Arbitration*, who, in its No. 2 Order, rejected the respondent's request for bifurcation (the PCA did not publish the tribunal's Rules of Procedure, or its No. 2 Order).¹²⁸

In contrast to *Guyana v. Suriname*, the tribunal of *Chagos Marine Protected Area Arbitration* and the tribunal of *Duzgit Integrity Arbitration* rejected the respondents' request for bifurcation without giving any reason as to whether or not the objection possessed an exclusively preliminary character.¹²⁹ Rather, it indicated that the preliminary character of an objection was at most a factor for consideration within the tribunal's discretion in the implementation of the mini-proceedings on bifurcation. In *Guyana v. Suriname*, if the tribunal found that the objection possessed an exclusively preliminary character, it remains to be seen whether the tribunal, while still retaining the discretion explicitly provided by its Rules of Procedure, would bifurcate the proceedings without taking into consideration other circumstances, e.g., efficiency of the ad hoc arbitration (see the discussion in Chapter 4).

In each of the cases, when a respondent raised its preliminary objection, a mini-proceeding on the matter of bifurcation was followed without suspension of the main proceedings.¹³⁰

The mini proceeding was within the tribunal's discretion on bifurcation, even when the mini proceeding was not specified in the Rules of Procedure. The format of the mini proceedings varied across the three cases; some permitted only oral arguments, while others required submissions in writing in addition to a hearing. When narrowly examining the question of bifurcation, however, the tribunals consider a variety of factors in exercising their discretion.

¹²⁷ See *Chagos Marine Protected Area Arb. (Mauritius v. U.K.)*, Case No. 2011-03, Procedural Order No. 2 (Perm. Ct. Arb. 2013), <https://pcacases.com/web/sendAttach/1795> [<https://perma.cc/6L95-R94P>].

¹²⁸ See *Duzgit Integrity Arb.*, *supra* note 109.

¹²⁹ See *Chagos Marine Protected Area Arb.*, *supra* note 127; *Duzgit Integrity Arb.*, *supra* note 109.

¹³⁰ See *Guy. v. Surin.*, *supra* note 113 (providing a clear example of the tribunal deciding to undertake a mini-proceeding on bifurcation without suspending its main proceeding). In fact, resolution of the question of bifurcation in the three cases was reached within approximately two months from the submission of preliminary objections; the original timetable for the submission of pleadings and the scheduling of hearings were barely affected.

The question of whether an objection possesses an exclusively preliminary character was not indispensable to the bifurcation inquiry, though sometimes it dominated the reasoning for non-bifurcation. In the mini proceedings, deliberation on bifurcation did not permit an argument on jurisdiction and admissibility to be fully debated; therefore, the tribunals at this stage could not adjudicate questions of jurisdiction or admissibility that had been raised as preliminary objections. Unlike the ICJ, the tribunals cannot render a separate judgment (award) to dispose of preliminary objections, including a judgment (award) declaring that the preliminary objection does not possess an exclusively preliminary character.

At the conclusion of the mini proceedings in the three above-mentioned cases, the tribunals made decisions on the question of bifurcation in the form of procedural orders – but all ended with rejections to the requests for bifurcation. The mini proceeding concluding with a procedural order necessarily constitutes a kind of procedural response to a duly raised preliminary objection. However, it is a procedure for deliberation on bifurcation only, so the tribunal cannot adjudicate the preliminary objection. In contrast, under Article 79 of the ICJ's Rules of Court, a party that duly submits its preliminary objections will have the Court adjudicate on questions raised therein, with no proceedings on the matter of bifurcation.¹³¹ This is the fundamental procedural difference when responding to a duly submitted preliminary objection.

3.2. *The matter of bifurcation in two cases of non-appearance*

In *South China Sea Arbitration* and *Arctic Sunrise*, the tribunals, having been constituted without participation of the respondents,¹³² adopted Rules of Procedure to address potential non-appearance.¹³³ Both sets of Rules adopted an identical Article 20 containing four

¹³¹ See Rules of Court, I.C.J. Acts & Docs, art. 79.

¹³² See UNCLOS, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. at Annex VII art. 3(c), (e) (discussing the appointment of members to an arbitral tribunal).

¹³³ The respective Rules of Procedure for these two cases of non-appearance set forth identical Article 25 provisions on "Failure to Appear or to Make Submissions." See *The Arctic Sunrise Arb. (Neth. v. Russ.)*, Rules of Procedure, PCA Case Repository, art. 25 (Mar. 17, 2014), <http://www.pcacases.com/web/sendAttach/1317> [<https://perma.cc/SZK5-AW9C>]; *South China Sea Arb. (Phil. v. China)*, Rules of Procedure, PCA Case Repository (Aug. 27, 2013), <http://www.pcacases.com/web/sendAttach/233> [<https://perma.cc/3GSC-53U9>].

paragraphs regarding “Preliminary Objections.”¹³⁴ The deadline for raising a plea concerning jurisdiction is “no later than in the Counter-Memorial.”¹³⁵ A later plea may be admitted by the tribunals,¹³⁶ though it is not clear whether raising an objection to jurisdiction in an extra-procedural communication would constitute such a plea.¹³⁷ The ensuing paragraphs of Article 20 read as follows:

The Arbitral Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question, unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.

Prior to a ruling on any matters relating to jurisdiction or admissibility, a hearing shall be held if the Arbitral Tribunal determines that such a hearing is necessary or useful, after seeking the views of the Parties.¹³⁸

In *Arctic Sunrise*, within three weeks of the initiation of the arbitration, Russia objected to jurisdiction in an extra-procedural communication and provided justification of non-appearance, on the basis of Article 298 of the UNCLOS.¹³⁹ The Netherlands requested provisional measures from ITLOS since the arbitral tribunal was yet-to-be constituted.¹⁴⁰ Russia’s communication was

¹³⁴ See *The Arctic Sunrise Arb. (Neth. v. Russ.)*, Rules of Procedure, PCA Case Repository, art. 20 (Mar. 17, 2014); *South China Sea Arb. (Phil. v. China)*, Rules of Procedure, PCA Case Repository, art. 20 (Aug. 27, 2013).

¹³⁵ See *id.* art. 20(2).

¹³⁶ See *id.* (“A plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Counter-Memorial . . . The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified”).

¹³⁷ Note that in ICJ cases, objections raised in extra-procedural communications can no longer be taken as formal “pleading” under the article on preliminary objections since *Fisheries Jurisdiction*. See *Fisheries Jurisdiction (U.K. v. Ice.)*, *supra* note 87, *Fisheries Jurisdiction (Ger. v. Ice.)*, *supra* note 87 and accompanying text (highlighting the Court’s continued manifestation of this approach).

¹³⁸ See *The Arctic Sunrise Arb. Rules of Proc.*, *supra* note 133, art. 20(3)-(4); *The South China Sea Arb. Rules of Proc.*, *supra* note 133, art. 20(3)-(4).

¹³⁹ See *The Arctic Sunrise Arb. (Neth. v. Russ.)*, Award on the Merits, PCA Case Repository, para. 5 (Aug. 14, 2015), <https://pcacases.com/web/sendAttach/1438> [<https://perma.cc/HX9E-8HUK>].

¹⁴⁰ See UNCLOS, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. at art. 290(5) (articulating the circumstances required for such a request to be entertained by ITLOS).

evaluated by ITLOS when ITLOS considered prescribing provisional measures.¹⁴¹ ITLOS, however, could not prescribe any procedural arrangement on the matter of bifurcation because procedural prescriptions regarding bifurcation are only within the purview of the arbitral tribunal. After the constitution of the arbitral tribunal, the applicant, Netherlands, requested bifurcation in its Memorial.¹⁴² The Netherlands saw this as the appropriate procedural response to Russia's extra-procedural communication, and the tribunal offered Russia the opportunity to comment on applicants' request.¹⁴³ In its No. 4 Procedural Order, the tribunal determined that Russia's extra-procedural communication effectively constituted "a plea concerning this Arbitral Tribunal's jurisdiction to which Article 20(3) of the Rules of Procedure applies, and such a plea possesses an exclusively preliminary character."¹⁴⁴ The tribunal then decided to "rule on this plea concerning its jurisdiction as a preliminary question without holding a hearing."¹⁴⁵

In *South China Sea Arbitration*, from the time the arbitration was initiated, China persistently held that it did not accept the arbitration.¹⁴⁶ Nevertheless, the tribunal set a deadline for China's submission of its Counter-Memorial.¹⁴⁷ A week before China's submission was due, China published a 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 (hereinafter "China's Position Paper"), in which China argued three major objections to the tribunal's

¹⁴¹ See The "Arctic Sunrise" Case, (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013, ITLOS Rep. 240, para. 42.

¹⁴² See The Arctic Sunrise Arb. (Neth. v. Russ.), Case No. 2014-02, Proc. Order No. 4 (Bifurcation), § 1 (Perm. Ct. Arb. 2014), <http://www.pcacases.com/web/sendAttach/1324> [<https://perma.cc/BV37-P327>].

¹⁴³ See *id.* at 3.

¹⁴⁴ See *id.* at 3.

¹⁴⁵ See *id.*

¹⁴⁶ See Letter from The Embassy of the People's Republic of China in the Republic of the Philippines to the Department of Foreign Affairs of the Republic of the Philippines (Feb. 19, 2013), <https://assets.documentcloud.org/documents/2165478/phl-prc-china-note-verbale.pdf> [<https://perma.cc/GX5C-LX3X>] [hereinafter Letter from PRC to Philippines 2013] ("China therefore rejects and returns the Philippines' Note Verbal No 13-0211 and the attached Notification.").

¹⁴⁷ See The South China Sea Arb. (Phil. v. China), Case No. 2013-19, Proc. Order No.2, at 3, <https://pcacases.com/web/sendAttach/1805> [<https://perma.cc/9BAC-RXTJ>].

jurisdiction.¹⁴⁸ In the Position Paper, however, no request for bifurcation was explicitly made.¹⁴⁹ The tribunal invited the Philippines to comment on, among other things, a possible bifurcation of the proceedings.¹⁵⁰ The Philippines replied to the tribunal that bifurcation would be “neither appropriate or desirable,” since “the jurisdictional issues . . . are plainly interwoven with the merits.”¹⁵¹ In the operative part of its No. 4 Procedural Order, the tribunal considered China’s extra-procedural communications to effectively constitute a plea concerning the tribunal’s jurisdiction for the purposes of Article 20 of the Rules of Procedure and decided to bifurcate the proceedings.¹⁵² The tribunal reserved the issue of whether jurisdictional objections possess exclusively preliminary character, to be determined later in the hearing on jurisdiction.¹⁵³

Under these tribunals’ identical Article 20(3) of Rules of Procedure, tribunals “shall rule on any plea concerning its jurisdiction as a preliminary question, unless the Arbitral Tribunal determines . . . that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.”¹⁵⁴ The procedural response to a plea, in principle, is bifurcation, which does not necessarily require any decision. The *only* explicit exception to this principle applies if the tribunal determines that the objection to its

¹⁴⁸ 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 (2014) at ¶ 86, https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm [<https://perma.cc/CZG5-C447>] [hereinafter “China’s Position Paper”] (articulating the reasoning for concluding that the Arbitral Tribunal does not have jurisdiction over this case).

¹⁴⁹ See *id.* ¶ 3.

¹⁵⁰ See The South China Sea Arb. (Phil. v. China), Case No. 2013-19, Proc. Order No.4, at ¶ 4 (Perm. Ct. Arb. 2015), <http://www.pcacases.com/web/sendAttach/1807%3E%203> [<https://perma.cc/XJJ2-SYS5>].

¹⁵¹ See *id.*

¹⁵² See *id.* §§ 1.1-1.3 (discussing the circumstances and the Tribunal’s determination regarding bifurcation).

¹⁵³ See *id.* § 2.2 (identifying the Tribunal’s determination regarding its approach to considerations of jurisdictional objections that do not possess an exclusively preliminary character).

¹⁵⁴ See The Arctic Sunrise Arb. Rules of Proc., *supra* note 133, art. 20(3), The South China Sea Arb. Rules of Proc., *supra* note 133, art. 20(3).

jurisdiction does not possess an exclusively preliminary character.¹⁵⁵ According to Article 20(3), the tribunal may decide on the matter of bifurcation in the form of procedural order, in which it shall exclusively address the question of exception and nothing else (other circumstantial factors such as efficiency etc.).¹⁵⁶ For this purpose, the decision must, therefore, be “prior to a ruling on any matters relating to jurisdiction or admissibility,” though a hearing shall be held if the tribunal finds it necessary or useful.¹⁵⁷ A mini proceeding on bifurcation becomes possible, but remains confined to the question of exception. A mini proceeding can be regarded as a procedural response to the objection raised in a party’s extra-procedural communication if the tribunal considers it as a plea. However, the tribunal at this stage cannot adjudicate jurisdictional questions raised by such a plea.

In *Arctic Sunrise*, the applicant, the Netherlands, in its request for bifurcation, did not raise the question of exception, but the tribunal stated in its order for bifurcation that there was no exception.¹⁵⁸ In *South China Sea Arbitration*, China did not explicitly request bifurcation in its extra-procedural communication in which it did timely raised objection concerning the tribunal’s jurisdiction.¹⁵⁹ The tribunal neglected the question of exception in its order for bifurcation and reserved the matter to be considered and decided in the proceedings on preliminary objections.¹⁶⁰ The tribunal stated in its Award on Jurisdiction that some of China’s objections did not possess an exclusively preliminary character.¹⁶¹ Since this question is reserved to the preliminary phase where parties are supposed to contest jurisdiction exclusively, the tribunal interpreted and applied Article 20 of the Rules of Procedures in a way similar to Article 79 of

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* art. 20(4).

¹⁵⁸ See *Arctic Sunrise Arb. Proc. Order No. 4*, *supra* note 142, ¶ 2 (discussing the Court’s explanation in light of Netherlands’ approach).

¹⁵⁹ See *supra* note 149.

¹⁶⁰ See *South China Sea Arb. Proc. Order No. 4*, *supra* note 150, ¶ 2.2 (explaining the outcome of the tribunal’s deliberations on the question).

¹⁶¹ See *The South China Sea Arb. (Phil. v. China), Case No. 2013-19, Award on Jurisdiction and Admissibility*, ¶¶ 398, 399, 402, 405, 406, 409, 411 (Perm. Ct. Arb. 2015), <http://www.pcacases.com/web/sendAttach/1506> [<https://perma.cc/5588-YPAX>] (concluding that possible jurisdictional objections with respect to the dispute underlying some of the Philippines’ Submission do not possess an exclusively preliminary character, reserves decisions on its jurisdiction with respect to the Philippines’ Submissions in conjunction with the merits).

the ICJ Rules of Court. However, as the decision on bifurcation manifested by a procedural order depends only on the question of exception under Article 20(3), deferring this question to the preliminary proceeding raises questions about why bifurcation was ordered and whether this mini-proceeding and order on bifurcation was necessary.

For both cases of non-appearance, the tribunals' bifurcation orders were issued after the expiration of the deadline for respondent's submission,¹⁶² or after respondent's decision to not submit a counter-memorial.¹⁶³ With their bifurcation orders, respondents' non-appearance becomes a fact to the tribunals. Only in the *South China Sea Arbitration* did the bifurcation order reference Annex VII Article 9 (addressing non-appearance) in its preamble in addition to referencing other matters as circumstantial factors; the order also explicitly referred to the ICJ practice of bifurcating proceedings in cases of non-appearance to justify the tribunal's decision.¹⁶⁴ The tribunal of the *South China Sea Arbitration* might have used China's non-appearance to justify the necessity of the bifurcation order, had the tribunal not also held the objections raised in China's extra-procedural communication to effectively constitute a plea concerning the tribunal's jurisdiction to which Article 20(3) of the Rules of Procedure shall apply.

However, the actions of the arbitral tribunals are not perfectly akin to the ICJ's approach to cases involving non-appearance. In cases of non-appearance, while the Court did issue procedural orders on bifurcation without waiting for formal preliminary objections required by Article 79 of the Rules of Court, the Court never took non-appearance as justification when issuing orders of bifurcation, nor did it regard non-appearance as having pre-emptory effect on bifurcation.¹⁶⁵ In other words, if the objection

¹⁶² See *South China Sea Arb. Proc. Order No. 4*, *supra* note 150, ¶ 2 (noting Proc Order No. 4 (bifurcation) was made in about four months after the time-limit set for China to submit counter memorial).

¹⁶³ See *Arctic Sunrise Arb. Proc. Order No. 4*, *supra* note 142, ¶ 2 (outlining the timeline of events leading to the outcome in the Order).

¹⁶⁴ See *South China Sea Arb. Proc. Order No. 4*, *supra* note 150, ¶ 3 (discussing the circumstances that led the tribunal to its determination).

¹⁶⁵ See *Fisheries Jurisdiction (U.K. v. Ice.)*, *Jurisdiction of the Court*, *supra* note 87, ¶ 12; *Aegean Sea Continental Shelf (Greece v. Turk.) Judgment on Jurisdiction and Admissibility*, *supra* note 87, ¶¶ 14-15; *U.S. Diplomatic Staff in Tehran (U.S. v. Iran)*, *Judgement*, *supra* note 83 and accompanying text (portraying the impact of different facts and outcomes across cases). See also ROSENNE, *supra* note 13, at 808 (lending insight into the approach of the ICJ to questions of non-appearance).

raised in extra-procedural communications is no longer regarded as constituting the formal preliminary objection, the non-appearing state cannot obtain a right to bifurcation within the meaning of Article 79. The tribunal's application of Article 20 of the Rules of Procedures, however, together with its unique approach to non-appearance in *South China Sea Arbitration*, imply an acknowledgement of a procedural right of the non-appearing party who had timely raised its objection concerning jurisdiction. Ultimately, both tribunals relied on an identical Article 20 of the Rules of Procedure to bifurcate the proceedings, arguably for the purpose of promoting procedural legitimacy in cases of non-appearance.

3.3. *Incorporation of Elements of Article 79 of the ICJ Rules of Court*

In the other two cases, the tribunals' Rules of Procedure incorporate major elements of Article 79 of the ICJ Rules of Court, which enable rule-based bifurcation. In the *ARA Libertad Arbitration (Argentina v. Ghana)*, Article 13 of the tribunal's Rules of Procedure provides:

3. Upon receipt of a Preliminary Objection under paragraph 2(a), the proceedings on the merits shall be suspended. Argentina shall be entitled to file a written statement of its observations and submissions no later than three months from the filing by Ghana of its submissions on the Preliminary Objection.

4. Any Preliminary Objection by Ghana shall be dealt with by way of an oral hearing. After hearing the Parties, the Arbitral Tribunal shall rule on Ghana's Preliminary Objection either as a preliminary issue or in its final Award. If the Tribunal rejects the preliminary objection or decides to give the ruling in its final Award, Ghana shall submit its Counter-Memorial no later than six months after that decision. The Tribunal shall fix the time limits for further proceedings.¹⁶⁶

¹⁶⁶ See The ARA Libertad Arb. (Argentina v. Ghana), PCA Case Repository, Rules of Procedure, art. 13 (Perm. Ct. Arb. 2013), <https://pcacases.com/web/sendAttach/427> [<https://perma.cc/58TV-K6GB>].

By raising preliminary objections, Ghana obtains a separate proceeding containing one round of written submissions and an oral debate on preliminary objections.¹⁶⁷ The proceedings on the merits shall also be suspended accordingly.¹⁶⁸ At the closure of this separate proceeding (on Preliminary Objection *in toto* but not on the matter of bifurcation), there will be a ruling on Ghana's Preliminary Objection either upholding or rejecting the preliminary objections, or a decision to give the ruling in its final award.¹⁶⁹ This provision, however, is silent as to whether such a ruling or decision shall be made in the form of a judgment (award). This is very similar to the rule-based bifurcation that Article 79 of the ICJ Rules of Court contemplates.¹⁷⁰

In this case, Ghana appeared to be a reluctant respondent as it "never did get around to appointing an arbitrator."¹⁷¹ Pending the constitution of the arbitral tribunal, Argentina petitioned ITLOS for a provisional measure pursuant to Article 290(5) of UNCLOS.¹⁷² Ghana submitted a written statement in which it stated that the "Annex VII arbitral tribunal which is to be constituted will not have jurisdiction over the dispute submitted to it by Argentina."¹⁷³

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See Rules of Court, I.C.J. Acts & Docs, art. 79 (outlining the procedural rules of the ICJ).

¹⁷¹ See Susan Simpson, *Argentina's Sham Annex VII Arbitration and ITLOS' Provisional Ruling on the Merits of the ARA Libertad Case*, THE VIEW FROM LL2 (Feb. 9, 2013), <https://viewfromll2.com/2013/02/09/argentinas-sham-annex-vii-arbitration-and-itlos-provisional-ruling-on-the-merits-of-the-ara-libertad-case> [<https://perma.cc/PE96-LFMA>] (discussing an observation based on the available records to Ms. Simpson. She noted that paragraph 70 of Argentine's Request for Provisional Measures, Argentina states: "[t]o date, Ghana has not appointed a member of the arbitral tribunal and has not reacted to the invitation of Argentina to enter into discussions with it for the purpose of appointing the other members of the Annex VII arbitral tribunal." But the page with paragraph 70 is missing in the ITLOS website publicizing this request); see also, ITLOS "Frigate Ara Libertad" (Argentina v. Ghana), Written Statement by Argentina, *Request for the Prescription of Provisions Measures Under Article 290, Paragraph 5, of the United Nations Convention on the Law of the Sea*, (Nov. 14, 2012), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_for_official_website.pdf [<https://perma.cc/7G7Q-Z8D7>].

¹⁷² See "ARA Libertad" (Argentina v. Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, p. 332.

¹⁷³ See ITLOS "Frigate Ara Libertad" (Argentina v. Ghana), Written Statement by Ghana, *Request for the Prescription of Provisions Measures Under Article 290, Paragraph 5, of the United Nations Convention on the Law of the Sea*, (Nov. 28, 2012), ¶

Difficulties also arose in the constitution of the arbitral tribunal. When parties were unable to agree on the remaining three arbitrators, the president of ITLOS made the appointment at the request of Argentina.¹⁷⁴ This might suggest that by reaching agreement with Argentina on Article 13—under which it acquired a right to bifurcation—a reluctant Ghana was able to contest jurisdiction exclusively; however, due to the limited disclosure of proceedings one can only infer this possibility. The case was ultimately terminated by agreement of the parties before the deadline for Ghana to submit preliminary objections.¹⁷⁵

In *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, Article 10 of the Tribunal's Rules of Procedure (Objections to the Jurisdiction and/or Admissibility) provides:

4. The Arbitral Tribunal shall rule on any Preliminary Objection in a preliminary phase of the proceedings, unless the Arbitral Tribunal determines, after ascertaining the views of the Parties, that such Objection does not possess an exclusively preliminary character and should be ruled upon in conjunction with the merits.

5. In the event that some or all of the Preliminary Objection(s) are addressed in a preliminary phase, the proceedings on the merits shall be suspended

6. Unless the Arbitral Tribunal decides otherwise after ascertaining the views of the Parties, the further proceedings shall be oral.

7. The written observations and submissions referred to in paragraph 5, and the statements and evidence presented at the hearings contemplated by paragraph 6, shall be confined

2, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/C20-Request_for_official_website.pdf [<https://perma.cc/7G7Q-Z8D7>].

¹⁷⁴ See Press Release, Int'l Tribunal for The Law of the Sea, Three Arbitrators Appointed in the Arbitral Proceedings Instituted by the Argentine Republic against the Republic of Ghana in respect of a Dispute concerning the Vessel Ara Libertad, ITLOS/Press 189, (Feb. 5, 2013), https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_189_E.pdf [<https://perma.cc/2PBFH-B7P2>] (declaring three arbitrators appointed to the arbitral proceedings between Argentina and Ghana).

¹⁷⁵ See *The Ara Libertad Arb. (Argentina v. Ghana)*, PCA 2013-11, Termination Order, (Perm. Ct. Arb. 2013), ¶ 4-5, <https://pcacases.com/web/sendAttach/429> [<https://perma.cc/SCR7-TAJM>] (declaring the termination of the international arbitration because of the finding that Ghanaian courts of the rules applicable to the case).

to those matters which are relevant to the Preliminary Objection . . .

8. The Arbitral Tribunal shall give its decision in the form of an award, by which it shall uphold the objection or reject it or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Arbitral Tribunal rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings.¹⁷⁶

Article 10(4) of the Rules of Procedure in the instant case is very similar to the mode of bifurcation that the identical Article 20(3) of Rules of Procedure contemplates in the two non-appearance cases.¹⁷⁷ This provision envisages a proceeding and decision on bifurcation in the form of a procedural order akin to the tribunals' practice in the two cases of non-appearance. Unlike the two non-appearance cases, hearings extend to matters relevant to Preliminary Objection,¹⁷⁸ but are not necessarily confined to the question of exception. More fundamentally, "the Arbitral Tribunal shall give its decision *in the form of an award*," including a declaration that the objection does not possess an exclusively preliminary character.¹⁷⁹ Since this award is stipulated in the rule on jurisdiction and/or admissibility, no doubt, it is a jurisdictional award. If this award does not result in disposal of the case (by upholding the objection), the tribunal "shall fix time-limits for the further proceedings." The pre-determined prescription of a jurisdictional award implies that, notwithstanding the stipulated suspension in Article 10(5), the proceedings on the merits shall be suspended upon the submission of Preliminary Objection, until the time designated by such an award.

On May 21, 2018, Russia timely submitted its Preliminary Objection in accordance with Article 10(2), noting that "all the

¹⁷⁶ See Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), PCA 2017-06, Rules of Procedure, art. 10 (Perm. Ct. Arb. 2017), <https://pcacases.com/web/sendAttach/2136> [https://perma.cc/6HUB-3RCN].

¹⁷⁷ See *id.* Rules of Procedure, art. 10(4) (stating bifurcation is the principle unless there is an exception that objection does not possess an exclusively preliminary character).

¹⁷⁸ See *id.* art. 10(6), 10(7).

¹⁷⁹ *Id.* art. 10(8) (emphasis added).

objections fall to be determined in a preliminary phase of the proceedings in accordance with the general principle established by Article 10(4) of the Rules of Procedure.”¹⁸⁰ Ukraine was invited to comment on Russia’s request for bifurcation, and Ukraine argued that Russia’s objections were “deeply intertwined with the merits of this case and lack an exclusively preliminary character.”¹⁸¹ Accordingly, Ukraine requested that the tribunal decline Russia’s request for bifurcation.¹⁸² Russia was invited to reply, and Russia refuted Ukraine’s Comment.¹⁸³ In its Procedural Order No. 3 (“Regarding Bifurcation of the Proceeding”) on August 20, 2018, the tribunal concluded that Russia’s Preliminary Objections appear *at this stage* to be of a character that required them to be examined in a preliminary phase and decided that the objections shall be addressed in a preliminary phase of these proceedings.¹⁸⁴ It follows that, “if the tribunal determines after the closure of the preliminary phase of the proceedings that there are Preliminary Objections that do not possess an exclusive preliminary character,” such matters shall be reserved to the proceedings on the merits, in accordance with Article 10(8) of the Rules of Procedure.¹⁸⁵

The tribunal’s bifurcation order was made nearly two years after Ukraine initiated this arbitration.¹⁸⁶ The proceeding on the matter of bifurcation lasted three months. Whether this constitutes unwarranted delay and cost, this is a matter of the parties’ appreciation. The tribunal devoted significant time to settling the differences between the parties and to interpreting and applying Article 10(4) of the Rules of Procedure. Article 10(4) requires the tribunal to consider the question of exception and to decide whether to bifurcate the proceeding.¹⁸⁷ The tribunal justified the procedural order for bifurcation on Article 10(4) with an interim appreciation of

¹⁸⁰ See *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.)*, PCA 2017-06, Procedural Order No.3, Regarding Bifurcation of the Proceedings, 3 (Perm. Ct. Arb. 2017), <https://pcacases.com/web/sendAttach/2446> [<https://perma.cc/K6VW-U25W>].

¹⁸¹ See *id.* at 3.

¹⁸² See *id.*

¹⁸³ See *id.* at 4.

¹⁸⁴ *Id.* at 5 (emphasis added).

¹⁸⁵ *Id.* (discussing the tribunal’s response should it find preliminary objections that are not exclusively preliminary in nature).

¹⁸⁶ The arbitration was initiated by Ukraine On September 16, 2016 and the bifurcation order was delivered by the tribunal on August 20, 2018.

¹⁸⁷ See *supra* note 176.

Russia's objections.¹⁸⁸ This is an improvement on the reasoning behind the bifurcation decision by the *South China Sea Arbitration* tribunal in the application of Article 20(3) of its Rules of Procedure.¹⁸⁹

Having said that, I find that it is not possible for the tribunal to make a procedural order for *non*-bifurcation on the basis of an interim conclusion that the objection does not possess an exclusively preliminary character, because a conclusion as such must be made, under Article 10(8), in the form of award and it cannot be interim.¹⁹⁰ Article 10(8) restricts the tribunal when it issues a procedural order on bifurcation: it must either state an interim appreciation of the objection and leaves it to be further tested in the preliminary phase, or determine that the objection possesses an exclusively preliminary character and rule that they constitute preliminary questions. None of them enable the tribunal to issue a procedural order for *non*-bifurcation. As such, the mini-proceeding and order on bifurcation envisaged in Article 10(4) seem superfluous. Ultimately, bifurcation is determined by Article 10(8). By this same award, the tribunal shall conclude a proceeding initiated by Russia's objection, irrespective of whether this proceeding is termed "a preliminary phase" (in the words of Article 10(5)) or not. The proceeding and this award do not necessarily involve any decision on the matter of bifurcation. Here, Russia is entitled to a procedural response to its preliminary objection in the form of an [jurisdictional] award, through which the tribunal adjudicates Russia's objection.

The Rules of Procedure were adopted in the first procedural meeting between the Parties on May 20, 2017, with consideration given to concepts raised during the meeting.¹⁹¹ Here, Russia may still reconsider under these Rules of Procedure whether to participate in the proceedings on the merits when it obtains an award either rejecting its objection or declaring that its objection

¹⁸⁸ See *supra* note 184.

¹⁸⁹ See *supra* note 153 and accompanying text (showing that the tribunal neglected the question of exception (whether or not China's objections do possess an exclusively preliminary character) in its order for bifurcation and reserved the matter to be considered and decided in the proceedings on preliminary objections).

¹⁹⁰ See *Dispute Concerning Coastal States Rights in [Several] Seas (Ukr. v. Russ.)*, *supra* note 176, art. 10(8) (stating "the tribunal shall give its decision in the form of award by which it shall . . . declare that *objection does not possess an exclusively preliminary character*" (emphasis added)).

¹⁹¹ See generally *Dispute Concerning Coastal States Rights in [Several] Seas (Ukr. v. Russ.) Procedural Order 3*, *supra* note 180, at 3 (discussing a State's alternatives as arbitral proceedings move forward).

does not possess an exclusively preliminary character as a result of having contested jurisdiction in a separate proceeding.¹⁹² This may suggest why Russia changed its stance of non-participation in *Arctic Sunrise*. However, in order for Russia to participate in the proceedings concerning *Coastal States Rights* for the sole purpose of contesting jurisdiction, Russia must ensure a right to bifurcation to be granted by a forthcoming Rules of Procedure before the tribunal is constituted in order to avoid the routine non-bifurcation in the other arbitral cases where both parties participate. This suggests that Russia could have made a deal on this matter with Ukraine not long after Ukraine initiated the arbitration against the backdrop of the time framework of Annex VII.¹⁹³ In so doing, Russia may avoid the discomfort of no deal after it has appointed its arbitrator. Moreover, it is too late for Russia to have such a deal when Russia is no longer able to nominate its arbitrator, since participation is less meaningful without its own arbitrator. All of which suggest an agreement prior to the constitution of the tribunal. Again, due to the limited disclosure of proceedings¹⁹⁴ we may only infer this early agreement.

In UNCLOS Annex VII arbitration, when parties participate in the constitution of the tribunal, the tribunal would maintain flexibility with respect to bifurcation, as the tribunal adopts its Rules of Procedure providing itself discretion on bifurcation.¹⁹⁵ In practice, unless the parties agree on bifurcation,¹⁹⁶ the tribunal's

¹⁹² See *Dispute Concerning Coastal States Rights in [Several] Seas (Ukr. v. Russ.)*, supra note 176, aArt. 10(8) (stating "The Arbitral Tribunal shall give its decision in the form of an award, by which it shall uphold the objection or reject it or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character.").

¹⁹³ See *infra* note 240-242 (discussing the 30-day rule on the nomination of the arbitrator by the respondent and the nomination of the rest three arbitrators when there is no agreement reached by the parties).

¹⁹⁴ In the first procedural meeting the tribunal also made a procedural order regarding confidentiality, by which the information about the proceedings may be designated as confidential and subject to non-disclosure. See *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.)*, PCA 2017-06, Procedural Order No. 2, 18 (Perm. Ct. Arb. 2018), <https://pcacases.com/web/sendAttach/2270> [<https://perma.cc/QV2H-ZJBP>] (failing to public disclose discuss how the arbitrators were appointed or when the arbitral tribunal was constituted — providing minimal to no information).

¹⁹⁵ See *supra* note 111-119 and accompanying text.

¹⁹⁶ One example of such an arrangement is in the Southern Bluefin Tuna case, in which the parties agreed on bifurcation after the adoption of the Rules but before the deadline for the submission of preliminary objections.

flexibility terminates upon the rejection of the request to bifurcate.¹⁹⁷ In order to avoid this scenario, a party intending to participate in a separate proceeding contesting jurisdiction should pursue a deal regarding the forthcoming Rules of Procedure, and this should likely occur before the constitution of the tribunal.¹⁹⁸ In the two cases of non-appearance, the tribunals, pursuant to Article 20 of their respective Rules of Court, admitted objections raised in extra-procedural communications as preliminary objections, and ordered bifurcation in each case.¹⁹⁹

4. BALANCING THE ISSUE OF BIFURCATION FOR JURISDICTIONAL SENSITIVITY VS. PROCEDURAL EFFICIENCY

Jurisdictional questions in inter-state disputes are not mere technical issues, since by raising questions concerning jurisdiction a respondent state indicates “the absence of political agreement that the Court should entertain the case.”²⁰⁰ Jurisdictional questions are even more significant in cases of non-appearance where the respondent contends that the absence of such a political agreement was “manifest” by its refusal to appear.²⁰¹

Bifurcation has been taken as a proper procedural response to address this political sensitivity. In the *Mavrommatis Palestine Concessions* case, the Court made the following observation when it decided to bifurcate the proceedings:

Neither the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken in limine litis to the Court’s jurisdiction. The Court therefore is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an

¹⁹⁷ See *supra* note 124, 127-128 and accompanying text.

¹⁹⁸ See *supra* note 192-193 and accompanying text.

¹⁹⁹ See *supra* note 144-145, 152-153 and accompanying text.

²⁰⁰ See ROSENNE, *supra* note 13, at 803 (discussing the substantive impact jurisdictional questions can potentially have in proceedings).

²⁰¹ See generally *Nuclear Tests Case (Austl. v. Fr.)*, Judgment, 1974 I.C.J. Rep. 253, ¶ 4 (Dec. 20) (discussing France’s refusal to accept the Court’s jurisdiction and therefore, “the French Government did not intend to appoint an agent, and requested the Court to remove the case from its list.”); see also *China’s Position Paper*, *supra* note 148, ¶¶ 3, 29, 85.

international tribunal and most in conformity with the fundamental principles of international law.

For this reason the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given, cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate. The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate. For the Mandatory has only accepted the Court's jurisdiction for such disputes.²⁰²

In the preparation of the Rules of Court of 1922, Judge Anzilotti, the sponsor of a draft article on preliminary objection, called on the judges to pay attention to the "principle that the question of jurisdiction must be decided by a special judgment to be given before any procedure on the question as a whole was commenced."²⁰³ However, the judges disagreed on the proposed principle, either because it was not generally recognized in municipal laws, or because preserving procedural flexibility was desirable.²⁰⁴ This debate continued in the course of discussion on the 1926 revision; the necessity to lay down an absolute rule on preliminary objection, which may restrict the Court's liberty and oblige it to consider objections and merits apart, again became the center of the debate.²⁰⁵ Indeed, it has been pointed out that municipal laws vary on this matter,²⁰⁶ which seems to indicate that in the management of justice, an absolute rule is not demanded. Judge Anzilotti, on the basis that questions of jurisdiction in international cases differ from those in municipal cases, argued that municipal law analogies could not be automatically applied in international cases and warned against prejudicing the essential

²⁰² See *Mavrommatis Palestine Concessions*, *supra* note 29, at 16.

²⁰³ See Preparation of the Rules of Court of January 30th, 1922 P.C.I.J. (ser. D) No. 2, at 213 (defining the draft rules submitted by the Drafting Committee).

²⁰⁴ See *id.* at 213-214.

²⁰⁵ See generally Acts and Documents concerning the Organization of the Court, *supra* note 46, at 78-94.

²⁰⁶ See *id.* at 81, 82, 85 (discussing the differences in the civil procedure laws of Holland, France and Spain).

principle of State sovereignty.²⁰⁷ This time, with accumulation of the experience of bifurcation in *Mavrommatis Palestine Concessions* and *Certain German Interests in Polish Upper Silesia*, Judge Anzilotti's view was shared by many others.²⁰⁸ A new Article 38 was added to the 1926 Rules of Court, based on Judge Anzilotti's proposal.²⁰⁹ Judge Anzilotti unfailingly maintained that the separate handling of preliminary objections is the required procedure for international cases.²¹⁰ This was subsequently confirmed by the Court as the objective of Article 38.²¹¹

Since the 1970s, the Court's handling of preliminary objections has raised efficiency concerns since proceedings on preliminary objections has becoming markedly longer.²¹² The 1972 and 2001 revisions of the Rules of Court were motivated, in part, to improve the Court's efficiency with respect to the handling of preliminary objections.²¹³ Apart from the technical question of whether the proceedings on preliminary objections can be dealt with in a more expeditious way, the issue raised a fundamental question whether the efficiency of the Court will decline as a result of bifurcation.

In specific cases, efficiency may be promoted if the court or tribunal upholds an objection, resulting in disposal of the case in the preliminary phase. This might contribute to a well-accepted perception that bifurcation promotes efficiency. However, concern with procedural efficiency under ICJ's systematic bifurcation is not unwarranted, since most bifurcated cases were not dismissed due to lack of jurisdiction. The Permanent Court declined jurisdiction in two out of 12 bifurcated cases.²¹⁴ The ICJ appears less accommodating to jurisdictional objections in the majority of

²⁰⁷ See *id.* at 84, 90 (discussing the difference in resolving the question of jurisdiction between international and municipal cases).

²⁰⁸ See *id.* at 89-92.

²⁰⁹ See *id.* at 93.

²¹⁰ See *Certain German Interests in Polish Upper Silesia*, *supra* note 32, at 30.

²¹¹ See *Rights of Minorities in Upper Silesia (Minority Schools) (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. Rep Series A15, at 22.

²¹² See *Prager*, *supra* note 96, at 156-57 (detailing the number of measure the Court adopted in order to increase the efficiency of proceeding by "tight[ing] the deliberations in proceedings on preliminary objections . . . [to] inform parties in advance of its intended schedule . . .").

²¹³ See *id.* at 155-56; see also Eduardo Jimenez de Arechaga, *supra* note 58, at 11 (discussing "The need to regulate [the] Rule of Court [in] the handling of preliminary objection in a more expeditious and rational way . . .").

²¹⁴ See Shabtai Rosenne, *The 1972 Revision of the Rules of International Court of Justice*, 8 ISR. L. REV. 197, 235 (1973) (discussing the Court declining jurisdiction in the case of *Mavrommatis (Readaptation)* and the case of *Phosphates in Morocco*).

bifurcated cases where preliminary objections were formally raised,²¹⁵ however, it declined jurisdiction in fewer cases of “isolation of jurisdiction,” in which proceedings were also bifurcated.²¹⁶ That is to say, the majority of the World Court’s

²¹⁵ Judgements on jurisdiction and admissibility have been rendered in the following cases as a result of raising formal preliminary objections (in those cases underlined, the Court declined jurisdiction): *Corfu Channel (U.K. v. Alb.)*; *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*; *Ambatielos (Greece v. U.K.)*; *Anglo-Iranian Oil Co. (U.K. v. Iran)*; *Nottebohm (Liech. v. Guat.)*; *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. and U.S.)*; *Right of Passage over Indian Territory (Port. v. India)*; *Interhandel (Switz. v. U.S.)*; *Aerial Incident of July 27, 1955 (Isr. v. Bulg.)*; *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*; *Temple of Preah Vihear (Cambodia v. Thai.)*; *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*; *Northern Cameroons (Cameroon v. U.K.)*; *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain) (New Application: 1962)*; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.) (discontinued after preliminary objection phase)*; *Oil Platforms (Iran v. U.S.)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*; *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Eq. Guinea intervening)*; *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*; *Legality of Use of Force (Serb. & Montenegro v. Belg.)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.)*; *Certain Property (Liech. v. Ger.)*; *Territorial and Maritime Dispute (Nicar. v. Colom.)*; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.)*; *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.)*; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.)*; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.)*; *Maritime Delimitation in the Indian Ocean (Som. v. Kenya)*. In *Certain Norwegian Loans (Fr. v. Nor.)*, preliminary objections were formally raised but the parties subsequently agreed to have these objections decided together with the merits. Preliminary objections were also raised in the following cases but discontinued at some point in the preliminary phase: *Aerial Incident of 27 July 1955 (U.S. v. Bulg.)*; *Compagnie du Port, des Quais et des Entrepôts de Beyrouth and Société Radio-Orient (Fr. v. Leb.)*; *Aerial Incident of 3 July 1988 (Iran v. U.S.)*; *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belg. v. Switz.)*.

²¹⁶ For the notion of “isolation of jurisdiction,” see ROSENNE, *supra* note 96 and accompanying text. Judgements on jurisdiction and admissibility have been rendered in the following cases as a result of “isolation of jurisdiction”: *Fisheries Jurisdiction (U.K. v. Ice.; Ger. v. Ice.)*; *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*; *Border and Transborder Armed Actions (Nicar. v. Hond.)*; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.)*. Moreover, the Court declined jurisdiction in the following cases of “isolation of jurisdiction”: *Nuclear Tests (Aust. v. Fr.; N.Z. v. Fr.)*; *Aegean Sea Continental Shelf (Greece v. Turkey)*; *Fisheries Jurisdiction (Spain v. Can.)*; *Aerial Incident of 10 August 1999 (Pak. v. India)*; *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India)*; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.)*.

bifurcated cases contain two-phase proceedings. In Annex VII arbitration, although a majority of cases did not bifurcate proceedings, proceedings terminated at the jurisdictional phase in only one of four bifurcated cases.²¹⁷ In any event, efficiency becomes a significant issue if the court or the tribunal spends more time in two-phase proceedings adjudicating objections and merits separately than in a single proceeding in which objections will be adjudicated together with merits.

But this hypothesis is difficult to prove. After all, it is not possible to answer this question in a specific case since the same case cannot be adjudicated both with and without bifurcation for comparison. An alternative method to compare the average time cost in cases of bifurcation with those of non-bifurcation was employed in an empirical study of international investment arbitration under ICSID, cognizant that the empirical evidence was imperfect.²¹⁸ This study found that the average time and cost of bifurcated ICSID cases was greater than cases of non-bifurcation, which is contrary to the accepted view that bifurcation promotes efficiency.²¹⁹ The discovery illustrates a potential approach to answering generic question about the efficiency of bifurcation, in light of the great number of ICSID bifurcated cases employing two-phase proceedings.²²⁰

This alternative method of measurement is not applicable to the ICJ/PCIJ or to Annex VII arbitrations due to the wide divergence among the samples which undermines a proper comparison.²²¹

²¹⁷ See *Southern Bluefin Tuna Case between Australia and Japan, Award on Jurisdiction and Admissibility*, *supra* note 102 (highlighting the frequency with which proceedings move beyond the jurisdictional phase). The other two cases of non-appearance (*Arctic Sunrise* and *South China Sea Arbitration*, also bifurcated cases) each contains two-phase proceedings. The tribunal decided to bifurcate the proceedings in 2018 in the *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* case. The award on jurisdiction is still pending.

²¹⁸ See Lucy Greenwood, *Does Bifurcation Really Promote Efficiency?*, 28 J. INT'L ARB. 105, 107 (2011) (“[C]ases can vary significantly in terms of factual and legal complexity. Clearly, there are many reasons for a case taking a longer time to be decided than others, not only whether the case is bifurcated.”).

²¹⁹ See *id.* at 106-07.

²²⁰ See *id.* at 107 (demonstrating that for the cases of bifurcation, ten out of forty-five ICSID cases and two out of ten ICSID Additional Facility cases ended at the preliminary stage).

²²¹ In PCIJ/ICJ, the rule-based, systematic bifurcation simply renders the samples for comparison (with a limited number of non-bifurcation cases) extremely disproportionate. The problem of samples for comparison also exists in Annex VII arbitration where non-bifurcation becomes overwhelming: only four (*Southern Bluefin Tuna Case*; *Arctic Sunrise*; *South China Sea Arbitration*; and *Dispute Concerning*

However, the finding on this question concerning the efficiency of bifurcation in the empirical study of ICSID cases is indeed the common understanding in PCIJ/ICJ as well as in Annex VII arbitration. In PCIJ/ICJ, the Court itself considered that bifurcation would cause unwanted delay when it decided not to bifurcate the proceedings.²²² Presumably, the parties in specific cases shared the same viewpoint when they reached agreement not to bifurcate the proceedings.²²³ Moreover, a party might decline to raise preliminary objections in order to expedite proceedings.²²⁴ Notably, in Annex VII arbitration, the Philippines in *South China Sea Arbitration* and Ukraine in *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* cited “unnecessary delay and expense” or “unwarranted delay and expense” to show their aversion to bifurcation.²²⁵ Examples of ICSID practices also strongly suggest that these tribunals would not grant bifurcation if the request for bifurcation is to be taken as a mere delaying tactic.²²⁶

As the ICJ and Annex VII arbitration are both forums for the settlement of inter-state disputes, political sensitivity concerning jurisdiction are likely to be similar. It is also conventional wisdom in these forums that efficiency declines as a result of bifurcation. But in the ICJ, since the matter of bifurcation is subject to rule-based regulation that has been systematically applied, bifurcation is the routine practice of the Court.²²⁷ In contrast, Annex VII arbitral tribunals maintain flexibility on the issue of bifurcation in the Rules

Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait) out of 14 cases have been bifurcated.

²²² See *Western Sahara, Advisory Opinion*, 1975 I.C.J. Rep.12 (Oct. 16) (illustrating that in the exercise of its advisory opinion, the Court shall also be guided by the provisions of the Statute and of these Rules which apply in contentious cases to the extent to which it recognizes them to be applicable). See also Rules of Court, I.C.J. Acts & Docs, art. 102(2).

²²³ See generally *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, Order of Dec. 13, 2000, ICJ Rep. 235-36 (providing an example in which the parties agreed not to bifurcate proceedings).

²²⁴ See Shigeki Sakamoto, *The Whaling in the Antarctic Case from a Japanese Perspective*, 58 JAPANESE YEARBOOK. INT'L L. 247, 248 (2015) (“However, Japan did not raise preliminary objections; rather, they implemented litigation tactics by contesting the jurisdiction jointly with the merits . . . From this course of action, it seems that both Japan and Australia preferred an early decision on the merits so as not to harm the generally friendly relations between the two countries.”).

²²⁵ See *South China Sea Arb. Proc. Order No. 4*, *supra* note 150, §2.1; *Dispute Concerning Coastal States Rights in [Several] Seas (Ukr. v. Russ.) Procedural Order 3*, *supra* note 180, at 3.

²²⁶ See Benedettelli, *supra* note 117, at 502; Greenwood, *supra* note 218, at 108.

²²⁷ See *supra* Part 2.2.

of Procedure in the majority of the cases, and in practice these tribunals have been reluctant to grant bifurcation. Why is the matter of bifurcation treated so differently in these two forums?

There are differences between the two forums. The ICJ is an adjudicative body with a standing court, whereas an Annex VII tribunal is an ad hoc body. The cost of an ad hoc arbitration is higher for the parties compared with a standing court.²²⁸ The Rules of Procedure adopted by Annex VII tribunals often contain guidance to conduct the proceedings so as to “avoid unnecessary delay and expense.”²²⁹ Although this is a hallmark of arbitration, it is absent from the ICJ Statute or the Rules of Court.²³⁰

Jurisdictional sensitivity in the adjudication of inter-state disputes motivated the PCIJ to introduce rule-based bifurcation into its article governing preliminary objections in 1926.²³¹ Rule-based bifurcation has been retained to the present day in the 1972 and 2001 revisions to the article governing preliminary objection, notwithstanding that the aim of these revisions was to promote judicial efficiency.²³² Changes in the two revisions sought to expedite proceedings on preliminary objections.²³³ One explanation for this is that the political sensitivity of jurisdictional issues remains as high as it was in the 1920s.²³⁴ Concerns over efficiency, though

²²⁸ See UNCLOS, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. at Annex VII, art. 7 (highlighting that unlike a standing court (e.g. ICJ or ITLOS), the expenses of the arbitral tribunal borne by the parties include the remuneration of its members).

²²⁹ See *The Arctic Sunrise Arb. Rules of Proc.*, *supra* note 133, art. 10(1); *The South China Sea Arb. Rules of Proc.*, *supra* note 133, art. 10(1). The Permanent Court of Arbitration (PCA) acting with secretarial assistance for most of Annex VII arbitration cases (except for the *South Bluefin Tuna* case in which ICSID provided secretarial assistance) provides its model PCA Arbitration Rules containing a similar provision. PCA Arbitration Rules 2012, *supra* note 117, art. 17(1).

²³⁰ See ITLOS Rules of the Tribunal, *supra* note 22, (providing that “[t]he proceedings before the Tribunal shall be conducted without unnecessary delay or expense.”). It is argued that ITLOS truly functions as an arbitrary body. Thomas E. Robins, *The Peculiar Case of the ARA Libertad: Provisional Measures and Prejudice to the Arbitral Tribunal’s Final Result* 20 HARV. NEGOT. L. REV. 265, 276 (2015). It is noted that in seven “normal” cases adjudicated by ITLOS, five of them were cases initially referred to Annex VII arbitration but later transferred to ITLOS (or its Chamber) by “Special Agreement” reached by the parties. See generally ITLOS Reports, *supra* note 21 (providing a clearer understanding of the various forms arbitral proceedings may take).

²³¹ See *supra* note 207-209 and accompanying text.

²³² See *supra* note 99-100 and accompanying text.

²³³ See *supra* note 213 and accompanying text.

²³⁴ See SHABTAI ROSENNE, *ESSAYS ON INTERNATIONAL LAW AND PRACTICE* (2007) 263 (“Comparison of the Rules of 1978 with those of 1922 will quickly show that

real, are secondary at least as far as the issue of bifurcation in the standing court of the ICJ.

An ad hoc tribunal presiding over an inter-state arbitration may balance the issues of jurisdictional sensitivity and procedural efficiency in deciding whether to bifurcate proceedings. Whenever the parties participate in the constitution of the ad hoc arbitral tribunal, to which each of the parties can appoint one arbitrator of their own choice,²³⁵ jurisdictional issues may be perceived by the tribunal as less sensitive between the parties, thus permitting it to render a procedural ruling on an ad hoc basis. This may explain in part why in a majority of Annex VII arbitrations where both parties participate, the rule on preliminary objection provided the tribunals with discretion on the issue of bifurcation. Indeed, preliminary objections have not been raised often in these cases, but whenever raised, efficiency concerns appear to prevail as no bifurcation has been granted.

In contrast, when the respondent states refused to participate in the constitution of the tribunals in *Arctic Sunrise* and *South China Sea Arbitration*, the two tribunals were forced to address jurisdictional sensitivity. The tribunals, in the irrespective Rules of Procedures, favored bifurcation in principle and bifurcated the proceedings in each of these cases in actual practice.²³⁶ Nevertheless, this kind of balancing of the issue of bifurcation in Annex VII arbitrations will put unwilling respondents in an untenable situation: participation means less jurisdictional sensitivity and potentially a negative decision on bifurcation; non-appearance of the unwilling respondent, on the other hand, is thought to deserve bifurcation where it can argue exclusively on jurisdiction. Yet the unwilling respondent must deprive itself of such opportunity.

For an unwilling respondent who intends to participate in the proceedings for the sole purpose of contesting jurisdiction, a way to break this conundrum is to make a deal with the applicant regarding the possibility of rule-based bifurcation (before the tribunal is constituted). I infer this possibility in *ARA Libertad Arbitration* and

they are all case in the same mold, the mold of diplomacy of the 1920s. The changes that have been made do not touch fundamentals").

²³⁵ See UNCLOS, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. at Annex VII. art. 3(b)-(c).

²³⁶ In *South China Sea Arbitration*, the tribunal did so notwithstanding the Philippines' accusation that it would "needlessly prolong and increase the costs" in opposing bifurcation. See *South China Sea Arb. Proc. Order No. 4*, *supra* note 150, at 4 and 6.

Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait, where the reluctant respondents eventually participated in the constitution of the arbitral tribunals.²³⁷ Ultimately, the apparent sensitivity of the jurisdictional issue in these two cases appears to have motivated the tribunals, after ascertaining views of the parties, to incorporate a rule-based bifurcation (self-contained proceedings on jurisdiction and admissibility) into the Rules of Procedure.

Finally, we get back to *South China Sea Arbitration*—why was China so resolute in deciding nonappearance as the manner of rejecting and returning the Philippines Notification and Statement?²³⁸ It is very plausible that China might have simply passed over the idea of making any procedural deal with the Philippines when it observed the Philippines' moves in the initiation of the arbitration as being firmly uncompromising. Above all, there had been no substantial exchange of views on the subject matter before initiation of arbitration,²³⁹ and the stunning suddenness of this legal action looked like a legal ambush and appeared procedurally hostile.

The Philippines initiated arbitration two weeks before the Chinese Lunar New Year of 2013 (the biggest festival and longest national holiday in China). Annex VII only provided thirty days from the receipt of the notification of arbitration for China to prepare the nomination of its arbitrator.²⁴⁰ Given the experience of the Philippines' team, this timing can hardly be taken as a mere coincidence. Against the backdrop of the time framework of Annex

²³⁷ See *supra* notes 171-175; 191-194 and accompanying text.

²³⁸ See Letter from PRC to Philippines 2013, *supra* note 146.

²³⁹ China made this point in China's Position Paper on the Matter of Jurisdiction. China emphasized that the two countries agreed in principle that they should settle their disputes by negotiation. See China's Position Paper, *supra* note 148, ¶¶ 30-41, 45-50. The tribunal cited *Chagos Marine Protected Area and Arctic Sunrise*, which was of the view that "Article 283 then requires that the Parties engage in some exchange of views regarding the means to settle the dispute," and "Article 283(1) does not require the Parties to engage in negotiations regarding the subject matter of the dispute." See *The South China Sea Arb. Award on Jurisdiction and Admissibility*, *supra* note 161, ¶ 333.

²⁴⁰ See UNCLOS, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. at Annex VII, art. 3(c) ("The other party to the dispute shall, within 30 days of receipt of the notification referred to in article I of this Annex, appoint one member to be chosen preferably from the list, who may be its national. If the appointment is not made within that period, the party instituting the proceedings may, within two weeks of the expiration of that period, request that the appointment be made in accordance with subparagraph (e).").

VII, this timing suggests that the Philippines was prepared for no agreement on the selection of the three arbitrators under Annex VII Article 3(d), in which case they shall be selected by the President of ITLOS,²⁴¹ who at that time was a national of another country pressing the territorial/maritime dispute with China.²⁴² Ultimately, the combination of the timing of the filing of the case and the 30-day rule is not without significance for China in evaluating the circumstances. This limited lead time presented China with a decision of whether or not to approach the Philippines to discuss procedures within the 30 days before the constitution of the tribunal. This approach, however, given the circumstances, would have been impractical.

5. CONCLUSION

While both the ICJ/PCIJ and UNCLOS Annex VII tribunals are judicial forums for the settlement of inter-state disputes, there is great divergence between the rules and practices of bifurcation under the ICJ/PCIJ (a standing court) and those of an ad hoc arbitration governed by UNCLOS Annex VII.

At the ICJ, a party is in principle, entitled to raise preliminary objections. If it does so, bifurcation is the resultant procedural avenue under the ICJ Rules of Court.²⁴³ The matter of bifurcation is thus strictly regulated by the Rules of Court (rule-based bifurcation). In UNCLOS Annex VII arbitration, the rules of procedure in the majority of cases provides tribunals with discretion in deciding whether or not to bifurcate proceedings. In practice, the tribunal's flexibility terminates upon the rejection of the request to bifurcate. Bifurcation has been granted in two cases of non-appearance and in one case by agreement of the parties—in the *Southern Bluefin Tuna* case. In *ARA Libertad Arbitration and Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait*, the rule-based bifurcation has been adopted in the tribunal's Rules of Procedure, probably at the insistence of unwilling respondent states and with

²⁴¹ See *id.* arts. 3(d)-(e).

²⁴² The author does not question the competence or impartiality of Judge Yanai of Japan in carrying out his duties to make the necessary appointments as President of ITLOS under Annex VII art. 3(e). Attention to this timing (as it was possibly perceived by the Philippines as taking advantage) is paid here to illustrate the non-compromising posture of the Philippines.

²⁴³ See *supra* Part 2.

the cooperation of the applicants prior to the constitution of the tribunals. In the latter case, bifurcation was decided in a procedural order, which appeared superfluous in the application of the Rules.

In Annex VII arbitration, unless a rule-based bifurcation has been agreed by the parties prior to the constitution of the tribunal, bifurcation is no longer a procedural right for an unwilling state who intends to contest jurisdiction exclusively in the first place. Bifurcation in the two cases of non-appearance indicates that, by depriving parties of the ability to argue jurisdiction in a bifurcated proceeding without being deemed to have appeared, the tribunal forces parties to elect between the undesirable options of non-appearance or risking the appearance on a preliminary matter without having been granted bifurcation.

The divergence in practice may be determined by the distinctive nature of the two forums (adjudicative/standing court versus arbitral/ad hoc tribunal) as decisionmakers balance jurisdictional sensitivity against procedural efficiency to decide the issue of bifurcation. In inter-state adjudications by a standing court, jurisdictional sensitivity seems to prevail over efficiency, as seen in the ICJ's adherence to rule-based bifurcation, notwithstanding the generally accepted belief that the Court's efficiency declines when it bifurcates proceedings. In contrast, Annex VII arbitral tribunals resist bifurcation in favor of efficiency. Nevertheless, jurisdictional sensitivity in inter-state disputes, including UNCLOS disputes, remains as high today as it was in the 1920s. However, although Annex VII arbitration is categorized as an arbitral body, it remains as an important adjudicatory body in actual nature, standing side by side with ICJ and ITLOS for the judicial settlement of UNCLOS disputes – proceedings initiated by means of application.²⁴⁴ If the essence of an Annex VII arbitral tribunal is closer to that of an adjudicative body than arbitral body, the value of rule-based bifurcation should be carefully considered. If such is the case, an Annex VII arbitral tribunal may ensure the legitimacy of its judgments by adhering to the best practice firmly rooted in the PCIJ and ICJ since the 1920s: that in the words of Judge Anzilotti, the

²⁴⁴ See UNCLOS, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. at art. 287 (showing that under art. 287(5), Annex VII arbitration becomes default if the Parties have not accepted the same procedure available under art. 287(1); or, under art. 287(3), default when no preference has been made with respect to the means of dispute resolution available under art. 287(1), according to which the other two are ICJ and ITLOS).

separate handling of preliminary objections is required procedure for international cases.²⁴⁵

²⁴⁵ See *Certain German Interests in Polish Upper Silesia*, *supra* note 32, at 30 (drawing observations by Judge Anzilotti). In the first UNCLOS inter-state compulsory conciliation case ([2016-10] Conciliation between The Democratic Republic of Timor-Leste and The Commonwealth of Australia), whose proceedings became available to public just recently, the practice on bifurcation in this case may attract our attention. This non-binding inter-state dispute settlement procedure was initiated by Timor-Leste against Australia pursuant to Article 298(1)(a)(i) and Annex V, section 2 of the UNCLOS, the Conciliation Commission retains discretion on the matter of bifurcation without necessity to state reasons, see *The Democratic Republic of Timor-Leste v. Australia*, Rules of Procedure, PCA Case Repository, art.17 (Aug. 22, 2016). However, upon receiving preliminary objections raised by Australia, the Commission ultimately delivered the Decision on Competence before it moved to the conciliation proceedings on the substance of the dispute. See *The Democratic Republic of Timor-Leste v. Australia*, Decision of Competence, PCA Case Repository (Sept. 19, 2016). The Commission's Decision on Competence was regarded to have binding legal effect notwithstanding the non-binding character of conciliation. See *The Timor Sea Conciliation (Timor-Leste v. Austl.)*, Report and Recommendations of the Compulsory Conciliation Commission between Timor-Leste and Australia on the Timor Sea, PCA Case Repository, para. 66 (May 9, 2018).