

China and the South China Sea Arbitration: Analyses in the Indo-Pacific Context

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In January 2013, the Philippines initiated an international arbitration case against China under Part XV, Section 2 on “Compulsory Procedures Entailing Binding Decisions” and Annex VII (“Arbitration”) to the *United Nations Convention on the Law of the Sea, 1982* (UNCLOS)¹. The case concerned the prevailing maritime disputes in the South China Sea (SCS), and broadly concerned the role of historic rights, maritime entitlements, the status of maritime features and the lawfulness of certain actions by China, upon which, the Philippines alleged that China had violated the Convention. China adopted a position of non-acceptance and non-participation in the proceedings, and eventually, rejected its verdict declared in July 2016.²

The case is very relevant to the ‘rise’ of the Indo-Pacific region; and more specifically, to the imponderable whether amidst the emerging challenges to the established legal maritime order, regional countries would eventually cherish their hard-fought and well-deserved objectives of the ‘Indo-Pacific’ idea³ that seeks regional prosperity and development.

Such academic enquiry — as also its functional solution — lie in ascertaining the answers to two key questions: First, in rejecting the jurisdiction of PCA — and later, its decision — under the compulsory dispute resolution mechanism of UNCLOS, is China’s position legally valid? If so, is the relevant international law (UNCLOS) inadequate to address the emergent geopolitical issues in the Indo-Pacific region?

This issue-brief aims to address these questions, ascertain the implications of the same on stable and lawful maritime order in ‘Indo-Pacific’ region, and offer recommendations in this regard.

The Legal Dimension

The UNCLOS, in the first instance, mandates all its State parties to settle their disputes amicably, mutually and by peaceful means (Article 279).⁴ However, when the parties are unable to settle a dispute, it also provides a procedure to resolve the contention under Part XV of UNCLOS on 'Settlement of Disputes'.⁵ It permits any State to institute a case against another State in one of the forums chosen by the latter in its declaration under Article 287(1) (Section 2 of Part XV on 'Compulsory Procedures Entailing Binding Decisions'). As per this provision, every State is free to choose one or more of the four enumerated forums namely, the *International Tribunal for the Law of the Sea* (ITLOS) or the *International Court of Justice* (ICJ) or an arbitral Tribunal constituted under Annexure VII or a special arbitral tribunal constituted under Annexure VIII.⁶ Given that China has not made a declaration choosing the forum, it is deemed to have accepted arbitration under Annexure VII [Art 287(3)]. Accordingly, given that the Philippines failed in its attempts to resolve its long-pending maritime dispute with China in the SCS through bilateral negotiation, it took recourse to instituting arbitration proceedings before the Permanent Court of Arbitration (PCA), in accordance with Annexure VII of the Convention.

The Philippines requested the PCA to decide on 15 issues.⁷ Manila's contentions may be distilled into three key issues, as follows: -

- China's claim to sovereign jurisdiction within the nine-dash line on the basis of 'historic rights' are unlawful.
- The features that China claims in SCS do not generate maritime zone entitlements as per UNCLOS.
- China has violated its obligations under UNCLOS, including in terms of interfering with the Philippines' exercise of the sovereign rights.

China refused to participate in the arbitration proceedings formally as a party. It, nonetheless, expressed its view to the Tribunal through a 'position paper'.⁸ Broadly, the paper said that the PCA had no jurisdiction on the issue between the two countries, and that China has filed a declaration under Article 298(1), which exempt it from compulsory arbitration [Article 287(3)]. The declaration made by China on 26 August 2006 had stated that:

“The Government of the People’s Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the convention with respect to all the categories of disputes referred to in paragraphs 1(a), (b) and (c) of Article 298 of the Convention.”⁹

Essentially, the three paragraphs of UNCLOS Article 298 refer to the disputes...

- 1(a) “...relating to historic bays or titles...and... sovereignty or other rights over continental or insular land territory”.
- 1(b) “...concerning military activities and disputes concerning law enforcement activities”.
- 1(c) “...in respect of which the Security Council of the United Nations (UN) is exercising the functions assigned to it by the (UN) Charter...”

On the jurisdiction issue, the PCA Tribunal conducted a separate hearing under UNCLOS Article 288(4), which empowers it to decide on its own jurisdiction. Accordingly, on 29 October 2015, the Tribunal passed a preliminary order affirming its lawful jurisdiction to decide the dispute between the Philippines and China.

The Tribunal proceedings, thereafter, continued as per Article 9 of Annexure VII, which *inter alia*, states that the absence of a party or the failure of a party to defend its case shall not constitute a bar to the proceedings. China was provided with daily transcripts and documents of the Tribunal proceedings, along with the opportunity to comment thereon. However, China continued to exempt itself from participating based on declaration it had made by it in 2006 under UNCLOS, Article 298(1) [sub-paras (a), (b) and (c)], as mentioned above) that exempts it from compulsory dispute settlement.

Clearly, the claims raised by the Philippines did not fall under (a) ‘sovereignty or other rights over continental or insular land territory’, or (b) or (c) above, for which China sought exemption. As regards the exception on (a) ‘historic bays or titles’, the Tribunal declared that,

“as between the Philippines and China, China’s claim to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the ‘Nine-dash line’ are contrary to the convention and without lawful effect, to the extent that they exceed the

geographic and substantive limits of China's maritime entitlements under the Convention".¹⁰

The Tribunal further declared that, "the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein."¹¹ Thus, the 'historic bay or titles' exception enumerated in Article 298(1)(a) is subject to the limits imposed by the UNCLOS and this exception cannot be taken to mean an exception to the geographic and substantive limits of the maritime entitlements enumerated under the Convention. Thus, China's claim to sovereign jurisdiction on the basis of historic rights was declared illegal by the PCA through its final order issued on 12 July 2016.¹²

The order of the PCA being "final" means there is no further chance of appeal or revision and both the Philippines and China are legally bound by it, alike the orders passed by the ITLOS, the ICJ, or arbitral tribunals under Annexure VII or VIII. Additionally, Article 33 of Annexure VI and Article 11 of Annexure VII also reiterate that the order of ITLOS and the arbitral Tribunal constituted under Annexure VII are final and binding on the parties.¹³ However, despite this, China refused to comply with the Tribunal's verdict. On the other hand, the Philippines has not been able to compel enforcement of the arbitral award due to lack of effective enforcement provisions under the UNCLOS.

Although Article 12(1) of Annexure VII says that a dispute regarding implementation of an arbitral award may be submitted to the same arbitral tribunal,¹⁴ the UNCLOS is silent on its power to execute the award. Only a decision adjudicated upon by the ICJ is enforceable by recourse to the UN Security Council, which can take measures to give effect to the judgment (Article 94 of the UN Charter).¹⁵ As things stand today, the execution of awards passed by ITLOS and the arbitral tribunals are left solely to the good faith obligations undertaken by the concerned State. The State that is adversely affected, therefore, may only secure compliance through persuasion and diplomatic goodwill. Given the increasing geopolitical rivalry in the Indo-Pacific region, this translates into a potential for a paralysis of the UNCLOS mechanisms.

Amending the UNCLOS to incorporate an enforcement mechanism may be a solution. The Convention permits such amendments through a procedure enumerated in Articles 312-316 of Part XVII (Final Provisions).¹⁶ Such an amendment could be adopted either through convening a conference (Regular Procedure), or through formal written communication (Simplified Procedure), as indicated in flow-chart below (Fig. 1).

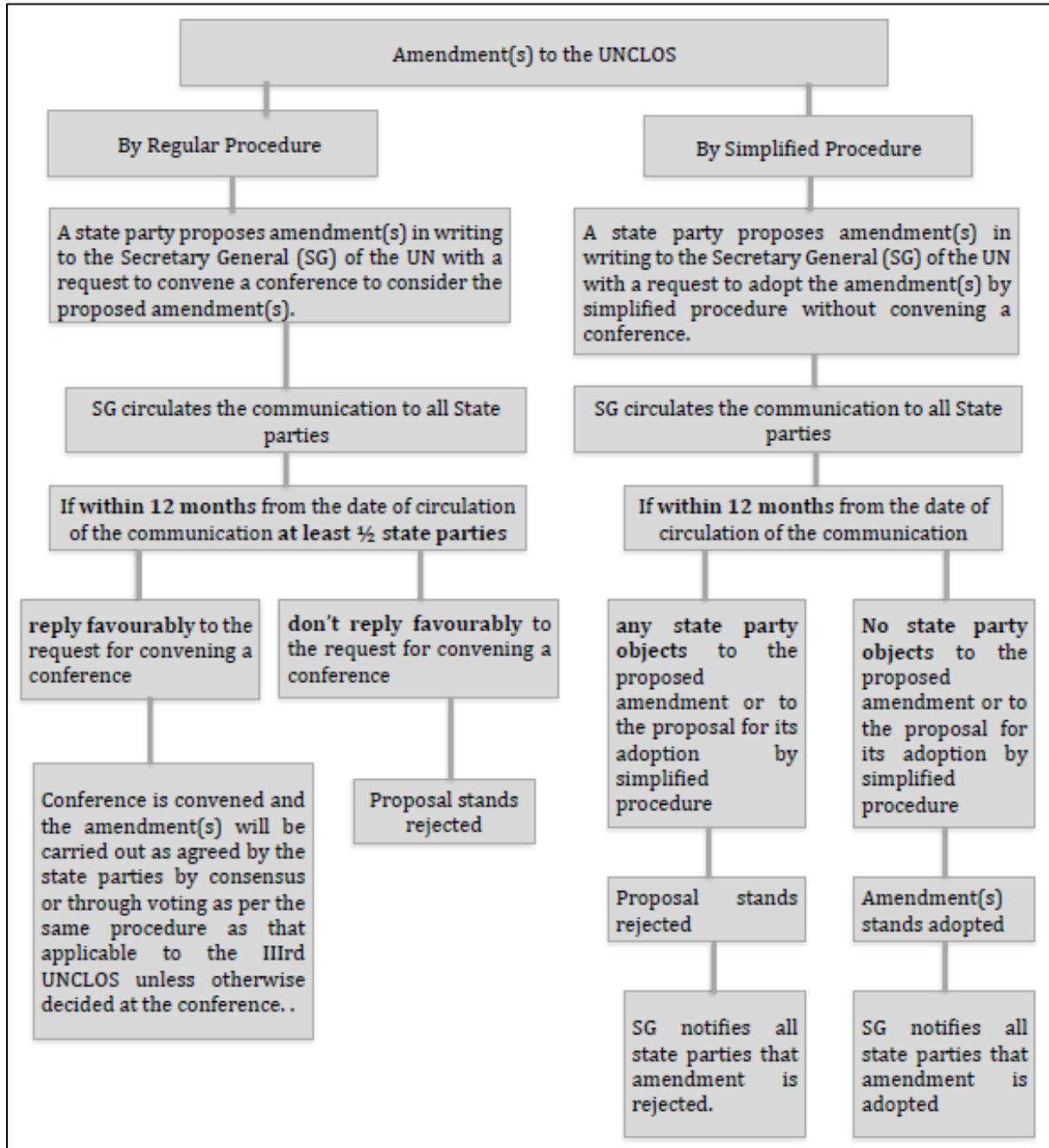


Figure 1 - Flow Chart: Procedure to adopt an amendment (UNCLOS Articles 312 and 313)

The Geopolitical Dimension

Despite being an active participant in the UNCLOS III (Third United Nations Conference on the Law of the Sea, 1973-82) negotiations and a State party to the UNCLOS, 1982, China declined to conform to its compulsory dispute resolution mechanism (UNCLOS, Part XV), citing the declaration that it made to the effect in

August 2006. While allowing for such declarations, UNCLOS provides its State-parties the latitude to choose what is best suited to their respective conditions and interests. However, such leeway ought not be used by a State party to absolve itself of its treaty obligations in entirety. For instance, by asserting its ‘historic claim’ within the “nine-dash line” without an established State practice as provided for in UNCLOS, Beijing is clearly reneging on its treaty obligations. China’s legal position is being supported by its geopolitical (including geo-economic) power, which is diluting the objectivity of international law.

Ostensibly, like its oft-articulated ‘dissatisfaction’ with the Western-based global order, China seeks to shun the UNCLOS that is based on ancient Roman and Nordic maritime laws. It seems as if the Chinese are saying “don’t impose Western-based laws upon China... as ancient Asian civilizations, China (and also India) did have flourishing maritime economic and cultural linkages within the Indo-Pacific region, which would not have been possible without existence of a robust maritime law... the ancient mariners of Asia were neither killing each other at sea, nor were their merchant ships colliding”. A dispassionate view holds such an argument to be substantially robust.

Nonetheless, this argument — and China’s assertion of geopolitical power to further it — is indeed a risky proposition for the Indo-Pacific, and also for the wider international community. It is unhelpful to meet the objectives of the contemporary concept of ‘Free and Open Indo-Pacific’ — as an essential prerequisite for regional prosperity — that which was originally conceived in 2006 in India, and articulated by the Japanese Prime Minister in the Indian Parliament in August 2007.¹⁷

During his address at the *Shangri La Dialogue* held at Singapore in June 2018, the Indian Prime Minister Sh. Narendra Modi said,

*“India's vision for the Indo-Pacific Region is...a positive one. And, it has many elements... We believe that our common prosperity and security require us to evolve, through dialogue, a common rules-based order for the region.... These rules and norms should be based on the consent of all, not on the power of the few. This must be based on faith in dialogue, and not dependence on force. It also means that when nations make international commitments, they must uphold them. This is the foundation of India's faith in multilateralism and regionalism; and, of our principled commitment to rule of law.”*¹⁸

This implies that the divergences in the interpretation of international law in the maritime domain, if any, would need to be reconciled through a consensual approach, and solutions found within the existing overarching legal framework, as represented by the UNCLOS.

This goes beyond a mere 'sermon' and is a case of 'practicing what you preach'. No matter which political party forms the central government in New Delhi, as a satiated and *status quo* power, India has stood by the established international legal order almost as a fundamental tenet of its foreign policy. In October 2009, when Bangladesh invoked UNCLOS (Part XV, Section 2 on "Compulsory Procedures Entailing Binding Decisions") to institute international arbitration against India at the PCA, India willingly involved itself in the arbitral proceedings. Later, in July 2014, notwithstanding a PCA judgement that was adverse to India, New Delhi gracefully accepted the Tribunal's award.¹⁹ Such national policy approach is also in consonance with Prime Minister Modi's vision of Security and Growth for All in the Region (abbreviated as SAGAR, meaning 'Ocean' in Hindi language), which was enunciated in Mauritius in March 2015.²⁰ The vision stands for collective economic development and security of the regional countries. It is premised on the realization that India can achieve prosperity only if its regional neighbours also prosper, which is best represented by the aphorism "a rising tide lifts all boats".

A couple of years before the resolution of the India-Bangladesh maritime dispute, in 2012, Myanmar also settled its maritime boundary with Bangladesh through referral to the ITLOS.²¹ The other countries of the Indo-Pacific are also increasingly resorting to international arbitration to resolve their outstanding maritime disputes amicably, and in accordance with the UNCLOS. For instance, in August 2014, Kenya referred its maritime boundary dispute with Somalia to the ICJ.²² More recently in 2017, pursuant to a UN General Assembly resolution, the ICJ was approached to resolve the dispute between Mauritius and the UK over the status of Chagos Archipelago.²³ In none of these cases has any involved party rejected the jurisdiction of the concerned court. China's non-participation in the Philippines-China PCA case, therefore, stands out starkly as an aberration in the emerging geopolitics of the Indo-Pacific region.

The Way Ahead

Ever since the 'Indo-Pacific' concept was renewed in 2006-07 to respond to the contemporary reality of emerging the security linkage between the two oceans, China

has been the centre-piece of the ‘Indo-Pacific’ idea.²⁴ Accordingly, the most appropriate regional geopolitical response to China should have been one of asserting nuanced and graduated persuasive and dissuasive pressures upon China. However, the governments of the Indo-Pacific countries could not comprehend this, much less implement it. India’s own apex leadership never fathomed the import of the ‘Indo-Pacific’ concept until June 2018, even though the Japanese Prime Minister articulated it in August 2007 in the Indian Parliament.²⁵

On the other extreme, the “Indo-Pacific...Indo-Pacific... Indo-Pacific...” articulation of the US President Donald Trump during his Asia Tour in November 2017,²⁶ and its temporal coincidence with the launching of the Quadrilateral Security Dialogue (QSD) has led to polarizing the Indo-Pacific region, with the region presently facing the adverse consequences in terms of being forced to choose sides.²⁷

This deleterious consequence needs to be neutralized through exerting subtle persuasive pressures upon China. In this regard, among other measures, international legal regimes like UNCLOS could be very helpful. Even though Beijing has been dismissive of the PCA arbitration instituted by the Philippines, the arbitral proceedings and its verdict have constructively served to exert substantial geopolitical pressures upon China. If the other ASEAN countries that have maritime disputes with China in the SCS were also to seek recourse to international arbitration against China, the weight of such pressures could be increased substantially.

The ‘power’ that China is using as its ‘primary weapon’ to challenge the established tenets of international law is also a source of its vulnerability. The more powerful a nation is, the more it needs to preserve its image and standing in the international community. For China specifically — which places much value upon ‘face’ owing to historic and cultural factors — going against the collective will of the international community is accompanied by substantially high costs in terms of its regional and global influence. China is thus likely to realise, sooner or later, that the transaction is not ‘cost-effective’.

Meanwhile, efforts need to be made at the global level to amend the UNCLOS under its inherent proviso (UNCLOS Articles 313 and 314), such that the decisions awarded under the UNCLOS provision of “Compulsory Procedures Entailing Binding Decisions” are made enforceable through the UN Security Council, alike those taken by the ICJ.

Concurrently, the countries of the Indo-Pacific region may need to undertake deliberations at multilateral fora, so as to evolve a common interpretation of UNCLOS with regard to freedom of navigation, such as in terms of the innocent passage of foreign warships in the Territorial Sea, and foreign military activities in the Exclusive Economic Zone (EEZ). This will prevent a scenario wherein China begins exploiting the 'fault-lines' among the Indo-Pacific countries in terms of the existing divergences in their interpretations of international law.

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Notes and References

¹ The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Permanent Court of Arbitration (PCA), the Hague, at <https://pca-cpa.org/en/cases/7/>

² "The Tribunal's Award in the 'South China Sea Arbitration' initiated by the Philippines is Null and Void", Chinese Society of International Law, *People's Daily Online*, 13 June 2016, at <http://www.globaltimes.cn/content/988029.shtml> Also see, Tom Phillips, Oliver Holmes and Own Boycott, "Beijing rejects tribunal's ruling in South China Sea case", *The Guardian*, 12 July 2016, at <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>

³ The contemporary 'Indo-Pacific' concept denoting the security linkage between the two oceans (with a focus on China's increasing assertiveness in the Indian Ocean) emerged during interactions between Indian and Japanese think-tanks in 2006-07. This was articulated by the Japanese Prime Minister Shinzo Abe in the Indian Parliament in August 2007. In this context, the concept was first explained by the author in Khurana, Gurpreet S., 'Security of Sea Lines: Prospects for India-Japan Cooperation', *Strategic Analysis*, Vol. 31(1), January-February 2007, pp. 139-153

⁴ United Nations Convention on the Law of the Sea, Article 279, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁵ United Nations Convention on the Law of the Sea, Article 281, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

⁶ United Nations Convention on the Law of the Sea, Article 287(1), at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf A State party to UNCLOS may make such a declaration either at the time of signing, ratifying or acceding to the Convention or anytime thereafter.

⁷ Award on PCA Case N° 2013-19 in the matter of the South China Sea arbitration - before - an Arbitral Tribunal constituted under Annex VII to the 1982 UNCLOS between the Republic of the Philippines and the People's Republic of China, 12 July 2016, PCA website, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>

⁸ 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, Ministry of Foreign Affairs of the PRC, 07 December 2014, at https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm

⁹ Declarations and statements, UN Division for Ocean Affairs and the Law of the Sea, UN website, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China Upon ratification (accessed on 25 December 2018)

¹⁰ Award on PCA Case N° 2013-19 in the matter of the South China Sea arbitration - before - an Arbitral Tribunal constituted under Annex VII to the 1982 UNCLOS between the Republic of the Philippines and the People's Republic of China, 12 July 2016, PCA website, at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>

¹¹ -ibid-

¹² -ibid-

¹³ United Nations Convention on the Law of the Sea, Art 33 of Annex VI and Art 11 of Annex VII, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

¹⁴ United Nations Convention on the Law of the Sea, Art 12(1) of Annex VII, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

¹⁵ Charter of the United Nations and Statute of the International Court of Justice, San Francisco, 1945, Art 94, at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> It may be noted that the US Security Council may be constrained to enforce the ICJ verdict. Nonetheless, this is a geopolitical issue, and at least, the legal provision exists.

¹⁶ United Nations Convention on the Law of the Sea, Art 312-316, at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf

¹⁷ Mercy A Kuo, "The Origin of 'Indo-Pacific' as Geopolitical Construct", *The Diplomat*, 25 January 2018, at <https://thediplomat.com/2018/01/the-origin-of-indo-pacific-as-geopolitical-construct/>

¹⁸ Prime Minister's Keynote Address at Shangri La Dialogue, June 01, 2018, Ministry of External Affairs (MEA), Government of India website, at <https://www.mea.gov.in/Speeches-Statements.htm?dtl/29943/Prime+Ministers+Keynote+Address+at+Shangri+La+Dialogue+June+01+2018>

¹⁹ Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India, *Permanent Court of Arbitration* (PCA), The Hague, 8 July 2014, at <https://www.pcacases.com/web/sendAttach/410>

²⁰ Text of the PM's Remarks on the Commissioning of Coast Ship Barracuda, Prime Minister's Office, Government of India, PIB Press Release, 12 March 2015, at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=116881>

²¹ Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Case No. 16), *International Tribunal for the Law of the Sea* (ITLOS) website, at <https://www.itlos.org/cases/list-of-cases/case-no-16/>

²² Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), *International Court of Justice* (ICJ), The Hague, ICJ Latest Press Release No. 2018/12, 12 February 2018, at <https://www.icj-cij.org/files/case-related/161/161-20180212-PRE-01-00-EN.pdf>

²³ “Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965”, Request for Advisory Opinion transmitted to the Court, *International Court of Justice* (ICJ), The Hague, 23 June 2017, at <https://www.icj-cij.org/files/case-related/169/169-20170623-REQ-01-00-EN.pdf>

²⁴ Mercy A Kuo, “The Origin of ‘Indo-Pacific’ as Geopolitical Construct”, *The Diplomat*, 25 January 2018, at <https://thediplomat.com/2018/01/the-origin-of-indo-pacific-as-geopolitical-construct/>

²⁵ “Confluence of the Two Seas”, Speech by H.E. Mr. Shinzo Abe, Prime Minister of Japan at the Parliament of the Republic of India, Ministry of Foreign Affairs of Japan, 22 August 2007, at <https://www.mofa.go.jp/region/asia-paci/pmvo708/speech-2.html>

²⁶ “Why Trump keeps saying Indo-Pacific”, *BBC News*, 9 November 2017, at <https://www.bbc.com/news/av/world-asia-41912990/why-trump-keeps-saying-indo-pacific>

²⁷ Gurpreet S. Khurana, “Trump’s new Cold War alliance in Asia is dangerous”, *The World Post (The Washington Post)*, 14 November 2017, at https://www.washingtonpost.com/news/theworldpost/wp/2017/11/14/trump-asia-trip/?noredirect=on&utm_term=.7de0c9ac7ac3