國立臺灣大學法律學院法律學研究所

碩士論文

Graduate Institute of Law
College of Law
National Taiwan University

Master Thesis

論《聯合國海洋法公約》爭端解決之強制管轄範圍：以領土主權歸屬爭端為中心

The Limits of Subject-matter Jurisdiction in UNCLOS Compulsory Dispute Settlement: An Analysis of Territorial Sovereignty Disputes

魏惇婷

Duen-Ting Wei

指導教授：姜皇池 博士

Advisor: Huang-Chih Chiang, Ph.D.

中華民國 108 年 7 月

July 2019

doi:10.6342/NTU201903686

This page is intentionally left blank

doi:10.6342/NTU201903686

ACKNOWLEDGMENTS

This thesis is the product of tremendous support and love from closed ones.

Deepest gratitude to Professor Huang-Chih Chiang, who has been the most instructive and generous advisor since day one. Professor Chiang's constant encouragement and guidance have helped me in overcoming countless difficulties throughout the past four years. Professor Chiang is the epitome of a true mentor. Without his advice and utmost support, I would not have been able to pass the Bar Exam and work on this thesis.

I am beyond honored to have Professor Chen-Ju Chen and Professor Yu-Tsang Wu as members of the advisory committee. I am very thankful to Professor Chen and Professor Wu for their valuable time and consideration given to this thesis. Their intellectual contribution is significant to the improvement and completion of this thesis.

I would like to express my immense appreciation for SCU Jessupers. Fellow Jessupers have been the best companions on this journey and a ray of sunshine. I would not have pursued studies in public international law were it not for the rewarding experiences with teammates of Jessup 2012 & 2014.

Thanks to Ian (Chao-Wei) Chen and Jeffrey (Chien-Yu) Long for their feedback and help in preparing for my oral defense. Special thanks to Howard J.S. Li for supporting me from an ocean away. I would also like to thank my bestie, Mitch Lai, for cheering me on and coming to the rescue when research materials were nowhere to be found within the country.

Grateful beyond words to P.H. LIAO, who has had my back come rain or shine and through thick and thin. I have learned and grown so much from and with P.H. since our paths crossed.

Finally, I am thankful to my family, especially Lily, for their unconditional love and support.

doi:10.6342/NTU201903686

ABSTRACT

It is a commonly advanced view that disputes of territorial sovereignty are not subject to the compulsory dispute settlement regime under Part XV of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). However, in the recent 2015 *Chagos* Arbitration and 2016 *South China Sea* Arbitration, the question became the focus of both arbitral awards and has generated heated debate on whether issues of land sovereignty are subject to the subject-matter jurisdiction of Section 2 (compulsory procedures entailing binding decision) under Part XV of UNCLOS.

Among the various arguments put forth in legal scholarship, few have referred and adhered rigorously to rules of treaty interpretation when interpreting relevant jurisdictional provisions of UNCLOS. A number of academic discussions focus on land sovereignty issues in the context of "mixed disputes," which refers to either dispute exclusively concerning maritime delimitation and territorial sovereignty or disputes concerning both UNCLOS and non-UNCLOS issues, which are often exemplified by maritime delimitation disputes. However, land sovereignty disputes may raise preliminary questions of jurisdiction in both (pure) territorial sovereignty disputes and mixed disputes. The arguments put forth by Mauritius and the UK in the 2015 *Chagos* Arbitration are an indication of such distinction.

The main task of the thesis is to determine whether and to what extent are territorial sovereignty disputes excluded from compulsory jurisdiction. It seeks to tackle the controversial issue at its root by conducting a construction of UNCLOS Article 288(1) in light of the rule of treaty interpretation under international law. The thesis then delves into how international courts and tribunals tackle disputes concerning land sovereignty. The thesis also analyses whether judicial decisions conform with the interpretation of Article 288(1) and its implications on cases involving land sovereignty brought under compulsory procedures in Section 2 of Part XV UNCLOS.

doi:10.6342/NTU201903686

Keywords: UNCLOS dispute settlement – territorial sovereignty disputes – limitations to compulsory jurisdiction– jurisdiction *ratione materiae* – Chagos Arbitration – South China Sea Arbitration

doi:10.6342/NTU201903686

中文摘要

國際法學界長期以來多認為《1982 年聯合國海洋法公約》（下稱《公約》）強制爭端解決機制之事務管轄範圍乃排除「領土主權歸屬爭端」（territorial sovereignty disputes）。2015 年「查戈斯群島仲裁案」及「南海仲裁案」係目前依據《公約》強制爭端解決程序並直接且較深入討論《公約》強制爭端解決機制之事務管轄範圍與「領土主權歸屬爭端」關係之唯二司法判決。此二案件亦開啟學說間對於領土主權歸屬管轄是否為《公約》強制爭端解決機制之事務管轄範圍之熱烈討論且眾說紛紜。尤其針對「混合型爭端」（mixed disputes），即同時涉領土主權歸屬事項及關於《公約》之事項。值得關注者為此二案件中，同樣係依據《公約》附件七組成之仲裁庭，就兩邊原告看似的相同性質之主張，於認定其依據公約強制管轄條款第 288 條第 1 款有無管轄權時，做出相反之判斷。

考量強制爭端解決機制之「強制」（compulsory）性質特殊，其管轄範圍應謹慎判斷。尤其，敏感性高之「領土主權歸屬爭端」是否屬《公約》事務管轄範圍極具爭議性。此爭議之討論彰顯過去採取之立場未必理所當然，而有重新檢視之必要。此爭議涉及國際法上如何認定《公約》第 288 條第 1 款管轄條款之範圍。《公約》之本質乃國際條約，就其條文內涵有爭執者，應循國際法上條約解釋原則加以闡釋。然，討論該管轄條款之多數學說及實務見解鮮少明示其乃依條約解釋原則為分析，即便是操作條約解釋之論述未嚴格遵循條約解釋原則。

本論文認為，釐清《公約》強制爭端解決機制之事務管轄範圍須回歸條約解釋原則以尋求締約當事國之真意。是以，本論文將依國際法上確立之條約解釋原則判斷「領土主權歸屬爭端」是否屬公約管轄條款第 288 條第 1 款之範圍。本論文試圖整理並分析關於《公約》締結之一手資料和目前學說見解，並實際操作條約解釋原則於《公約》管轄條款。同時，本論文將分析並觀察「查戈斯群島仲裁案」及「南海仲裁案」是否與條約解釋結果相符。最後，本文結論認為條約解釋之結果係《公約》當然排除領土主權歸屬爭端，且不因系單純涉及領土主權爭端或混合型爭端而異。此外，國際司法實務與條約解釋不一致之情形乃因受訴法院或法庭具有一定裁量權限，主要系對於解釋《公約》條款、定性原告主張所採原則及實際適用有相當程度之裁量，而使個案間認定不一致，造成不確定性。本論文認為往後國際司法判決應循條約解釋原則，使各項解釋元素受到完整考量，使不同國際法院和法庭間之裁判趨於一致性並具法確定性。

doi:10.6342/NTU201903686

關鍵字：《1982 年聯合國海洋法公約》強制爭端解決機制、事物管轄範圍、領土主權歸屬爭端、查戈斯群島仲裁案、南海仲裁案

doi:10.6342/NTU201903686

TABLE OF CONTENTS

doi:10.6342/NTU201903686

doi:10.6342/NTU201903686

doi:10.6342/NTU201903686

CHAPTER I: INTRODUCTION

I. Origin and Purpose of Research

One of the main issues dealt with by the Permanent Court of Arbitration (PCA) in the 2015 *South China Sea Arbitration*,[1] as well as the 2015 *Chagos Archipelago Arbitration*,[2] was jurisdiction. The *South China Sea* arbitral award marks the latest rendered judicial decision sparking discussions about the scope of jurisdiction *ratione materiae* (or subject-matter jurisdiction) under the "Dispute Settlement" regime in Part XV, specifically, the *compulsory* dispute settlement, of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[3]

The jurisdiction clauses of dispute settlement under Part XV of UNCLOS acknowledges voluntary and compulsory dispute settlement mechanisms. Compulsory dispute settlement under Section 2 of Part XV is of particular importance for it is a mandatory procedure applicable notwithstanding an agreement between the concerned parties to initiate judicial proceedings. Section 2 of Part XV is a not only compulsory but binding framework. By reason of its compulsory and binding nature, certain limitations and exceptions to its jurisdiction *ratione materiae* are enshrined in UNCLOS provisions. As explicit in Articles 286 and 288, only disputes concerning the "interpretation or application" of UNCLOS or other related agreements may be subject to the compulsory jurisdiction of UNCLOS.

---

[1] The South China Sea (Phil. v. China), Award on Jurisdiction and Admissibility, PCA Case No. 2013–19 (UNCLOS Annex VII Arb. Trib. Oct. 29, 2015), http://www.pca-cpa.org (last visited Aug. 7, 2019) [hereinafter South China Sea Arbitration].

[2] Chagos Marine Protected Area (Mauritius v. U.K.), Award, PCA Case No. 2011–3 (UNCLOS Annex VII Arb. Trib. Mar. 18, 2015), http://www.pca-cpa.org (last visited Aug. 7, 2019) [hereinafter Chagos Arbitration].

[3] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

doi:10.6342/NTU201903686

It is said that States generally agree disputes of "territorial sovereignty" are not considered as concerning the "interpretation or application" of UNCLOS, and hence, are not subject to the compulsory dispute settlement regime under UNCLOS. However, not all proponents of this view have offered explanation other than the mere absence of relevant provision governing land sovereignty disputes under UNCLOS. Recent scholarship suggests discrepancies in the "widely accepted" notion. Not much academic literature provides a reference to the rule of treaty interpretation. Given the main issue to this thesis lies in the interpretation of provisions under UNCLOS Part XV, it is only reasonable that methods of treaty interpretation are reviewed in pursuit of an interpretation of the scope of its compulsory jurisdiction. In practice, the Permanent Court of Arbitration has on few occasions been faced with disputes of territorial sovereignty, but seem to have responded differently on each account. Most notably, the *South China Sea* Tribunal found their jurisdiction over disputes seemingly relating to territorial sovereignty, whereas the *Chagos* Tribunal found otherwise. Academic scholarship and judicial decisions have apparently demonstrated various understanding of the limits of the scope of subject-matter jurisdiction in relation to territorial sovereignty disputes.

The purpose of this thesis is to ascertain whether and if so, to what extent are territorial sovereignty disputes subject to UNCLOS compulsory jurisdiction, and the underlying legal rationale in light of contemporary academic literature and judicial decisions.

II. Research Question

The research question of this thesis is whether territorial sovereignty disputes are subject to UNCLOS compulsory dispute settlement. In answering this problem, the following issues will be addressed in turn.

First, the basis of the exercise of jurisdiction by international adjudicating bodies, and the method to be taken in order to elucidate the precise content of jurisdiction conferred to adjudicating bodies.

doi:10.6342/NTU201903686

Second, the scope of jurisdiction *ratione materiae* of UNCLOS compulsory dispute settlement.

Third, whether UNCLOS provisions on the subject-matter jurisdiction of compulsory dispute settlement allow the exercise of jurisdiction over disputes concerning territorial sovereignty (i.e. whether territorial sovereignty disputes *are* disputes concerning the interpretation or application of UNCLOS). This is answered by recourse to the rule of treaty interpretation under general international law.

Fourth, in light of recent practices, whether courts and tribunals consider territorial sovereignty disputes within the scope of compulsory jurisdiction, and if so, what the extent or limitations to jurisdiction over territorial sovereignty are.

Fifth, whether the practices of the UNCLOS Tribunals in understanding the jurisdictional provisions deviate from, modify, or affirm the interpretation in accordance with the 1969 Vienna Convention on the Law of Treaties.

Sixth, the conclusion to be drawn from existing academic literature and cases.

III. Scope and Method of the Research

A. Scope of the Research

As identified in Part I and II of Chapter I, the subject-matter jurisdiction of UNCLOS compulsory dispute settlement lies at the core of this thesis and is subject to treaty interpretation. The purview of this thesis is thus, international treaties, judicial decisions and academic scholarship on the issues specifically related to the compulsory dispute settlement of UNCLOS, the rule of treaty interpretation, and territorial sovereignty disputes that are subject to compulsory jurisdiction under UNCLOS dispute settlement regime.

The overview of the 1982 UNCLOS includes important official records of negotiating history and supplemented by legal scholarship.

The discussion and application of the 1969 Vienna Convention on the Law of Treaties and rules of customary international law are limited to those applied in

doi:10.6342/NTU201903686

interpreting UNCLOS jurisdictional provisions. Not all elements of treaty interpretation are explored in this thesis.

In terms of UNCLOS provisions, the scope of research is confined to the subject-matter jurisdiction of the compulsory dispute settlement. Provisions of other treaties and jurisdictional provision beyond those involving the scope of subject-matter jurisdiction are not addressed.

Cases are limited to ones that involve the relevant issues discussed in this thesis and those that explicitly address the issue of jurisdiction over territorial sovereignty disputes.

B. Method of the Research

The research method applied in this thesis is the inductive method, which consists of the following.

First, a survey of legal scholarship on the canons of treaty interpretation under international law and the scope of UNCLOS compulsory jurisdiction. It covers existing academic literature, including, *inter alia*, books, journal articles and commentaries.

Second, a review and analysis on case studies, in which the scope of compulsory jurisdiction and territorial sovereignty disputes are considered.

Third, this thesis induces from the result of the first and second steps to conduct analyses and conclude its research findings on the question.

IV. Structure of the Research

This thesis is organized as follows. Chapter II provides an introduction of the fundamental basis of dispute settlement. The reason why judicial bodies possess the power to adjudicate over disputes, especially given the fact that disputes are referred by States for *a binding resolution by third parties*, serves as a gateway to further discussion.

doi:10.6342/NTU201903686

Chapter III is composed of two main Parts. In Part 1, this thesis begins with an overview of the 1982 UNCLOS dispute settlement framework, i.e. Part XV. This thesis will illustrate the background to the negotiation and drafting history of the 1982 UNCLOS. In Part 2, this thesis focuses on provisions concerning the subject-matter jurisdiction of the "compulsory dispute settlement" and the limits thereof.

Chapter IV consists of an in-depth analysis of Article 288(1), the main provision of jurisdiction *ratione materiae*, through the rule of treaty interpretation. In Part I and II, canons of treaty interpretation applicable in interpreting Article 288(1) are introduced. Part III reviews the various theories identified through legal scholarship. In Part IV, this thesis concludes by applying the rule of treaty interpretation to Article 288(1).

In Chapter V, judicial decisions that dealt with territorial sovereignty disputes under UNCLOS compulsory jurisdiction are discussed in length and analyzed.

Lastly, in Chapter VI, this thesis concludes with some key observations.

V. Terms Used

A. Mixed Disputes-

This thesis refers to the general definition of mixed disputes to indicate disputes involving UNCLOS issues and non-UNCLOS issues, unless otherwise specified.

While some commentators refer to "mixed disputes" as disputes concerning maritime boundary delimitation and territorial sovereignty issues under UNCLOS Article 298(1)(a)(i);[4] others generally categorize "mixed disputes"

---

[4] Peter Tzeng, *Supplemental Jurisdiction under UNCLOS*, 38 HOUS. J. INT'L L. 499, 501 (2016); Irina Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals*, 27 INT'L J. MARINE & COASTAL L. 59, 60 (2012); Rüdiger Wolfrum, *Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs*, President of the International Tribunal for the Law of the Sea, Oct. 23, 2006, 2–6, https://www.itlos.org/press-media/statements-of-the-president/statements-of-president-wolfrum/ (last visited Aug. 7, 2019) [hereinafter Wolfrum Statement]; Chagos Marine Protected

doi:10.6342/NTU201903686

disputes that involve UNCLOS disputes and non-UNCLOS disputes.[5] It is commonly agreed that no UNCLOS provision addresses territorial sovereignty issues;[6] hence, the former category is merely an example of the latter.[7] The nomenclature adopted in academic writings may vary based on their respective views; however, neither classification affects the discussions of this thesis.

B. UNCLOS disputes/ Non-UNCLOS disputes-

UNCLOS disputes refer to disputes that are governed by provisions of UNCLOS. Conversely, non-UNCLOS disputes are disputes that are not addressed by UNCLOS provisions.

Area (Mauritius v. U.K.), PCA Case No. 2011–3, ¶ 45 (UNCLOS Annex VII Arb. Trib. Mar. 18, 2015) (dissenting and concurring opinion by Judge James Kateka & Judge Rüdiger Wolfrum), http://www.pca-cpa.org (last visited Aug. 7, 2019) [hereinafter Chagos Dissenting Opinion]; Stefan Talmon, *The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction*, 65 INT'L & COMP. L.Q. 927, 946 (2016); Loris Marotti, *Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals*, *in* INTERPRETATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY INTERNATIONAL COURTS AND TRIBUNALS 383, 384 (Angela Del Vecchio & Robert Virzo eds., 2019).

[5] Talmon, *supra* note 4, at 933; *see also* Benard Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 394, 400 (Donald R. Rothwell et al. eds., 2014); Tullio Treves, *Article 286:Application of procedures under this section*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1844, 1847, ¶ 11 (Alexander Proelss ed., 2017) [hereinafter Treves (2017)]; Patibandla Chandrasekhara Rao, *Delimitation Disputes Under the United Nations Convention on the Law of the Sea: Settlement Procedures*, *in* LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH 877, 887 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007).

[6] Chagos Dissenting Opinion, *supra* note 4, ¶ 45; Talmon, *supra* note 4, at 933; *see also* Sienho Yee, *The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT'L L. 663, 689 (2014).

[7] Marotti, *supra* note 4, at 394.

doi:10.6342/NTU201903686

Throughout this thesis and as defined to by some commentators,[8] an "UNCLOS dispute" is any dispute concerning the interpretation or application of UNCLOS (i.e. disputes governed by UNCLOS provisions); whereas, a "non-UNCLOS dispute" is any dispute concerning the interpretation or application of any rule of international law beyond UNCLOS (i.e. disputes not governed by UNCLOS provisions).

C. UNCLOS Tribunals-

UNCLOS Tribunals is used in this thesis to indicate the adjudicating bodies set out in Article 287 of UNCLOS.

[8] Tzeng, *supra* note 4, at 501; *see also* M. Bruce Volbeda, *The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS,* 42 TEX. INT'L L.J. 211, 220–1 (2006).

doi:10.6342/NTU201903686

CHAPTER II: JURISDICTION OF INTERNATIONAL DISPUTE SETTLEMENT

I. Introduction

In identifying the scope of jurisdiction *ratione materiae* of the compulsory dispute settlement of UNCLOS, the fundamental principle of the jurisdiction of international courts and tribunals in judicial settlement should be born in mind. In this chapter, the following issues are explored to lay grounds for discussions in the subsequent chapters. Namely, the basis of international courts and tribunals' jurisdiction to decide a case, the scope of jurisdiction and by whom the question of jurisdiction is determined. Viewing these issues as a whole is indicative of why the construction of UNCLOS jurisdictional clauses is rudimentary to ascertain the scope of compulsory jurisdiction.

II. Legal Basis of Jurisdiction

A. Sovereignty and State Consent

The international legal order is premised on State sovereignty, which provides legal authority for international courts or tribunals to adjudicate cases. [9] International adjudication is a means of dispute settlement where parties refer a dispute for a legally binding decision by an impartial third-party, which is usually a court or tribunal.[10] The jurisdiction of international courts or tribunals is the

---

[9] Yuval Shany, *Jurisdiction and Admissibility*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 779, 782 (Cesare P.R. Romano et al. eds., 2013).

[10] Richard Bilder, *Adjudication: International Arbitral Tribunals and Courts*, *in* PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES 195 (I. William Zartman ed., 2007). *See generally* Alain Pallet, *Judicial Settlement of International Disputes*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Online ed. July 2013), http://opil.ouplaw.com (last visited Aug. 7, 2019); Md. Saiful Karim, *Litigating Law of the Sea Disputes Using the*

doi:10.6342/NTU201903686

legal authority bestowed by States.[11] The basis of jurisdiction stems from notions of delegation and consent.[12] In other words, the legal powers of international courts or tribunals derive from the delegated authority of States.[13] Accordingly, the sole foundation of a court or tribunal's jurisdiction over disputes between States lies in State sovereignty, which is expressed by State consent.[14]

No obligation exists in general international law to settle disputes. International dispute settlement by formal and legal procedures are consensual in character.[15] The jurisdiction of international courts or tribunals to render a binding decision in a particular dispute hinges upon the consent of the State parties to the dispute in question. The principle governing dispute settlement is that a dispute cannot be referred to an international court or tribunal without consent from the parties to the dispute.[16] Judicial or arbitral process entailing a binding decision cannot take place in the absence of the parties' consent.[17] This is true either of *ad hoc* or

---

UNCLOS Dispute Settlement System, in LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS 260, 261 (Natalie Klein ed., 2014).

[11] Shany, *supra* note 9, at 782; *see also* Shabtai Rosenne, *International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (Online ed. Mar. 2006), http://opil.ouplaw.com (last visited Aug. 7, 2019) (Rosenne defines jurisdiction as "the channel through which a court or tribunal receives its power to decide a case with binding force for the parties to that case.").

[12] Shany, *supra* note 9, at 782; *see also* CHITTHARANJAN F. AMERASHINGHE, INTERNATIONAL ARBITRAL JURISDICTION 55–6 (2011) [hereinafter AMERASHINGHE (2011)]; AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 563 (Alexander Orakhelashvili ed., 8th ed. 2018).

[13] Shany, *supra* note 9, at 782.

[14] Alexander Proelss, *The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals*, 46 HITOTSUBASHI J.L. & POL. 47, 48 (2018); A.O. Adede, *Settlement of Dispute Arising Under the Law of the Sea Convention*, 69 AM. J. INT'L L. 798, 816–7 (1975).

[15] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 718 (8th ed., 2012).

[16] Robert Beckman, *Part XV and South China Sea, in* THE SOUTH CHINA SEA DISPUTE AND LAW OF THE SEA 229, 231 (S. Jayakumar et al. eds., 2014).

[17] Rosenne, *supra* note 11, ¶ 3; Pallet, *supra* note 10, ¶ 8.

doi:10.6342/NTU201903686

permanent (i.e. existing or standing) courts.[18] In this respect, international judicial settlement is distinct from domestic court systems.[19]

The method in which consent is manifested is not controlled.[20] States can express consent to international adjudication by entering into a special agreement (*compromis*).[21] A *compromis* is an agreement between parties to refer a specific dispute to a judicial or arbitral body. It is an *ad hoc* treaty-instrument used for the settlement of a specific dispute after it has arisen between the parties.[22] State parties may agree on the contentious claims (i.e. subject-matter of the dispute), the parties and procedure.[23]

Consent can also be generalized and given in advance in relation to a treaty and specific parties or for future cases falling within certain categories of dispute.[24] Such consent usually takes the form of a compromissory clause in a treaty providing for dispute resolution mechanisms.[25] States consent to the jurisdiction of international court or tribunal before a dispute occurs by way of becoming a party to a treaty with a dispute settlement clause.[26] A compromissory clause may allow a party to unilaterally institute proceedings against other parties.[27] Unlike

---

[18] Oxman, *supra* note 5, at 396.

[19] CRAWFORD, *supra* note 15, at 718.

[20] Rosenne, *supra* note 11, ¶ 3.

[21] *Id.*, ¶¶ 3, 10; Hugh Thirlway, *Compromis*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 4–5, 26 (Online ed. Aug. 2006), http://opil.ouplaw.com (last visited Aug. 7, 2019).

[22] Oxman, *supra* note 5, at 396; Thirlway, *supra* note 21, ¶¶ 1–6.

[23] Thirlway, *supra* note 21, ¶¶ 7–22 (suggesting the applicable procedure may be one agreed upon in the *compromis* or may be the statute or rules of a standing court, for which the *compromis* provides reference).

[24] *Id.*, ¶¶ 3–5, 26; Rosenne, *supra* note 11, ¶¶ 3, 10.

[25] Thirlway, *supra* note 21, ¶¶ 3–5.

[26] Oxman, *supra* note 5, at 396–7; Beckman, *supra* note 16, at 231.

[27] Rosenne, *supra* note 11, ¶ 10; UNCLOS, *supra* note 3, art. 286 et seq.

doi:10.6342/NTU201903686

a *compromis*, advanced consent (or "pre-consent")[28] provides an aggrieved party access to an impartial court or tribunal without having to wait for the other party to agree.[29] This is comparable to domestic legal systems with compulsory recourse to judicial settlement.[30]

B. Scope of Jurisdiction

International judicial jurisdiction is based on and derives from the consent of States, and this is well recognized in relation to the *scope* of jurisdiction.[31] As noted by Shany, international courts and tribunals have subject-matter jurisdiction over cases "that raise those factual and legal questions which the constitutive instruments have defined and (or) that one or more of the parties have agreed to refer to adjudication."[32] With respect to subject-matter jurisdiction, it is either contingent upon the legal instrument concerned or otherwise agreed upon by the parties to a dispute.[33]

In commenting on consent being the underpinning basis of jurisdiction of courts and tribunals, Thirlway also notes:

---

[28] MIGUEL GARCÍA-REVILLO, THE CONTENTIOUS AND ADVISORY JURISDICTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 32 (2015).

[29] Oxman, *supra* note 5, at 396–7; CRAWFORD, *supra* note 15, at 447.

[30] Oxman, *supra* note 5, at 396–7; Andreas Paulus, *International Adjudication*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 207, 208 (Samantha Besson & John Tasioulas eds., 2010); Chester Brown, *Inherent Powers in International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 828, 834 (Cesare P. R. Romano et al. eds., 2013).

[31] Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989: Part Nine*, 69 BRIT. Y.B. INT'L L. 1, 4 (1999) [hereinafter Thirlway (1999)]; Natalie Klein, *The Vicissitudes of Dispute Settlement under the Law of the Sea Convention*, 32 INT'L. J. MARINE & COASTAL L. 332, 361 (2017) [hereinafter Klein (2017)].

[32] Shany, *supra* note 9, at 779–805.

[33] *Id.*

doi:10.6342/NTU201903686

> [T]he essence of jurisdiction is consent: if the Statute expresses the consent of States to a limited power to […], it is self-contradictory to argue that, by creating a *court*, they implicitly consented to a wider power.[34]

By the same token, the scope of subject-matter jurisdiction is controlled by the extent of State consent.

> Jurisdiction or competence […] is the power, conferred by the consent of the parties, to make a determination on specified disputed issues which will be binding on the parties because that is what they have consented to.[35]

C. Types of Jurisdiction

Generally, the delegation of powers to international courts or tribunals are confined and subject to conditions.[36] International courts and tribunals are bestowed limited delegated power to adjudicate cases.

Academic literature typically perceives jurisdiction from four main dimensions: personal jurisdiction (jurisdiction *ratione personae*), which decides "who" can be parties to a case when relevant conditions are met; subject-matter jurisdiction (jurisdiction *ratione materiae*), which decides the factual and legal questions agreed by the parties in the constitutive instrument of judicial forums; temporal jurisdiction (jurisdiction *ratione temporis*), which places limits on the court or tribunal to "review cases involving facts or legal claims that have been consolidated before and (or) certain dates;" and spatial jurisdiction (jurisdiction *ratione loci*), which confines the powers of courts or tribunals to cases occurring in a particular geographical area.[37]

In addition to these four dimensions, a court or tribunal's jurisdiction in a specific case is governed by other jurisdictional conditions.[38] Any given court or tribunal

---

[34] Thirlway (1999), *supra* note 31, at 21.

[35] *Id.*, at 6.

[36] Shany, *supra* note 9, at 781–2.

[37] *Id.*, at 790–2.

[38] *Id.*, at 793.

doi:10.6342/NTU201903686

will only have the competence to exercise jurisdiction in a case when it is granted authority in these dimensions and jurisdictional conditions are satisfied.[39] The three main categories of jurisdictional conditions are identified as consent-based conditions, conditions of alternative venues, and time limits.[40] Consent-based conditions require the consent of both parties to a case in order for the court to exercise jurisdiction.[41] Take the International Court of Justice (*hereinafter* ICJ) for instance, aside from the consent required for the four main dimensions of jurisdiction, the parties must also consent to the conduct of adjudication by the Court.[42] Conditions pertaining to alternative venues may require international adjudication to be initiated only in the absence of alternative dispute resolution venues.[43] An underpinning rationale has to do with which forum is more adequate to settle disputes or enforce legal norms.[44] The familiarity of facts, better access to resources, enforcement mechanisms, special expertise in certain fields of law, and costs are examples of factors to be considered.[45] One possible reason for rendering international adjudication as a last resort is the reluctance of States to give up their control over disputes.[46]

Shany identifies another category of jurisdiction as "foundational jurisdiction" and "specific jurisdiction." The former refers to the delegated power from member States to international courts or tribunals, thereby denoting the potential power to hear a case.[47] The source of foundational jurisdiction can be found in the provisions of the constitutive instrument of the international court

---

[39] *Id.*

[40] *Id.*

[41] *Id.*, at 793–4.

[42] *Id.*

[43] *Id.*, at 794–5

[44] *Id.*

[45] *Id.*

[46] *Id.*, at 795.

[47] *Id.*, at 782–3.

doi:10.6342/NTU201903686

or tribunal.[48] The latter is the consent of the parties' to a dispute that allows the court or tribunal to adjudicate in a particular case.[49] The source of specific jurisdiction can be found in the specific grant of authorization by the parties to a given case.[50]

The ICJ itself serves as an adequate example. While the ICJ is delegated legal power to adjudicate cases, States must give consent to the ICJ before it can exercise jurisdiction over a particular case.[51] This requires a two-tier authorization: parties to the ICJ Statute delegate power to the ICJ to hear a case, and also consent to have the ICJ hear a particular case.[52] The foundational jurisdiction depicts the four main dimensions of jurisdictional powers[53] and preconditions to the exercise of jurisdiction.[54]

III. Determining the Scope of Subject-Matter Jurisdiction

The court or tribunal to which a dispute is submitted has the power to determine the scope of subject-matter jurisdiction and whether the dispute at hand falls within the scope.[55] The ICJ and international arbitral tribunals have consistently abode by this principle:[56]

---

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*, at 782.

[52] *Id.*

[53] The four dimensions are jurisdiction *ratione materiae*, jurisdiction *ratione personae*, jurisdiction *ratione temporis* and jurisdiction *ratione loci*.

[54] Shany, *supra* note 9, at 783.

[55] Rosenne, *supra* note 11, ¶ 23; UNCLOS, *supra* note 3, art. 288(4).

[56] For discussion on whether a court or tribunal has jurisdiction to determine its own jurisdiction (*la compétence de la compétence*), *see generally* AMERASHINGHE (2011), *supra* note 12, at 23–46.

doi:10.6342/NTU201903686

> It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions.[57]
>
> The Court will itself determine the real dispute that has been submitted to it.[58]
>
> [The Court] is not only entitled to interpret the submissions of the parties, but bound to do so.[59]

The determination of the scope of jurisdiction *ratione materiae* of a dispute involves two aspects. On the one hand, a court or tribunal must determine the scope of jurisdiction as set out in the jurisdictional clause. On the other hand, a court or tribunal must identify whether the subject-matter of the dispute falls within the scope of the jurisdictional clause.

An international court or tribunal ascertains the scope of jurisdiction as indicated in the relevant instrument, which signifies the parties' consent. In doing so, "[t]he Court must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent."[60]

International courts and tribunals have some discretion in the interpretation of provisions governing the scope of jurisdictional dimensions and conditions, as well as their application to relevant facts.[61] "Open-ended" provisions are more likely to face interpretative discretion of courts.[62] While an international legal instrument may provide a basis for courts and tribunals' subject-matter

---

[57] Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, 466, ¶ 30 (Dec. 20); Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, 262, ¶ 29 (Dec. 20); Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. Rep. 432, 449, ¶¶ 30–1 (Dec. 4).

[58] Fisheries Jurisdiction (Spain v. Can.), *supra* note 57, at 449, ¶ 31.

[59] South China Sea Arbitration, *supra* note 1, ¶ 150.

[60] Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. Rep. 13, ¶ 19 (June 3).

[61] Shany, *supra* note 9, at 798; Asier Garrido-Muñoz, *Dispute*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 29 (Online ed. Dec. 2018), http://opil.ouplaw.com (last visited Aug. 7, 2019).

[62] Shany, *supra* note 9, at 798.

doi:10.6342/NTU201903686

jurisdiction, it may not necessarily prescribe the finer parameters to ultimately guide a court's finding.[63]

The attitude of international courts or tribunals in construing jurisdictional provision is affected by their respective policy.[64] A court that seeks to push its normative agenda may adopt a broader approach to expand jurisdiction.[65] Whereas, a court may embrace a narrower approach given its deferential attitude to State sovereignty.[66] Whichever approach an international judicial forum favors, its construction of jurisdictional provision should be consistent so as not to undermine its credibility or result in *ad hoc* selection of cases.[67] Proelss concludes that the Court is thus "allocated a considerable scope of interpretation in respect of the elements of the jurisdictional clause concerned" and this would result in varying views among international adjudicating bodies.[68]

Similarly, when determining the subject-matter of a dispute in a given case, the court or tribunal also has some discretion. As consistently observed by the ICJ and other international arbitral tribunals:

> [I]t is the Court's duty to isolate the real issue in the case and to identify the object of the claim.[69]
>
> [T]he Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of

---

[63] Proelss, *supra* note 14, at 52.

[64] Shany, *supra* note 9, at 798–9.

[65] *Id.*

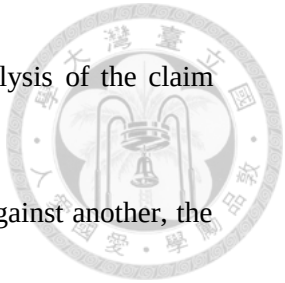
[66] *Id.*

[67] *Id.*, at 800.

[68] Proelss, *supra* note 14, at 53.

[69] Nuclear Tests (N.Z. v. Fr.), *supra* note 57, at 466, ¶ 30; Nuclear Tests (Austl. v. Fr.), *supra* note 57, at 262, ¶ 29; Fisheries Jurisdiction (Spain v. Can.), *supra* note 57, at 449, ¶¶ 30–1.

doi:10.6342/NTU201903686



> the proceedings. It will therefore be necessary to make a detailed analysis of the claim submitted to the Court by the Application of [the Applicant].[70]
>
> In order to identify its task in any proceedings instituted by one State against another, the Court must begin by examining the Application.[71]

However, in determining the issue of a dispute, courts and tribunals shall look beyond the Applicant's submission.

> [I]t may happen that uncertainties or disagreements arise with regard to the real subject of the dispute with which the Court has been seised, or to the exact nature of the claims submitted to it. In such cases the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by the claims of the Applicant.[72]
>
> Even in proceedings instituted by Special Agreement, the Court has determined for itself, having examined all of the relevant instruments, what was the subject of the dispute brought before it, in circumstances where the parties could not agree on how it should be characterized.[73]
>
> It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties […].[74]
>
> [T]he Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute.[75]

---

70 Nuclear Tests (N.Z. v. Fr.), *supra* note 57, at 463, ¶ 24; Nuclear Tests (Austl. v. Fr.), *supra* note 57, at 260, ¶ 24.

71 Fisheries Jurisdiction (Spain v. Can.), *supra* note 57, at 448, ¶ 29.

72 *Id.*, at 448, ¶ 29.

73 *Id.*

74 *Id.*, at 449, ¶¶ 30–1; Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2015 I.C.J. Rep. 592, 602, ¶ 26 (Sep. 24).

75 Fisheries Jurisdiction (Spain v. Can.), *supra* note 57, at 449, ¶¶ 30–1.

doi:10.6342/NTU201903686

It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence.[76]

[T]he Court will distinguish between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute […].[77]

To identify the subject-matter of the dispute, the Court bases itself on the application, as well as the written and oral pleadings of the parties. In particular, it takes account of the facts that the applicant identifies as the basis for its claim.[78]

[I]t is for the Tribunal itself "while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties" and in the process "to isolate the real issue in the case and to identify the object of the claim."[79]

The South China Sea Tribunal reiterated the same principle with reference to the foregoing cases.

The nature of the dispute may have significant jurisdictional implications, including whether the dispute can fairly be said to concern the interpretation or application of the Convention or whether subject-matter based exclusions from jurisdiction are applicable. Here again, an objective approach is called for, and the Tribunal is required to "isolate the real issue in the case and to identify the object of the claim."[80]

[I]t is for the Court itself "to determine on an objective basis the dispute dividing the parties, by examining the position of both parties." Such a determination will be based not only on the "Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence." In the process, a distinction should be made "between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute."[81] (citation omitted)

---

[76] *Id.*, at 449, ¶ 31; Nuclear Tests (Austl. v. Fr.), *supra* note 57, at 262–3, ¶¶ 29–30.

[77] Fisheries Jurisdiction (Spain v. Can.), *supra* note 57, at 449, ¶ 32.

[78] Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), *supra* note 74, at 602, ¶ 26.

[79] Chagos Arbitration, *supra* note 2, ¶ 208.

[80] South China Sea Arbitration, *supra* note 1, ¶ 150.

[81] *Id.*

doi:10.6342/NTU201903686

One commentator (Garrido-Muñoz) noted that given no general conclusion can be drawn as to how such methodology is applied, the determination of the real subject-matter of a dispute necessary to determine jurisdiction *ratione materiae* is particularly difficult.[82] Garrido-Muñoz further stated:

> What matters is that 'the force of the arguments militating in favour of jurisdiction is preponderant' and that 'an intention on the part of the Parties exists to confer jurisdiction upon it' […]; such a conclusion depends more on a circumstantial analysis than on the formulation of the dispute chosen by either party. This is for instance the case of UNCLOS Annex VII arbitrations where questions pertaining to the law of the sea appear to be linked to sovereignty disputes.[83]

IV. Conclusion

With respect to UNCLOS, States express their consent to be subject to the jurisdiction of international courts and tribunals under UNCLOS when they became parties to UNCLOS through signing and ratifying or accession.[84] Section 2 of UNCLOS Part XV is indicative of the parties' "advance consent" to submit disputes to adjudication and arbitration.[85]

The scope of subject-matter jurisdiction of UNCLOS tribunals is governed by what is articulated in the same instrument.[86] However, given the extent of

---

[82] Garrido-Muñoz, *supra* note 61, ¶¶ 28–9.

[83] *Id.*, ¶ 29.

[84] Proelss, *supra* note 14, at 48; Klein (2017), *supra* note 31, at 361.

[85] Oxman, *supra* note 5, at 397; Klein (2017), *supra* note 31, at 361.

[86] UNCLOS, *supra* note 3, art. 287(1) (original Text of Article 287(1): *When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.*).

doi:10.6342/NTU201903686

discretion conferred upon judicial bodies, courts and tribunals may express various views upon the same jurisdictional provision.

A compromissiory clause signifies States' consent to jurisdiction for international adjudication—a corollary of State sovereignty. The determination of the scope of subject-matter jurisdiction equally rests on the extent of States' consent and is exercised by the court or tribunal with jurisdiction. On the one hand, a court or tribunal has a relative degree of discretion in construing a jurisdictional provision. On the other hand, courts and tribunals may reach different conclusions when identifying the subject-matter of a given dispute. The ambiguity and inconsistency in the two-tier determination of jurisdiction *ratione materiae* would tilt the balance between ensuring effective dispute resolution and attaining the purpose of the dispute settlement clause, and respect for State consent. The upshot is then, an obscure clause regulating the scope of subject-matter jurisdiction should be attentively construed to avoid encroachment of sovereignty by exceeding the extent of consent.

doi:10.6342/NTU201903686

CHAPTER III: UNCLOS DISPUTE SETTLEMENT REGIME

Chapter III of this thesis provides an overview of the UNCLOS dispute settlement regime and its voluntary dispute settlement procedures. Given the main focus of this thesis is the scope of jurisdiction *ratione materiae* of the compulsory procedures, the compulsory dispute settlement regime will be discussed separately in Part IV.

I. Part XV of UNCLOS: Dispute Settlement

A. Background of UNCLOS Dispute Settlement Regime

The 1982 UNCLOS was opened for signature on 10 December 1982 and came into effect on 16 November 1994. As of 10 January 2019, UNCLOS has 168 contracting parties. [87] As further explored in the following, UNCLOS envisioned a comprehensive regime of dispute settlement and, as demonstrated further in this Part, is one that differs from tradition dispute settlement procedures.

B. UNCLOS Dispute Settlement Framework

The UNCLOS III foresaw differences of opinion in interpretation and application of the UNCLOS and recognized that they should be resolved by peaceful means with an effort to protect the interests of all parties, powerful or weak. In light of the concern, the UNCLOS III established a system of dispute settlement regime.[88] However, a dispute settlement regime specific to the law of the sea took on heated

---

[87] United Nations Convention on the Law of the Sea, Status of Treaties, United Nations Treaty Collection, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (last visited Aug. 7, 2019) [hereinafter UNCLOS Status] (contracting parties include both States and non-State entities).

[88] Thomas A. Mensah, *The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea, in* 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 307 (Online ed. 1998), https://doi.org/10.1163/187574198X00109 (last visited Aug. 7, 2019).

doi:10.6342/NTU201903686

discussion during the negotiation process over whether to adopt judicial dispute settlement. [89] The goals to not only solve but prevent disputes from budding were why UNCLOS eventually settled on judicial methods.[90]

Dispute settlement procedures are provided under Part XV (Article 279–299) of UNCLOS. Part XV is composed of three sections and establishes two types of dispute settlement procedures: voluntary and compulsory.[91]

Section 1 (Articles 279–285) of Part XV contains "voluntary dispute settlement procedures," which gives parties autonomy in their choice of time, means of settlement and law.[92] Section 2 (Articles 286–296) of Part XV comes into play when parties are unable to settle disputes via Section 1.[93] Section 3 (Articles 297–299) of Part XV lays down limitations and exceptions to Sections 2.[94]

1. Voluntary Dispute Settlement Procedures

Section 1—"*General Provisions*"—of Part XV finds its roots in general international law. The principle of peaceful settlement of disputes in Article 2(3) and 33(1) of the United Nations Charter (*hereinafter* UN Charter) is reiterated and reinforced in Article 279 of UNCLOS.[95] Non-peaceful means of dispute

---

[89] Raymond Ranjeva, *Settlement of Disputes*, *in* 2 A HANDBOOK ON THE NEW LAW OF THE SEA 1333, 1334–5 (René-Jean Dupuy & Daniel Vignes eds., 1991).

[90] *Id.*

[91] Patibandla Chandrasekhara Rao, *Law of the Sea, Settlement of Disputes*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 5 (Online ed. March 2011), http://opil.ouplaw.com (last visited Aug. 7, 2019); Klein (2017), *supra* note 31, at 334 [hereinafter Rao (2011)].

[92] UNCLOS, *supra* note 3, art. 279–285.

[93] *Id.*, art. 286–296.

[94] *Id.*, art. 297–299.

[95] Charter of the United Nations (June 26, 1945), 1 U.N.T.S. XVI [hereinafter UN Charter]; Rao (2011), *supra* note 91, ¶ 6.

doi:10.6342/NTU201903686

settlement has no place in general international law, including UNCLOS.[96] Generally, parties may resort to diplomatic means or refer to judicial settlement by way of a general or special agreement (i.e. *compromis*). Churchill observes that there are no records of disputes settled via consensual judicial settlement, conciliation or inquiry under Section 1 of Part XV.[97] More often than not, disputes have been resolved through negotiation or other diplomatic methods.[98]

2. Compulsory Procedures Entailing Binding Decisions

Novel rules introduced by UNCLOS were bound to cause tension in international relations, and such strain among States would inevitably breed disputes.[99] A system of dispute settlement was considered the best approach to cater to the new legal order.[100] States thought a system of compulsory dispute settlement which entailed third-party procedures would dissuade States from non-compliance and act as a means to prevent disputes from arising.[101] Accordingly, the UNCLOS compulsory dispute settlement system was birthed in pursuit of three main purposes: 1) to develop a comprehensive set of rules pertaining to all relevant law of the sea issues; 2) to make UNCLOS a universal instrument that reflects wide

---

[96] G.A. Res. 2625 (XXV) Principles of International Law concerning Friendly Relations and Co-operation Among States (Oct. 24, 1970); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 290 (June 27).

[97] Robin Churchill, *The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use*, 48 OCEAN DEV. & INT'L L. 216, 223 (2017) [hereinafter Churchill (2017)].

[98] *Id.*; Øystein Jensen & Nigel Bankes, *Compulsory and Binding Dispute Resolution under the United Nations Convention on the Law of the Sea: Introduction*, 48 OCEAN DEV. & INT'L L. 209, 210 (2017).

[99] Ranjeva, *supra* note 89, at 1333; CHITTHARANJAN F. AMERASHINGHE, JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS 257 (2009) [hereinafter AMERASHINGHE (2009)].

[100] Ranjeva, *supra* note 89, at 1333.

[101] *Id.*; AMERASHINGHE (2009), *supra* note 99, at 257.

doi:10.6342/NTU201903686

support and consensus of States; and 3) to make UNCLOS as a whole a "package deal."[102]

The principal objectives of the dispute settlement provision were to create authoritative mechanisms for disputes regarding the "interpretation or application" of the UNLCOS, to guarantee the integrity of its provisions and thereby prevent fragmentation of the convention, and to ensure its implementation and development.[103] Constructing a mechanism with a set of "automatically available procedures" would put a check on both justified and unjustified claim, and prevent disputes from arising.[104]

C. General Obligation of Pacific Dispute Settlement

Prior to the adoption of UNCLOS, traditional dispute settlement methods generally took recourse to those of peaceful dispute settlement methods articulated in Article 33 of the UN Charter.[105] Peaceful settlement of disputes includes, *inter alia*, negotiation, mediation, conciliation, arbitration, and judicial settlement.[106]

Article 279 explicitly refers to the UN Charter in obligating States to resort to methods of pacific dispute settlement.[107] The obligation to settle disputes via peaceful means in law of the sea issues is reinforced by its cross-reference to the UN Charter.[108] Incorporation of UN Charter Article 33 allows it to apply to any

---

[102] Alan Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37, 38 (1997).

[103] *Id.*, at 38–9.

[104] *Id.*, at 38; IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 235–6 (2nd ed., 1984).

[105] UN Charter, *supra* note 95.

[106] *Id.*, art. 33.

[107] UNCLOS, *supra* note 3, art. 279.

[108] Andrew Serdy, *Article 279: Obligation to settle disputes by peaceful means, in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1813–4 (Alexander Proelss ed., 2017) [hereinafter Serdy (art.279)].

doi:10.6342/NTU201903686

UNCLOS party irrespective of its membership in the UN,[109] though virtually all States are UN members. As these traditional dispute settlement procedures have been available for all international law disputes, their incorporation into UNCLOS has little effect over what is already imposed upon States.[110] Nevertheless, the UNCLOS dispute settlement regime marks a major breakthrough with its distinct features.[111]

The judicial settlement of international disputes is one means of peaceful settlement of international disputes listed in Article 33 UN Charter.[112] Some consider 'judicial settlement' to include both arbitration and the settlement of disputes by permanent international courts and tribunals. Others define judicial settlement to refer only to the settlement of disputes by permanent international courts and tribunals. The wording of UN Charter Article 33 indicates that arbitration and judicial settlement are mentioned separately.[113]

Judicial settlement *stricto sensu* refers to settlement by a "permanent" international court or tribunal, in contrast to arbitral settlement.[114] Though such distinction is apparent in Article 33 of the UN Charter, some do not distinguish between the two, which are collectively denominated "judicial settlement." As explained in Chapter II, international adjudication is the settlement of disputes by way of referral to a third-party tribunal for a binding decision. Both judicial

---

[109] 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 18 (Myron H. Nordquist et al. eds., 1989) [hereinafter Virginia Commentary].

[110] Serdy (art.279), *supra* note 108, at 1813–4; NATALIE KLEIN, DISPUTE SETTLEMENT IN THE UN CONVENTION ON THE LAW OF THE SEA 31–2 (2005) [hereinafter KLEIN (2005)].

[111] Rao (2011), *supra* note 91, ¶¶ 1–3; Churchill (2017), *supra* note 97, at 221–3.

[112] UN Charter, *supra* note 95, art. 33 (original text of Article 33(1): *The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*).

[113] Pallet, *supra* note 10, ¶¶ 1–2.

[114] *Id.*, ¶¶ 1–5.

doi:10.6342/NTU201903686

settlement and arbitration embody characters of international adjudication.[115] Compulsory procedures under UNCLOS are undoubtedly means of international adjudication and the broadly defined judicial settlement.[116]

D. Characteristics of UNCLOS Dispute Settlement

UNCLOS is known as "a constitution of the oceans,"[117] with a desire to settle comprehensive issues—"all issues relating to the law of the sea."[118] The most significant feature of UNCLOS is the "compulsory" nature of its dispute settlement regime.[119] UNCLOS stipulates no reservation or exception may be made, unless it expressly permits so.[120] When a State becomes a party to UNCLOS, it is subject to Part XV "Settlement of Disputes." In this regard, Part

---

[115] *Id*., ¶ 25.

[116] Clearly, judicial settlement and international adjudication are taxonomy observed from respective aspects. International adjudication encompasses a broader scope of methods, which appears to include judicial settlement *stricto sensu*. However, for the purpose of discussions of the procedures articulated in Article 287(1) of UNCLOS, judicial settlement and international adjudication are used interchangeably to indicate settlement by *ad hoc* and permanent courts and tribunals. The distinction in the designation of the means under Article 287(1) of UNCLOS as "international adjudication" or "judicial settlement" play little role in this thesis, if any.

[117] *185th Plenary Meeting*, at 11, 13, ¶ 47, U.N. Doc. A/CONF.62/SR.185 (1982), *in* [1984] 17 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA; Tzeng, *supra* note 4, at 504; AKEHURST'S, *supra* note 12, at 159.

[118] UNCLOS, *supra* note 3, Preamble. (The Convention was "*Prompted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea* […].") *See also* JOHN COLLIER & VAUGHAN LOWE, THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES 84 (1999); Rainer Lagoni, *Preamble*, *in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA- A COMMENTARY 1, 10, ¶ 25 (Alexander Proelss ed., 2017). *Cf*. Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 INT'L & COMP. L.Q. 863, 863–4 (1995) (arguing the Convention is not as comprehensive in covering all disputes as some claim but is rather limited in its reach).

[119] Churchill (2017), *supra* note 97, at 217–8; J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 179–80 (6th ed. 2017).

[120] UNCLOS, *supra* note 3, art. 309.

doi:10.6342/NTU201903686

XV constitutes an "integral" and "binding" part of UNCLOS,[121] and so do all Annexes.[122]

Surely, compromissory clause is of no novelty and has a role in numerous treaties preceding UNCLOS.[123] Some compromissory clauses refer jurisdiction to existing international adjudicating bodies, such as the ICJ and arbitral tribunals.[124] Compromissory clauses are usually "optional," allowing States to choose not to be bound or make reservations;[125] whereas, UNCLOS makes dispute settlement procedures compulsory in the sense that no party may opt-out or make reservations, unless explicitly provided by the Convention.[126]

II. UNCLOS Compulsory Dispute Settlement

Section 2 of Part XV not only articulates a set of compulsory procedure, but one that entails "binding" decisions.[127] These two features are what makes Section 2 stand out from tradition dispute settlement regimes. Any dispute resolved pursuant to Section 2 will result in a binding decision, with which parties to the dispute must comply.

---

[121] Rao (2011), *supra* note 91, ¶ 5; Jensen & Bankes, *supra* note 98, at 210.

[122] UNCLOS, *supra* note 3, art. 318.

[123] Churchill (2017), *supra* note 97, at 217–8, 221.

[124] For treaties that include compulsory reference to the International Court of Justice, *see* www.icj-cij.org (last visited Aug. 7, 2019). For examples of treaties that provide for compulsory reference to arbitration, *see* http://www.pca-cpa.org (last visited Aug. 7, 2019). *See also* Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 64 (Mar. 18, 1965), 575 U.N.T.S. 159; International Convention on the Elimination of All Forms of Racial Discrimination art. 22 (Dec. 21, 1965), 660 U.N.T.S. 195; and International Convention for the Prevention of Pollution from Ships art. 10 (Nov. 2, 1973), 1340 U.N.T.S. 61.

[125] Rao (2011), *supra* note 91, ¶¶ 2–3.

[126] UNCLOS, *supra* note 3, art. 309. *See also* Rao (2011), *supra* note 91, ¶¶ 2–3; Jensen & Bankes, *supra* note 98, at 210.

[127] Virginia Commentary, *supra* note 109, at 38.

doi:10.6342/NTU201903686

A. Introduction

The incorporation of a compulsory dispute settlement system initially received considerable objection at the UNCLOS Conference.[128] Unlike UNCLOS, the preceding 1958 Geneva Conventions on the Law of the Sea had adopted a compulsory dispute settlement procedures by way of an *optional* protocol.[129] An optional protocol was deemed inadequate, as it would be ineffective and pose as an obstacle to the ratification and even the signing of the UNCLOS.[130] The incorporation of compulsory dispute settlement provisions appeared to be the only effective solution to anticipated issues that would be introduced with the new law of the sea convention.[131]

The novelty of UNCLOS was one reason that warranted a dispute settlement regime capable of attending to disputes arising therefrom.[132] Many states found innovations in the new UNCLOS would eventually cause disputes that could only be resolved through an obligatory and binding third-party procedure.[133] Even States who were less enthusiastic about adopting a compulsory dispute settlement mechanism agreed disputes would arise from "ambiguities and compromises" in UNCLOS provisions.[134] Another reason is the difference between international courts and tribunals and domestic courts where the former

---

[128] MERRILLS, *supra* note 119, at 179.

[129] *Id.*; Convention on the High Seas, 450 U.N.T.S. 11 (Apr. 29, 1958); Convention on the Continental Shelf, 499 U.N.T.S. 311 (Apr. 29, 1958); Convention on the Territorial Sea and the Contiguous, 516 U.N.T.S. 205 (Apr. 29, 1958); Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 U.N.T.S. 285 (Apr. 29, 1958).

[130] *51st Plenary Meeting*, at 213, ¶ 10, A/CONF.62/SR.51 (1974), *in* [1975] 1 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA.

[131] *Id.*

[132] Virginia Commentary, *supra* note 109, at 6; Churchill (2017), *supra* note 97, at 218; Boyle, *supra* note 102, at 38–9.

[133] MERRILLS, *supra* note 119, at 179.

[134] Treves (2017), *supra* note 5, at 1846, ¶ 7.

doi:10.6342/NTU201903686

does not have unlimited compulsory jurisdiction, if any.[135] In the international legal order, an injurious party may not be able to seek relief from a judicial forum.[136]

In addition, compulsory settlement intended to deter disputes from arising by recourse to compulsory procedures.[137] Moreover, developing and weaker States regarded compulsory procedures as a means to stand up against developed States.[138] Furthermore, States were eager to ensure the balance of interests among States and uniformity of interpretation.[139]

As the President of the Conference (Chittharanjan F. Amerasinghe) explained: "effective dispute settlement would [...] guarantee that the substance and intention within the legislative language of the Convention will be interpreted consistently and equitably."[140] While the avant-garde dispute settlement regime is not a panacea, it embodied rules that address a twofold concern for encouraging the use of peaceful means of dispute settlement and ensuring uniformity in the interpretation and application of UNCLOS.[141]

In the drafting process, States became resolved that disputes concerning UNCLOS are to be submitted to a procedure entailing a binding decision. The US

---

[135] Oxman, *supra* note 5, at 396–7; Paulus, *supra* note 30, at 208; Brown, *supra* note 30, at 834.

[136] Tzeng, *supra* note 4, at 503–4.

[137] MERRILLS, *supra* note 119, at 179.

[138] Churchill (2017), *supra* note 97, at 218; KLEIN (2005), *supra* note 110, at 52–3.

[139] Karim, *supra* note 10, at 260; *see also* A. O. ADEDE, THE SYSTEM FOR SETTLEMENT OF DISPUTES UNDER THE UN CONVENTION ON THE LAW OF THE SEA 241 (1987) [hereinafter ADEDE (1987)]; Robin R. Churchill, *Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade*, THE LAW OF THE SEA: PROGRESS AND PROSPECTS 388, 389 (David Freestone et al. eds., 2006) [hereinafter Churchill (2006)].

[140] *Memorandum by the President of the Conference on document A/CONF.62/WP.9*, at 122, ¶ 6 U.N. Doc. A/CONF.62/WP.9/Add.1 (1976), *in* [1976] 5 OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA.

[141] Ranjeva, *supra* note 89, at 1338.

doi:10.6342/NTU201903686

and UK were among the proponents of such a procedure.[142] What remained at issue was determining the adequate adjudicating bodies to deal with UNCLOS disputes.[143] Divergence in agreement on the appropriate method eventually led the States to articulate more than a single judicial forum and method.[144]

Some States advocated referral of jurisdiction to the ICJ for consistency in jurisprudence; others thought the new UNCLOS disputes should be heard by a special law of the sea tribunal, which would ensure a better understanding of UNCLOS and representation of legal systems across States.[145] Still some regard arbitration the ideal method over traditional tribunals.[146] Courts and tribunals were considered ridged in terms of its composition of judges and preordained procedures rendering proceedings ponderous.[147] States also cast doubt on the inadequacy of lawyers in deciding cases involving technical matters and recommended adding experts to the bench.[148] Few States, including China, objected to compulsory dispute settlement of any kind and called for an optional protocol instead.[149] These views survived in part in UNCLOS.

B. Negotiating History of UNCLOS Dispute Settlement Regime

In Section B, the drafting history of the dispute settlement regime is discussed to lay the foundation for the interpretation and analysis of relevant UNCLOS provisions in the following Chapters. This Section takes into account the negotiating process of Article 288, 293, 297 and 298 as are relevant to compulsory jurisdiction over territorial sovereignty disputes.

---

[142] VIRGINIA COMMENTARY, *supra* note 109, at 5–15, 41.

[143] *Id.*, at 41.

[144] *Id.*, at 41–5; MERRILLS, *supra* note 119, at 179–80.

[145] VIRGINIA COMMENTARY, *supra* note 109, at 41.

[146] *Id.*, at 42

[147] *Id.*

[148] *Id.*

[149] *Id.*

doi:10.6342/NTU201903686

1. Negotiating History of Part XV in General

Prior to the 1982 UNCLOS, attempts to establish a system for the settlement of disputes relating to the law of the sea were futile.[150] Specifically, the 1958 Conventions on the Law of the Sea retained an optional protocol for the settlement of disputes in Annex 5. Falling short of the goal envisioned for the First UN Conference on the Law of the Sea in Geneva, the 1958 Optional Protocol of Signature concerning the Compulsory Settlement of Disputes was made "option" and has a modest 37 State Parties.[151] The 1958 Optional Protocol has never applied in practice but served as a lesson for the Third United Nations Conference on the Law of the Sea (1973–1982) in drafting the 1982 Convention.[152] The settlement of disputes was recognized as one of the items to be addressed early on in the Second Session of the Third United Nations Conference on the Law of the Sea.[153]

2. Negotiating History of Compulsory Dispute Settlement

a. Article 288

The drafting history of Article 288 itself does not indicate resistance from States over the formulation of "the interpretation or application" in Article 288.[154] It was acknowledged that a system of dispute settlement should be incorporated in

---

[150] *Id.*, at 5, ¶ XV.1.

[151] Optional Protocol of Signature concerning the Compulsory Settlement of Disputes art 5, 450 U.N.T.S. 169 (Apr. 29, 1958); Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, Status of Treaties, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-5&chapter=21&clang=_en (last visited Aug. 7, 2019).

[152] Tullio Treves, Introductory Note to the 1958 Conventions on the Law of the Sea (2008), http://legal.un.org/avl/ha/gclos/gclos.html (last visited Aug. 7, 2019).

[153] *Organization of the second session of the Conference and allocation of items: report of the General Committee*, at 57, ¶ 9, U.N. Doc. A/CONF.62/28 (1974), *in* [1975] 3 Official Records of the Third United Nations Conference on the Law of the Sea.

[154] Virginia Commentary, *supra* note 109, at 5–15.

doi:10.6342/NTU201903686

UNCLOS. What States had debated on instead was the exclusionary clause of specific categories of disputes from compulsory procedures.[155]

b. Article 297

When the El Salvador Ambassador (Dr. Reynaldo Galindo Pohl), who was one of the cochairmen to an informal meeting established to attend to issues of dispute settlement,[156] introduced the first draft on the settlement of disputes in the Second Session (1974), he highlighted the need for exceptions from obligatory jurisdiction.[157] The Ambassador noted with special regard to "the exceptions to which obligatory jurisdiction did not apply were the questions directly related to the territorial integrity of States."[158] It was in consideration for an effective system that he further noted "[o]therwise, the convention would go too far and might dissuade a number of States from ratifying and even signing [UNCLOS]."[159]

In the subsequent discussions, however, States converged on negotiating exceptions of certain disputes relating to the exclusive economic zone from binding settlement procedures.[160] Some States were concerned that the exceptions would render the dispute settlement ineffective,[161] and weaker States would be left "at the mercy of arbitrary interpretation and unilateral measures by States strong enough to impose their will."[162] Bearing in mind these apprehensions, changes were made as a compromise. While the later revised draft included the broader scope of disputes concerning the sovereign rights of

---

[155] *Id.*, at 85–141.

[156] *Id.*, at 7.

[157] *Id.*, at 88, ¶ 297.1; *51st Plenary Meeting*, *supra* note 130, at 213, ¶ 10.

[158] *51st Plenary Meeting*, *supra* note 130, at 213, ¶ 10.

[159] *Id.*

[160] Virginia Commentary, *supra* note 109, at 88–103.

[161] *Id.*, at 88–94.

[162] *Id.*, at 194, ¶ 297.6.

doi:10.6342/NTU201903686

States, the exceptions were made "more explicit by defining more precisely the questions that would remain subject to the [compulsory] jurisdiction."[163]

c. Article 298

From the outset, the idea for exemption clause for specific categories of disputes was recognized in the Conference by the informal working group on the settlement of disputes in 1974.[164] Some States voiced their objection for the preservation of the integrity of the compromise packages of the Convention;[165] however, the majority of States considered certain disputes so sensitive as to require exclusion from the far-reaching dispute settlement system.[166] The types of disputes subject to optional exemption related to the exercise of States' regulatory or enforcement jurisdiction, sea boundary delimitation, historic bay, vessels and aircraft entitled to sovereign immunity under international law, and military activities.[167]

Issues also arose regarding the excluded procedure. Some criticized sea boundary delimitation disputes being excluded only from Section 2 (i.e. compulsory procedures entailing binding decision) and called for the procedures in Section 1 of Part XV (i.e. voluntary dispute settlement procedures) to be equally excluded upon declaration.[168] Others insisted on the inclusion of maritime boundary delimitation disputes in Section 2 of Part XV.[169] The President of the Conference found neither view had received majority support so as to revise the substance of

---

[163] *Id.*, at 94, ¶ 297.7.

[164] *Id.*, at 109, ¶ 298.2.

[165] *Id.*

[166] *Id.*, at 110, ¶ 298.2

[167] *Id.*

[168] *Id.*, at 112, ¶ 298.8.

[169] *Id.*

doi:10.6342/NTU201903686

the article.[170] The text was revised and explicit in reserving the right of Parties to take recourse to procedures under Section 1, unless the Parties agree otherwise.[171]

Another issue arose in relation to "mixed disputes" of maritime boundary delimitation and sovereignty disputes.[172] Some States were wary of the possibility that "under the guise of a dispute relating to sea boundary delimitation, a party to a dispute might bring up a dispute involving claims to land territory or an island."[173] The concern was addressed and Article 298(1) was amended accordingly.[174] Thus, one of the key elements incorporated with respect to maritime delimitation disputes was the exclusion of territorial claims.[175]

The provision on maritime delimitation remained controversial throughout the negotiating process. The suggestion to exclude disputes relating to sovereignty over land or insular territories from the compulsory dispute settlement procedures entirely and list such dispute among those in Article 297 (i.e. automatic exceptions) was proposed in the informal plenary meetings.[176] The proposal was not reflected in the final text of UNCLOS.[177] The President of the Conference noted that given the "delicate compromises that had been very

---

[170] *Id.*

[171] *Id.*, at 113, ¶ 298.9.

[172] *Id.*, at 117, ¶ 298.20.

[173] *Id.*

[174] *Id.*, at 112, ¶ 298.9; *Memorandum by the President of the Conference on document A/CONF.62/WP.10*, at 65, 70, U.N. Doc. A/CONF.62/WP.10/Add.1 (1977), *in* [1978] 8 Official Records of the Third United Nations Conference on the Law of the Sea.

[175] *Memorandum by the President of the Conference on document A/CONF.62/WP.10*, *supra* note 174, at 70.

[176] *Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes*, at 130, ¶¶ 6–7, U.N. Doc. A/CONF.62/L.59 (1980), *in* [1982] 14 *Official Records of the Third United Nations Conference on the Law of the Sea*; Virginia Commentary, *supra* note 109, at 131–2, ¶ 298.28.

[177] Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes, *supra* note 176, ¶¶ 6–7.

doi:10.6342/NTU201903686

carefully negotiated [...], any attempt to raise these questions should be avoided."[178]

C. Compulsory Dispute Settlement Procedures

By virtue of the integral and binding nature of Part XV, parties are automatically subject to Section 2 when they ratify or otherwise expressly consent to be bound by UNCLOS.

If the parties fail to resolve a dispute consensually through means provided in Article 279, any party to the dispute may unilaterally refer to a means stipulated in Article 287(1) for a legally binding decision.[179] Article 286 of UNCLOS makes explicit that States shall submit any dispute concerning interpretation or application of UNCLOS at the request of any party to the dispute to the competent court or tribunal under Section 2 of Part XV.[180]

The purpose of Article 286 is to ensure that States have the right to invoke a dispute settlement procedure entailing a binding decision,[181] provided that the dispute falls within the prescribed jurisdiction *ratione materiae*.[182] Accordingly, States have an obligation to submit the dispute and a right to do so even without prior consent from any other party to the dispute under Section 2.[183] Even absent the requisite preconditions set out in Section 2, States may willingly agree to take recourse to a compulsory procedure notwithstanding Section 1 and 3.[184]

---

[178] *Id.*

[179] Churchill (2017), *supra* note 97, at 221.

[180] UNCLOS, *supra* note 3, art. 286 (original text: *Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section*.).

[181] UNCLOS, *supra* note 3, art. 296.

[182] Virginia Commentary, *supra* note 109, at 39; Treves (2017), *supra* note 5, at 1844.

[183] Virginia Commentary, *supra* note 109, at 39, ¶ 286.6.

[184] Rao (2011), *supra* note 91, ¶¶ 15–6.

doi:10.6342/NTU201903686

Parties may choose one or more fora by a declaration under Article 287(1). Four choices of fora are available in Section 2: the International Tribunal for the Law of the Sea; the ICJ; an arbitral tribunal under Annex VII; and a special arbitral tribunal under Annex VIII.[185] However, when the parties' choices do not coincide or no declaration is made, the dispute will be referred to an arbitral tribunal subject to Annex VII.[186] The inclusion of various choices of forums was crucial in facilitating the incorporating of a compulsory dispute settlement regime in UNCLOS.[187]

1. Jurisdiction Ratione Materiae

Article 286 serves as the opening provision of Section 2 (*Compulsory procedures entailing binding decisions*) of Part XV. Article 286 prescribes the same formulation in defining disputes submitted under compulsory jurisdiction as Article 288(1). Any dispute submitted to compulsory settlement under Section 2 must concern the "interpretation or application" of UNCLOS.[188]

Article 288(1) of UNCLOS articulates the scope of jurisdiction *ratione materiae* to the compulsory dispute settlement in Section 2.[189] Article 288(1) provides that "[a] court or tribunal referred to in article 287 [i.e. UNCLOS Tribunals] shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."[190] Identical to Article 286, only disputes concerning "the interpretation or application of the

---

[185] UNCLOS, *supra* note 3, art. 287(1).

[186] Churchill (2017), *supra* note 97, at 219; Rao (2011), *supra* note 91, ¶ 21.

[187] Virginia Commentary, *supra* note 109, at 41–2; Rao (2011), *supra* note 91, ¶ 18; ADEDE (1987), *supra* note 139, at 49–54,243–4, 283; David Anderson, *Peaceful Settlement of Disputes under UNCLOS*, *in* LAW OF THE SEA: UNCLOS AS A LIVING TREATY 385, 390 (Jill Barrett & Richard Barnes eds., 2016).

[188] Treves (2017), *supra* note 5, at 1847.

[189] Proelss, *supra* note 14, at 49.

[190] UNCLOS, *supra* note 3, art. 288(1).

doi:10.6342/NTU201903686

Convention" fall within the subject-matter jurisdiction of a court or tribunal under the compulsory procedures of Section 2.[191]

The subject-matter jurisdiction of adjudicating bodies under Section 2 Part XV is not all-encompassing. Jurisdictional conditions and limitations to Section 2 of Part XV are explicit in Article 286, 288, 297 and 298. What is not explicit is a rule governing disputes concerning territorial sovereignty. Nowhere in UNCLOS does it address rules of territorial sovereignty.[192] The rules of international law governing titles of sovereignty over territories have their bases in customary international law.[193] Namely, rules of international law on, *inter alia*, occupation, prescription, and cessation.[194]

The UNCLOS itself is silent on issues of territorial sovereignty.[195] One scholar (Stefan Talmon), among several, maintains that it is "widely agreed" disputes over territorial sovereignty do not qualify as disputes concerning the interpretation or application of UNCLOS.[196] As will be demonstrated in further detail in Chapter IV, this thesis intends to examine the validity of such claim in light of canons of treaty interpretation.

2. Limitations and Exceptions

In addition to conditions set out in Section 1 of Part XV, Section 3 stipulates limitations and exceptions to the mandatory procedures in Section 2.

While Article 297 catalogs "automatic" or "mandatory" limitations to compulsory jurisdiction with respect to certain subject matters, Article 298 provides grounds for "optional" exceptions from compulsory jurisdiction by way of declarations on

---

[191] UNCLOS, *supra* note 3, art. 288; Virginia Commentary, *supra* note 109, at 47.

[192] Proelss, *supra* note 14, at 50.

[193] *Id.*; Talmon, *supra* note 4. For acquisition of territorial sovereignty in international law, *see, e.g.*, AKEHURST'S, *supra* note 12, at 122–56.

[194] Proelss, *supra* note 14, at 50.

[195] Klein (2017), *supra* note 31, at 349.

[196] Talmon, *supra* note 4, at 933.

doi:10.6342/NTU201903686

specific subject matters.[197] Whether a dispute is automatically excluded or exempted by consent from Section 2, parties to the dispute can always resort to the compulsory procedures by agreement.[198]

The exemption of disputes from compulsory jurisdiction was a necessary compromise of interests among States.[199] While States were reluctant to allow reservation from UNCLOS provisions, they demanded some disputes be excluded.[200] In the Third UNCLOS Conference, many States accepted the dispute settlement provisions on the condition that certain disputes would be excluded from being subject to compulsory procedures entailing a binding decision under Section 2.[201] Despite the absence of mandatory jurisdiction, such cases can still take recourse to consensual means of peaceful settlement, such as those set out in Section 1 of UNCLOS Part XV.[202]

a. Article 297

Article 297 of Section 3 puts down certain categories of disputes that are automatically excluded from applying compulsory dispute settlement procedures.[203] Disputes relating to sovereign rights, fisheries, and marine environment are among the excluded groups.[204] Article 297 also encapsulates certain disputes that are subject to compulsory dispute settlement. According to Article 297(1):

> Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its *sovereign rights or jurisdiction* provided for in this

---

197 UNCLOS, *supra* note 3, art. 297, 298; Jensen & Bankes, *supra* note 98, at 212.

198 Rao (2011), *supra* note 91, ¶ 30.

199 Virginia Commentary, *supra* note 109, at 93–4.

200 *Id.*, at 109, ¶ 298.1–2.

201 *Id.*, at 87, ¶ 297.1.

202 *51st Plenary Meeting*, *supra* note 130, at 213, ¶ 10.

203 Klein (2017), *supra* note 31, at 349–53.

204 UNCLOS, *supra* note 3, art. 297(1) and (3).

doi:10.6342/NTU201903686

Convention shall be subject to the procedures provided for in section 2 in the following cases […]. (emphasis added)

An issue arises in regards to the implication of Article 297. Traditionally, scholarly comments and practices consider it as placing a limitation on the jurisdiction of UNCLOS Tribunals over disputes of sovereign rights or jurisdiction in the exclusive economic zone to those explicitly provided in Article 297.[205] Only the disputes framed in Article 297(1) are subject to compulsory dispute settlement. Any other dispute concerning sovereign rights or jurisdiction is thus excluded.[206] Some, however, see Article 297(1) as an illumination or rather, an affirmation of the prominent disputes concerning sovereign rights and jurisdiction, but does not pose as a restriction on disputes seeking recourse to compulsory procedures.[207] The recent *Chagos* Arbitration took a turn in rejecting the orthodox interpretation of Article 297(1) and adopted the latter approach.[208]

b. Article 298

Pursuant to Article 298(1), parties may choose to be exempt from an exhaustive list of disputes by a separate declaration.[209] Three categories of disputes are open

---

[205] Talmon, *supra* note 4, at 942–3; COLLIER & LOWE, *supra* note 118, at 92.

[206] *Id.*

[207] For a review of the two differing views on this issue, *see* Stephen Allen, *Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction*, 48 OCEAN DEV. & INT'L L. 313–30 (2017).

[208] Chagos Arbitration, *supra* note 2, ¶¶ 307–17.

[209] Klein (2017), *supra* note 31, at 353–9; UNCLOS, *supra* note 3, art. 298 (original text of Article 298(1)(a)(i): *disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a State having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled dispute*

doi:10.6342/NTU201903686

for exclusion from compulsory dispute settlement. Namely, disputes concerning maritime boundary delimitation or historic bays or titles, military activities or law enforcement in connection with Article 297, and those seized by the UN Security Council under the UN Charter.[210]

UNCLOS parties may declare to opt-out when signing, ratifying or acceding to the Convention or at any time thereafter.[211] However, neither the making of a new declaration nor the withdrawal of an existing one affects on-going proceedings, unless the parties otherwise agree.[212]

3. Applicable Law

By virtue of Article 293 under UNCLOS, tribunals have an obligation to apply not only rules prescribed in UNCLOS, but also "other rules of international law not incompatible with the Convention."[213] The controversy is not whether UNCLOS Tribunals may refer to other rules of international law beyond UNCLOS, but whether the Tribunals may rely on 293(1) to exercise jurisdiction over disputes not governed by UNCLOS.[214] While legal scholarship has suggested Article 293(1)

---

concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission.).

[210] UNCLOS, *supra* note 3, art. 298. *See also* AMERASHINGHE (2009), *supra* note 99, at 260–1.

[211] UNCLOS, *supra* note 3, art 298(1).

[212] UNCLOS, *supra* note 3, art 298(5) (original text: *A new declaration, or the withdrawal of a declaration, does not in any way affect proceedings pending before a court or tribunal in accordance with this article, unless the parties otherwise agree*.).

[213] UNCLOS, *supra* note 3, art. 293(1) (original text: *A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention. (2)Paragraph l does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree*.).

[214] Kate Parlett, *Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals*, 48 OCEAN DEV. & INT'L L. 284, 285, 290 (2017).

doi:10.6342/NTU201903686

is not an independent source of jurisdiction,[215] there is, however, another side to this contention which deserves to be noted.

Some judicial decisions found jurisdiction on the basis of Article 293 and decided on disputes governed by general international law. In *Guyana v. Suriname*, the Tribunal (Annex VII) held Article 293(1) as "giving it competence to apply not only the Convention, but also the norms of customary international law (including, of course, those relating to the use of force)."[216]

Contrarily, the 2003 *MOX Plant* case made a clear distinguished between the scope of jurisdiction and applicable law. The Tribunal (Annex VII) stated: "there is a cardinal distinction between the scope of its jurisdiction under article 288, paragraph 1 of the Convention [...] and the law to be applied by the Tribunal under article 293 of the Convention [...]."[217]

Further elaboration on this issue was made by the Tribunal (Annex VII) in the 2015 *Arctic Sunrise* case. The Tribunal held:

> Article 293(1) does not extend the jurisdiction of a tribunal. Rather, it ensures that, in exercising its jurisdiction under the Convention, a tribunal can give full effect to the provisions of the Convention. For this purpose, some provisions of the Convention directly incorporate other rules of international law[…].[218] (citation omitted)

---

[215] *Id.*

[216] Guyana v. Suriname, Award, PCA Case No. 2004–04, ¶ 405 (UNCLOS Annex VII Arb. Trib. Sep. 17, 2007), http://www.pca-cpa.org (last visited Aug. 7, 2019). *See also* M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, ITLOS Rep. 10, ¶ 155 (In the earlier M/V Saiga (No. 2) case, the UNCLOS tribunal similarly exercised jurisdiction over a dispute concerning the use of force and decided according to other rules of international law).

[217] MOX Plant (Ir. v. U.K.), Order No.3, ¶ 19 (Perm. Ct. Arb. June 24, 2003).

[218] Arctic Sunrise (Neth. v. Russ.), Award, PCA Case No. 2014–02, ¶ 188 (Perm. Ct. Arb. Aug. 14, 2015).

doi:10.6342/NTU201903686

> Article 293 is not, however, a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction, or unless the treaty otherwise directly applies pursuant to the Convention.[219] (citation omitted)

III. Conclusion

Articles relating to territorial sovereignty disputes and their place in the UNCLOS compulsory dispute resolution include Articles 286, 288(1), 297, 298(1) and 293. Each of these provisions has been relied upon to include territorial sovereignty disputes within the scope of subject-matter jurisdiction under Section 2 of UNCLOS Part XV. Various rationales have found their way to legal scholarship. In the following Chapter, this thesis endeavors to survey some of the leading scholarship which has more or less dealt with whether territorial sovereignty disputes subject to UNCLOS compulsory jurisdiction. This thesis relies on the discussion in Chapter III and the underpinning arguments of the scholarly commentary to form an interpretation of the relevant provisions.

[219] *Id.*, ¶ 192. *See also* Chagos Arbitration, *supra* note 2, ¶ 181.

doi:10.6342/NTU201903686

CHAPTER IV: TREATY INTERPRETATION AND THE BASIS OF JURISDICTION FOR TERRITORIAL SOVEREIGNTY DISPUTES

I. Recourse to Treaty Interpretation

It has been said that disputes relating to territorial sovereignty are not subject to Section 2 of Part XV. In other words, issues of territorial sovereignty are not disputes concerning the interpretation or application of the UNCLOS and thus do not fall within the jurisdiction of compulsory dispute settlement under Section 2 of Part XV. The jurisdictional clause—Article 288(1)—mentions nothing of territorial sovereignty disputes. The rest of UNLCOS is equally silent. The question is thus subject to debate in scholarly writings and judicial fora.

Given the absence of explicit provision, legal scholarship has offered a variety of approaches and rationales in determining whether territorial sovereignty disputes fall within the scope of UNCLOS compulsory jurisdiction. From textual analysis to reading jurisdictional clauses in light of the drafters' intention found in the negotiating history of the Convention, all roads appear to lead back to the rule of treaty interpretation.

Multilateral treaties, such as UNCLOS, are more likely to be subject to treaty interpretation, given the fact that such treaties were the product of compromise to reconcile competing interests and concerns among a great number of negotiating States.[220] This leads to ambiguous terms in need of construction.[221]

---

[220] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 205 (2013).

[221] *Id.*

doi:10.6342/NTU201903686

Even legal texts that are deemed clear must undergo the process of legal interpretation to determine and confirm its clarity.[222] UNCLOS provisions regarding subject-matter jurisdiction and its limitations are of no exception. In order to reveal the source of jurisdiction for land sovereignty disputes, it seems only reasonable to draw a construction of the provisions contained therein in accordance with the rule of treaty interpretation codified in Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[223]

A treaty, for the purpose of the VCLT and this thesis, is defined as: [224]

> [A]n international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[225]

The UNCLOS, which has 167 State parties,[226] is a written, legally binding—having an intention to create obligations under international law—[227] and multilateral agreement among States, as well as other entities.[228] UNCLOS is hence with no doubt a treaty, to which the rule of treaty interpretation in the VCLT may apply.

---

[222] LILIANA E. POPA, PATTERNS OF TREATY INTERPRETATION AS ANTI-FRAGMENTATION TOOLS: A COMPARATIVE ANALYSIS WITH A SPECIAL FOCUS ON THE ECTHR, WTO AND ICJ 91 (2018).

[223] Vienna Convention on the Law of Treaties (May 23, 1969), U.N. Doc. A/Conf.39/27; 1155 U.N.T.S. 331 [hereinafter VCLT].

[224] *Cf.* AUST, *supra* note 220, at 15 (A treaty can be concluded between States, international organizations or both).

[225] VCLT, *supra* note 223, art. 2(1)(a).

[226] UNCLOS Status, *supra* note 87; UNCLOS, *supra* note 3, art. 1(2) ("State Parties" are States that have signed and ratified, or acceded to UNCLOS. It also refers to other entities, to which UNCLOS applies *mutatis mutandis*).

[227] AUST, *supra* note 220, at 14–20. For more discussion on the legally binding nature of treaties, *see also id.*, at 28–35.

[228] UNCLOS, *supra* note 3, art. 305–7; Annex IX. International organizations may consent to be bound by UNCLOS in accordance with Annex IX.

doi:10.6342/NTU201903686

In Part II of Chapter IV, this thesis first addresses how the rule of treaty interpretation under the VCLT is to be applied.[229]

II. The General Rule of Treaty Interpretation

The interpretation of international treaties is governed by the rule of treaty interpretation explicit in the VCLT.[230] Virtually all provisions of the VCLT are considered having customary international law status, which is reflected by the practices of the ICJ and legal scholarship.[231] As commented by Sir Arthur Watts: "[t]he modern law of treaties is now authoritatively set out in the Vienna Convention on the Law of Treaties 1969."[232] For this reason, this thesis does not intend to take on the "futile task" to discern whether the rule in the VCLT has achieved customary law status.[233]

Specifically, judicial decisions have on numerous occasions held that the VCLT rule of treaty interpretation—Articles 31 to 33—reflects customary international

---

[229] VCLT, *supra* note 223, art. 31–33.

[230] VCLT, *supra* note 223, art. 31–33 (Article 31 of the VCLT requires an interpretation of treaty provision be made based on "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Three main factors are considered: text of the provision, its context, and object and purpose. Article 32 allows recourse to "supplementary means of interpretation," "including the preparatory work of the treaty and the circumstances of its conclusion, in order to *confirm* the meaning resulting from the application of article 31, or to *determine* the meaning when the interpretation according to article 31 (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable[emphasis added]." Article 33 provides that when a treaty text is equally authoritative in each language and "a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." For the purpose of this thesis, only articles 31 and 32 will be explored).

[231] AUST, *supra* note 220, at 11.

[232] *Id.*, at xx–xxi, 11 (Sir Watts' comment is found in the Foreword to AUST'S MODERN TREATY LAW AND PRACTICE).

[233] *Id.*, at 11.

doi:10.6342/NTU201903686

law.[234] It is on this basis, Part II begins by illustrating general rules and key issues of treaty interpretation. This Part serves as the foundation to academic discussions in Part III and the interpretation of Articles 288(1), 298(1)(a)(i) and 293 in Part IV.

A. The VCLT Approach to Treaty Interpretation

The International Law Commission (hereinafter ILC), which was tasked to codify the VCLT, underwent debate over the various theories of treaty interpretation. The discussion over which school of interpretation should be given weight was induced by Gerald Fitzmaurice, who was one of the Special Rapporteurs of the ILC. [235] Fitzmaurice distinguished between three main schools of interpretation:[236] the textual approach, the intention-based approach, and the teleological approach. [237] Some consider Articles 31 (general rule of interpretation) the embodiment of the teleological approach, which stresses the importance of the object and purpose of a treaty and opposes a narrow

---

[234] *Id.*, at 207; Territorial Dispute (Libya/ Chad), Judgment, 1994 I.C.J. Rep. 6, ¶ 41 (3 Feb.); Oil Platforms (Iran v.U.S.), Judgment, I.C.J. Rep. 1996, 803, ¶ 23 (12 Dec.); Kasikili/Sedudu Island (Bots. v. Namib.), Judgment, I.C.J. Rep. 1999, 1045, ¶ 18 (13 Dec.); Int'l Law Comm'n Rep. on the Work of its Fifty-Eighth Session, U.N. Doc. A/CN.4/L.682, 213, ¶ 427 (2006).

[235] Eirik Bjorge, *The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties*, *in* INTERPRETATION IN INTERNATIONAL LAW 189, 196 (Andrea Bianchi et al. eds., 2015).

[236] *Id.*; *see generally* Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203–93 (1957).

[237] Fitzmaurice, *supra* note 236, 203–93; Bjorge, *supra* note 235, at 189–204; *Report of the International Law Commission to the General Assembly*, 19 U.N. GAOR Supp. No. 9, U.N. Doc. A/5809 (1964), *reprinted in* [1964] 2 Y.B. Int'l Comm'n 173, 199–200, U.N. Doc. A/CN.4/173. For discussion of the different approaches, *see also* Francis G. Jacobs, *Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference*, 18 INT'L & COMP. L.Q. 318–46 (1969).

doi:10.6342/NTU201903686

construction of the text,[238] while others are convinced the ILC opted for the textual approach.[239]

Essentially, as expressed by the ILC, the "textual approach" was adopted by the VCLT:

> The article as already indicated is based on the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties.[240]

Nevertheless, the "intention-based approach" was not jettisoned by the VCLT as some would like to argue. Rather, a reason pointed out by the ILC for undertaking the task of drafting the Convention was to formulate "the means of interpretation admissible for ascertaining the intentions of the parties."[241] The "intention of the parties" was never neglected; rather, it is the "aim" which interpretation seeks to reveal on the premise that "the signed text is, with very few exceptions, the only and most recent expression of the common will of the parties."[242]

1. Article 31

Article 31 requires a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in light of its object and purpose.[243] As such, the Vienna Convention calls for a

---

[238] POPA, *supra* note 222, at 122.

[239] Bjorge, *supra* note 235, at 198.

[240] *Report of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. No. 9, U.N. Doc. A/6309/Rev.1 (1966), *in* [1966] 2 Y.B. Int'l Comm'n 173, 220, U.N. Doc. A/CN.4/191 [hereinafter ILC Report (1966)].

[241] *Id.*, at 218–9.

[242] *Id.*, at 220; Douglas Guilfoyle, *The South China Sea Award: How Should We Read the UN Convention on the Law of the Sea?*, 8 ASIAN J. INT'L L. 51–63 (2018). For a survey of legal scholarship in support of this view, *see* Bjorge, *supra* note 235, at 198–201.

[243] VCLT, *supra* note 223, art. 31.

doi:10.6342/NTU201903686

holistic and comprehensive approach to interpretation.[244] The ordinary meaning of treaty terms can only be construed in its context. As explicit in Article 31, the text, intention and object and purpose of the treaty are the three major factors in treaty interpretation.[245]

Questions surface as to whether the listed factors are placed in any order of hierarchy. The influential 1935 Harvard Draft Convention on the Law of Treaties, in regards to its list of factors, explicitly noted that no importance is given to their sequence.[246] The function of interpretation is to "discover and effectuate the

---

[244] POPA, *supra* note 222, at 122.

[245] AUST, *supra* note 220, at 208; VCLT, *supra note* 222, art. 31 (original text of Article 31: *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties.*).

[246] *Draft Convention on the Law of Treaties*, 29 AM. J. INT'L L. Supp. 657, 661 (1935) (original text of Article 19 to the Draft Convention: *(a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve. The historical background of the treaty, travaux preparatoires, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve. (b) When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve.*).

doi:10.6342/NTU201903686

purpose which a treaty is intended to serve," and is to be achieved by giving attention to all factors.[247]

Similarly, the ILC, in its commentary on the drafts of VCLT Articles 31 and 32 (originally draft Articles 27 and 28), refused to attach prevalence to a particular element.[248]

> The Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule. In the same way the word "context" in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this paragraph to the word "context" in the first paragraph and thereby incorporate them in the provision contained in that paragraph. Equally, the opening phrase of paragraph 3 "There shall be taken into account *together with the context"* is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3.[249] [original emphasis]

The order of the elements seen in Article 31 merely represents a logical progression, where interpretation naturally begins with the text.[250]

> It considered that the article, when read as a whole, cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties. The elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy, which guided the Commission in arriving at the arrangement proposed in the article.[251]

---

[247] *Article 19. Interpretation of Treaties*, 29 AM. J. INT'L L. Supp. 937, 938 (1935).

[248] AUST, *supra* note 220, at 206.

[249] ILC Report (1966), *supra* note 240, at 220.

[250] AUST, *supra* note 220, at 208.

[251] ILC Report (1966), *supra* note 240, at 220.

doi:10.6342/NTU201903686

Thus, not one element shall take prevalence, nor is one by itself sufficient to reach a solution in treaty interpretation.[252] The various means of interpretation governed by Article 31 are "all of equal value."[253]

2. Article 32

One of the most controversial adoptions associated with the debate over the three approaches discussed in Section A.1. is the recourse to the "preparatory work of a treaty (*travaux préparatoires*)".[254] Avid proponents of the intention-based approach, such as Sir Hersch Laupterpach, accord great weight to the *travaux préparatoires* of a treaty, while some are wary of such reliance, due to the "danger of legal certainty."[255]

The ILC was clear in explaining why a distinction is made between Article 31 and 32. The former catalogs elements that "all relate to the agreement between the parties *at the time when or after it received authentic expression in the text* [original emphasis]," whereas, the latter does not necessarily reflect such authentic character.[256] In addition, Special Rapporteurs Waldock stressed that:

> [I]t is beyond question that the records of treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation.[257]

Article 32 provides "supplementary means of interpretation," including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to

---

[252] TASLIM OLAWALE ELIAS, THE MODERN LAW OF TREATIES 72 (1974).

[253] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 434–6 (2009).

[254] Bjorge, *supra* note 235, at 196–7 (quoting the original literature by Lauterpach in French).

[255] *Id.* (with reference to Eric Beckett, 43 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* 435, 435–44 (1950)).

[256] ILC Report (1966), *supra* note 240, at 220.

[257] *Id.*

doi:10.6342/NTU201903686

determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[258] Preparatory work of a treaty is hence not always referred to in interpretation but may at times confirm a reading of the text.[259] Ultimately, the negotiating history of a treaty was accorded supplemental status to the primary elements in Article 31.

III. Academic Debate on Jurisdiction over Territorial Sovereignty Disputes

While Article 288(1) of UNCLOS identifies the UNCLOS Tribunals' scope of subject-matter jurisdiction for compulsory procedures, the determination of jurisdiction is not without debate, especially in a dispute not exclusively concerning territorial sovereignty. Issues arise over the nature of "mixed dispute," which is formulated as a dispute of the law of the sea addressed by UNCLOS but at the same time involves issues not addressed by UNCLOS. One of the more common and prominent examples is where parties seek maritime delimitation of an island, but the sovereignty of the island is disputed.[260]

This thesis aims to determine the scope of jurisdiction over territorial sovereignty disputes; hence, the jurisdiction over pure and mixed disputes involving UNCLOS issues and sovereignty issues are discussed. This Part addresses the question: whether an UNCLOS Tribunal can find jurisdiction over sovereignty disputes in UNCLOS provisions. Does any provision in Section 2 of UNCLOS Part XV constitute the basis of State parties' consent to the jurisdiction of UNCLOS Tribunals over mixed sovereignty disputes?[261] The question touches upon the nature of territorial sovereignty issues in the UNCLOS dispute settlement regime. Though the exclusion of sovereignty issues from compulsory jurisdiction is

---

[258] VCLT, *supra* note 223, art. 32.

[259] Territorial Dispute (Libya/ Chad), *supra* note 234, at 27. ¶ 55.

[260] Oxman, *supra* note 5, at 400; Proelss, *supra* note 14, at 50.

[261] Oxman, *supra* note 5, at 400.

doi:10.6342/NTU201903686

sometimes seen as a given, potent arguments to the contrary render it necessary to uncover the underpinning reasons of both sides. Thus, this thesis targets "pure" territorial sovereignty disputes and "mixed" territorial sovereignty disputes for a thorough analysis of the question at hand.

Before diving into the question at hand, Part III first provides an overview of academic debate on the relevant jurisdictional provisions. A survey of scholarly writings highlights the main arguments and acts as a comparison among various constructions of the same provisions subject to interpretation in the following sections. It should be noted that Part III is not an exhaustive list of existing scholarly commentary but merely some of the more outspoken views on the question.

A. Academic Literature in Support of Compulsory Jurisdiction over Territorial Sovereignty Disputes

Judge Wolfrum contends in his 2006 Statement that territorial issues in maritime disputes are subject to the compulsory jurisdiction of UNCLOS Tribunals. He notes that disputes such as maritime boundary delimitation and maritime entitlement cannot be determined in isolation without reference to territory.[262] Wolfrum stressed the interrelations between land and sea, and finds "issues of sovereignty [...] concern the interpretation or application of the Convention and therefore fall within its scope."[263] While arguing in favor of the exercise of compulsory jurisdiction over territorial sovereignty disputes, Wolfrum appears to limit his argument to maritime delimitation disputes involving territorial sovereignty disputes, as opposed to land sovereignty disputes in general.

In the Chagos Dissenting Opinion, when discussing the issue in a broader manner beyond maritime delimitation, Wolfrum suggests that there is no general exclusion of sovereignty disputes. Judge Kateka also expresses alongside

---

[262] Wolfrum Statement, *supra* note 4, at 2–6.

[263] *Id.*

doi:10.6342/NTU201903686

Wolfrum their view towards the limits of jurisdiction prescribed in Articles 288(1) and 298(1).[264] Kateka and Wolfrum examined Article 297 and 298 and contends there is no exclusion of jurisdiction over territorial sovereignty disputes articulated in the provisions.[265] Firstly, textual reading of Article 297 suggests no exclusion of disputes involving consideration of unsettled issues over territory.[266] Secondly, the optional exception in Article 298(1)(a)(i) pertains only to dispute of "maritime boundary delimitation."[267] If the issue of sovereignty does not come up in the delimitation context, it is difficult to fathom the introduction of an additional limitation other than the nexus that is required in Article 288(1)—"concerning the interpretation or application of the Convention."[268] Thirdly, the legislative history of UNCLOS suggests that automatic exception of territorial claims did not receive majority support since it did not survive in the final text of Article 297.[269] In addition, Article 298(1)(a)(i) does not warrant complete exclusion of disputes which require sovereignty over a territory in general. An "optional" exception from territorial sovereignty claims would not have been necessary if it were an "inherent" restriction.[270] Wolfrum and Kateka conclude: as long as the territorial sovereignty dispute that arises "incidentally" has a nexus to a dispute concerning the interpretation or application of UNCLOS, an UNCLOS Tribunal may decide on the incidental issue of sovereignty.[271] It can be implied that Wolfrum and Kateka agree territorial sovereignty disputes are non-UNCLOS disputes, and "pure" territorial sovereignty disputes having no connection to UNCLOS disputes are not subject to compulsory jurisdiction.

---

[264] Chagos Dissenting Opinion, *supra* note 4, ¶¶ 29–45.

[265] *Id.*, ¶¶ 40–5.

[266] *Id.*, ¶¶ 32–3.

[267] *Id.*, ¶¶ 33, 42–5.

[268] *Id.*

[269] *Id.*, ¶¶ 36–7.

[270] *Id.*, ¶¶ 33, 40.

[271] *Id.*, ¶¶ 44–5.

doi:10.6342/NTU201903686

Boyle puts forth two reasons for reading territorial sovereignty disputes into the UNCLOS Tribunals' jurisdiction. First, Article 293(1) allows matters of general international law that are not part of the law of the sea be subject to compulsory jurisdiction.[272] Second, UNCLOS does not provide a distinction between law of the sea disputes and general international law disputes to confine the tribunals' jurisdiction to maritime issues.[273] In other words, territorial sovereignty issues are in principle not excluded from compulsory procedures, and Article 298(1)(a)(i) only sets out limitations to sovereignty issues when involved with maritime delimitation. Boyle suggests that in regards to delimitation disputes, "no compulsory process of any kind is required" if delimitation disputes necessarily involve territorial sovereignty.[274]

In a similar line of reasoning to Wolfrum and Kateka's, Boyle understands Article 298(1)(a)(i) as an optional exception specifically relating to "sea boundary delimitation or historic title" that necessarily involve the concurrent consideration of disputed sovereignty or other rights over continental or insular land territory. An obligation under Article 298(1)(a)(i) arises to submit the dispute to conciliation under Annex V when a State party declares to opt-out from Section 2 of UNCLOS Part XV.[275] The implication is then, if no such optional exception is declared by States, an UNCLOS Tribunal may exercise jurisdiction over the territorial and maritime dispute if necessary.[276] Essentially, Boyle argues that how a State formulates its claims will dictate whether the dispute falls within UNCLOS compulsory jurisdiction.[277]

In commenting on Article 286 of Section 2 in UNCLOS Part XV, which articulates the same condition for subject-matter jurisdiction in Article 288(1), Treves

---

[272] Boyle, *supra* note 102, at 49.

[273] *Id.*

[274] *Id.*, at 44.

[275] *Id.*

[276] *Id.*, at 49.

[277] *Id.*, at 44–5.

doi:10.6342/NTU201903686

anticipates problems to surface from disputes which in part concerns the "interpretation or application" of UNCLOS and in part does not (i.e. mixed disputes).[278] Treves draws from a dispute concerning "questions of sovereignty on land features" and maritime delimitation as an appropriate example.[279] When discussing the question of jurisdiction over mixed territorial sovereignty disputes, Treves distinguishes between disputes concerning delimitation and non-delimitation. In a delimitation dispute with sovereignty issues, an *a contrario* reading of Article 298(1)(a)(i)—"a dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission"—appears to be in favor of including such mixed dispute within compulsory jurisdiction.[280] Whereas, in non-delimitation disputes involving territorial sovereignty issues, it will depend on the circumstances of each case as well as the characterization of the dispute by respective tribunals.[281] Treves' argument seems to be based on an exclusion of disputes over solely territorial sovereignty claims, but finds "mixed disputes" not necessarily excluded from compulsory jurisdiction.

B. Academic Literature Against Compulsory Jurisdiction over Territorial Sovereignty Disputes

When discussing whether a dispute involving land sovereignty is one concerning the interpretation or application of the LOSC, Oxman notes that some have argued in favor of jurisdiction over land sovereignty question when it is incidental or ancillary to the main issue of the dispute. However, Oxman suggests:

---

[278] Treves (2017), *supra* note 5, at 1847, ¶ 11.

[279] *Id.*

[280] *Id.*

[281] *Id.*; Tullio Treves, *What Have the United Nations Convention and the International Tribunal for the Law of the Sea to Offer as Regards Maritime Delimitation Disputes?*, *in* MARITIME DELIMITATION 63, 77 (Rainer Lagoni & Daniel Vignes eds., 2006) [hereinafter Treves (2006)].

doi:10.6342/NTU201903686

> [T]he fact that land sovereignty questions are not addressed by the [UNCLOS] and that there is no indication that becoming party to the [UNCLOS] entails consent to adjudicate disputes regarding sovereignty over land territory.[282]

Oxman unequivocally accepts the restrictive approach in regards to mixed disputes involving land sovereignty issues. Oxman answers the question in the negative for two main reasons. First, land sovereignty issues are not addressed by UNCLOS provision; Second, State parties of UNCLOS did not consent to the jurisdiction of compulsory dispute settlement. Mere ratification or accession to UNCLOS does not entail consent to adjudication by UNCLOS Tribunals.[283] With respect to the implications of UNCLOS Article 298(1)(a)(i), Oxman argues that the land sovereignty clause is "a mere drafting point" and an otherwise reading of the provision to support jurisdiction over sovereignty issues in the absence of an optional exclusion is untenable. On the one hand, Article 288(1) already limits disputes to those concerning the interpretation or application of UNCLOS; and on the other hand, questions of sovereignty "can hardly be regarded as incidental or ancillary."[284]

The most prominent reason put forth by Talmon is that question of jurisdiction over disputes concerning territorial sovereignty rests on rules of customary international law, as well as treaties, but none of which are found in UNCLOS.[285]

Michael Wood agrees UNCLOS should be understood within the context of international law as a whole, but he urges caution in references to general international law to avoid the risk of an excess of jurisdiction.[286] While Wood warns against an excess of compulsory jurisdiction beyond what is prescribed in

---

[282] Oxman, *supra* note 5, at 400.

[283] *Id.*

[284] Bernard H. Oxman, *The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980)*, 75 AM. J. INT'L L. 211, 233 (1981).

[285] Talmon, *supra* note 4, at 933.

[286] Michael Wood, *The International Tribunal for the Law of the Sea and General International Law*, 22 INT'L J. MARINE & COASTAL L. 351, 367 (2007).

doi:10.6342/NTU201903686

UNCLOS,[287] Wood suggests a possible but controversial way for an UNCLOS Tribunal to consider "primary rule of general international law" over a non-UNCLOS dispute is if it "arises incidentally in the course of deciding an issue within [the court or tribunal's] jurisdiction."[288] It can be concluded that Wood contends UNCLOS Tribunals may exercise incidental jurisdiction over mixed disputes of territorial sovereignty.

In Beckman's view, if UNCLOS provisions do not deal with the dispute, it does not concern the "interpretation or application" of UNLCOS. Beckman suggests UNCLOS provision are of no help in clarifying the rights and obligations of States if their dispute is not governed by provisions found in UNCLOS, but is instead governed by principles and rules of general international law.[289] In such cases, the compulsory dispute settlement procedures in UNCLOS are not applicable.

By the same token, Anderson states that the dispute between the parties must be determined by the interpretation or application of the provisions of UNCLOS, rather than other rules of international law.[290]

Proelss also advances the narrower approach in defining the scope of UNCLOS Tribunals' subject-matter jurisdiction. Proelss emphasizes that Article 279 and 288 embody the UNCLOS parties' consent to jurisdiction.[291] Proelss grounds his argument on the fundamental basis of international judicial bodies' jurisdiction over claims and treaty interpretation.

In interpreting Articles 298 of the UNCLOS, Proelss resorts to rules of interpretation enshrined in the 1969 VCLT.[292] A contextual and teleological reading of Article 298(1)(a)(i) reveals its relevance to specific dispute over

---

[287] *Id.*

[288] *Id.*, at 364 (using a dispute of maritime delimitation that requires a necessary determination of land sovereignty as an example).

[289] Beckman, *supra* note 16, at 263.

[290] Anderson, *supra* note 187, at 397–8.

[291] Proelss, *supra* note 14, at 54.

[292] *Id.*, at 53–4.

doi:10.6342/NTU201903686

"maritime delimitation or historic titles" and where a State party has made a declaration under Article 298(1)(a) to submit the listed matters to conciliation subject to Section 2 of Annex V.[293] In retrospect, according to Article 32 of the VCLT, the negotiating history of UNCLOS fails to offer justification for jurisdiction over territorial sovereignty disputes.[294] In fact, it was considered that States intended to exclude matters of territorial sovereignty from UNCLOS compulsory procedures.[295] Besides, the fact that UNCLOS did not list territorial sovereignty disputes as an exception in Article 297 does not imply the scope of subject-matter jurisdiction hence includes such disputes.[296]

Proelss places great emphasis on State consent to jurisdiction.[297] He argues, as a general rule, the jurisdiction of adjudicating bodies over issues is contingent upon the relevant international agreement having dealt with said issues.[298] An international agreement does not warrant jurisdiction over issues not addressed by the agreement itself. In a similar effort, other commentators suggest that "international courts are mere instruments of dispute settlement whose activities are justified by the consent of the states that created them and in whose name they decide."[299]

Proelss disagrees with Kateka and Wolfrum in arguing that territorial sovereignty disputes would have been included in Article 297 if UNCLOS intended to exclude such disputes.[300] It is true that Article 298(1)(a)(i) only explicitly excludes territorial sovereignty disputes from conciliation under Annex V. The mere lack of a provision expressly excluding territorial sovereignty disputes from

---

[293] *Id.*

[294] *Id.*

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME: A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 1 (2014).

[300] Chagos Dissenting Opinion, *supra* note 4, ¶ 40; Proelss, *supra* note 14, at 54.

doi:10.6342/NTU201903686

international adjudication does not mean such disputes are thus subject to compulsory procedures.[301] Moreover, the second phrase in Article 298(1)(a)(i) is a mere "clarification" of the first phrase, rather than a substantive rule on its own.[302]

Moreover, Proelss explains by comparing the subject-matter jurisdiction in Article 288 of UNCLOS to that of the Statute of the International Court of Justice (ICJ Statute).[303] While Article 36(1) of the ICJ Statute covers "all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force,"[304] as well as any dispute of international law otherwise agreed upon by the parties,[305] Article 288 is confined to disputes concerning the interpretation and application UNCLOS or other agreements related to the purpose of UNCLOS.[306]

---

[301] Proelss, *supra* note 14, at 54.

[302] *Id.*; *see also* Abraham D. Sofaer, *The Philippine Law of the Sea Action against China: Relearning the Limits of International Adjudication*, 15 CHINESE J. INT'L L. 393–402 (2016) (similarly arguing that UNCLOS does not deal with territorial sovereignty issues, and suggests that this is implicit in Article 298(1)(a)(i), which excludes maritime delimitation disputes from mandatory conciliation when involved with such issues).

[303] Proelss, *supra* note 14, at 54.

[304] Statute of the International Court of Justice art. 36(1) (Apr. 18, 1946), 33 U.N.T.S. 993 (original text of Article 36(1): *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.*).

[305] *Id.*, art. 36(2) (original text: *The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation.*).

[306] Proelss, *supra* note 14, at 54.

doi:10.6342/NTU201903686

Proelss further argues that UNCLOS Tribunals have on occasion mistakenly resorted to Article 293(1) as the basis of subject-matter jurisdiction over legal issues not expressly addressed by UNCLOS. The wording of Article 293(1) unequivocally prescribes, as a precondition, UNCLOS Tribunals must have jurisdiction under Section 2 of Part XV when applying other rules of international law.[307] Article 293(1) entitles a court of tribunal to apply other rules of international law, in relation to determining the scope of jurisdiction, if and to the extent that is "necessary in order to substantiate, or inform respectively, the meaning of the terms of the treaty on which the jurisdiction of the dispute settlement body concerned is based."[308]

Proelss' position is rooted in the principles of State sovereignty on the one hand and the effectiveness and reliability of the UNCLOS regime on the other.[309] The jurisdiction of a court or tribunal comes from States' sovereign decision to accept it by way of consent, regardless of its form.[310] The limits of jurisdiction should be confined to those set out in the UNCLOS to which the States' have agreed. Proelss also takes into account of States parties' willingness to continuously support the compulsory dispute settlement regime if the UNCLOS Tribunals were to expand jurisdiction beyond the scope of their consent. Essentially, Proelss calls for a uniform approach to define the limits of jurisdiction so as to achieve legal certainty.[311]

Similarly, in establishing a dispute is subject to compulsory jurisdiction, Klein resorts to an assessment of whether it concerns the "interpretation or application" of UNCLOS.[312] As UNCLOS does not contain any provision on the question of

---

[307] *Id.*, at 57; Peter Tzeng, *Jurisdiction and Applicable Law Under UNCLOS*, 126 YALE L.J. 242, 247 (2016).

[308] Proelss, *supra* note 14, at 59.

[309] *Id.*, at 60.

[310] *Id.*, at 58–60.

[311] *Id.*, at 60.

[312] Klein (2017), *supra* note 31, at 342.

doi:10.6342/NTU201903686

territorial sovereignty, sovereignty issues would render law of the sea disputes not distinctly of "interpretation or application" of UNCLOS.[313] While contextual interpretation reveals such mixed disputes to be beyond the scope of disputes resolved within the compulsory procedures, a blinkered reading of the relevant provisions would expand the scope of subject-matter jurisdiction.[314] Klein anticipates a shifting scope of jurisdiction given UNCLOS has long been deemed a "living constitution" capable of evolving over time.[315] In light of the dynamic nature, Klein essentially suggests striking a balance between the principle of consent in terms of what exactly States have consented to, and the principle of effectiveness, which allows courts and tribunals to fulfill their judicial function.[316]

Klein suggests that Section 3 lays out exceptions to the application of compulsory procedures under Section 2 of UNCLOS Part XV. In addition, States were reluctant to render "complete acquiescence" in compulsory procedures entailing binding decision on territorial issues, given the high stakes involved.[317] The lack of criteria in the normative framework of Article 298 was also a deterrence.[318]

John G. Merrills holds the view that Section 2 of Part XV does not apply to disputes involving sovereignty or other rights over land territory. However, Merrills does not offer further explanation.[319]

Zou and Ye describe Article 298 as "a safety valve" in allowing exemptions from compulsory dispute settlement procedures with respect to "sensitive issues of

---

[313] *Id.*

[314] *Id.*, at 349.

[315] *Id.*, at 362.

[316] *Id.*, at 361–3.

[317] Klein (2005), *supra* note 110, at 278–9; Keyuan Zou & Qiang Ye, *Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Apprasial*, 48 OCEAN DEV. & INT'L L. 331, 332 (2017).

[318] Klein (2005), *supra* note 110, at 278–9; Zou & Ye, *supra* note 317, at 332.

[319] MERRILLS, *supra* note 119, at 183.

doi:10.6342/NTU201903686

sovereignty."[320] Zou and Ye draw from the drafting history of the UNCLOS provisions where a compromise between State sovereignty and wide acceptance of compulsory dispute settlement procedures was struck.[321] Zou & Ye cited the 1989 Virginia Commentary to support the notion that Article 298 was drafted against the backdrop of striking a compromise between State sovereignty and achieving near-global acceptance of the UNCLOS.[322]

C. Some Observations of the Debate

In light of existing academic literature, including those discussed in Section A and B, this thesis makes a few observations as follows.

The majority of legal scholarship maintains either UNCLOS inherently excludes territorial sovereignty disputes or there is no general exclusion but does not necessarily go further to suggest even mixed territorial sovereignty disputes fall within the scope of compulsory jurisdiction.

In terms of disputes *solely* relating to territorial sovereignty, most commentators argue such pure sovereignty disputes are not subject to the compulsory jurisdiction of UNCLOS Part XV.[323] The logic of this argument stems from Article 288(1), which requires disputes must concern the interpretation or application of UNCLOS, and territorial sovereignty disputes happen to be governed by rules of

---

[320] Zou & Ye, *supra* note 317, at 331–2.

[321] *Id.*

[322] *Id.*

[323] *See, e.g.*, Buga, *supra* note 4, at 68; Mario Gervasi, *The Interpretation of the United Nations Convention on the Law of the Sea in the Chagos Marine Protected Area Arbitration: The Influence of the Land Sovereignty Dispute*, *in* INTERPRETATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY INTERNATIONAL COURTS AND TRIBUNALS 191, 197 (Angela Del Vecchio & Robert Virzo eds., 2019); Wensheng Qu, *The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond*, 47 OCEAN DEV. & INT'L L. 40, 44–50 (2016).

doi:10.6342/NTU201903686

customary international law.[324] This has been understood to mean that for an UNCLOS Tribunal to exercise compulsory jurisdiction, a dispute must be regulated by UNCLOS. In other words, there must be a corresponding provision found in UNCLOS that governs the dispute in question.[325] Otherwise, in the absence of such provision, the dispute would not be considered to fall within Article 288(1), and hence, the UNCLOS Tribunal is without subject-matter jurisdiction. Accordingly, issues governed by rules of customary international law or treaties other than UNCLOS are not disputes under Article 288(1).[326]

Despite the debate in legal scholarship, common ground exists. The contrasting views among academic writings demonstrate one consistent view: no provision regulates territorial sovereignty under UNCLOS. Both sides of the debate consider "pure" land sovereignty disputes outside the scope of compulsory jurisdiction, either explicitly or implicitly. Even commentators who embrace the exercise of jurisdiction over disputes involving territorial sovereignty imply that no UNCLOS provision addresses land sovereignty issues.[327] Jurisdiction over "mixed disputes" of territorial sovereignty, however, remains highly controversial.

IV. Interpretation of Sources of Jurisdiction over Territorial Sovereignty Disputes

This Part provides a detailed analysis, by way of treaty interpretation, on the sources of the Tribunals' jurisdiction over questions of land sovereignty, which are not regulated by UNCLOS. Articles 288(1), 293 and 298(1)(a)(i) are explored in the following as they are the most often cited sources of jurisdiction in favor

---

[324] Chagos Dissenting Opinion, *supra* note 4, ¶ 45; Rao (2007), *supra* note 5, at 891; Sienho, *supra* note 6, at 689–90; Wood, *supra* note 286, at 357; Qu, *supra* note 323, at 44–5.

[325] *See, e.g.*, Wood, *supra* note 285, 357; Qu, *supra* note 322, at 44–5 Sienho, *supra* note 6, at 689–90; Karim, *supra* note 10, at 267; Marotti, *supra* note 4, at 388; Stefan Talmon, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT'L L. 309, 329 (2016).

[326] Wood, *supra* note 285, at 357; Qu, *supra* note 322, at 44–5.

[327] *See, e.g.*, Chagos Dissenting Opinion, *supra* note 4; Treves (2006), *supra* note 281, at 63–78.

doi:10.6342/NTU201903686

and against compulsory jurisdiction over land sovereignty issues. Article 288(1) is the provision under interpretation for it prescribes the basis of "Jurisdiction" to compulsory dispute settlement. Some key elements of Article 288(1) are identified before an application of the rule of treaty interpretation discussed in Section A of this Part. The critical element of Article 288(1) is: "any dispute concerning the interpretation or application of the Convention."

A. Article 288(1)

Generally, Article 288(1) provides the basis of compulsory jurisdiction (i.e. disputes submitted under Section 2 of UNCLOS Part XV) for "UNCLOS disputes," which are disputes governed by rules of UNCLOS. It does not, however, provide the basis of jurisdiction for "non-UNCLOS" disputes, which are disputes not governed by UNCLOS.[328]

Two exceptions to this principle rule are found.[329] The first is governed by Section 3 of UNCLOS Part XV,[330] which sets out exceptions to the compulsory jurisdiction of UNCLOS Part XV. The second exception concerns jurisdiction over "non-UNCLOS" disputes that are found in certain UNCLOS provisions and general principles of international law.[331]

1. Elements of Article 288(1): a dispute concerning the interpretation or application of UNCLOS

UNCLOS does not dwell upon the concept of "dispute." Provisions pertaining to voluntary (Article 279) and compulsory jurisdiction (Article 286 and 288) refer to virtually identical conditions for "disputes."[332]

---

[328] Tzeng, *supra* note 4, at 505–6.

[329] *Id.*

[330] UNCLOS, *supra* note 3, art. 297–9.

[331] Tzeng, *supra* note 4, at 506.

[332] UNCLOS, *supra* note 3, art. 279, 286, 288.

doi:10.6342/NTU201903686

a. A Dispute between State Parties

Article 288(1) unequivocally refers to disputes exclusively between States that are Parties to UNCLOS. Two conditions must be identified in order to resort to Part XV mechanisms.[333] First, States must have signed and ratified or otherwise acceded to UNCLOS.[334] Second, UNCLOS must have entered into force at the time the dispute arises.[335]

b. Existence of a Dispute

As depicted in Article 288(1), "any dispute concerning the interpretation or application of [UNCLOS]" appears broad, but is not without conditions. Although, UNCLOS does not provide the conditions for the existence of a dispute, delegates to the UNCLOS Conference regarded the meaning of dispute as "self-evident."[336] It follows that reference to the practice the ICJ is necessary.[337]

The existence of a dispute is a condition for an UNCLOS Tribunal to exercise its judicial function. As observed by the International Court of Justice:

> [I]t is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination."[338]

Moreover, in the opinion of the ICJ, the existence of the dispute is not required to be manifested in a particular way.

> [The court] cannot require that the dispute should have manifested itself in a formal way; according to the Court's view, it should be sufficient if the two Governments have in fact

---

333 Ranjeva, *supra* note 89, at 1339.

334 UNCLOS, *supra* note 3, art. 305–7.

335 *Id.*, art. 308.

336 Ranjeva, *supra* note 89, at 1340..

337 *Id.*

338 Nuclear Tests (Austl. v. Fr.), *supra* note 57, at 270–1, ¶ 55.

doi:10.6342/NTU201903686

shown themselves as holding opposite views in 'regard to the meaning or scope of a judgment of the Court.[339]

Thus, the object of a dispute is defined as "a difference of view which has not been capable of otherwise being overcome."[340] Viewing a law of the sea dispute in light of the ICJ approach appears to be of no difficulty. While no particular form of manifestation of a dispute is required, the necessary recourse to diplomatic means may be sufficient to prove the existence of a dispute.[341]

c. Disputes over the interpretation or application of UNCLOS

A clause containing the formulation identical or similar to that of Article 288(1)—"any disputes concerning the interpretation or application"—is commonly seen in dispute settlement. However, no consensus is found on the meaning of "interpretation or application."[342]

The breach of a rule of international law is merely one of the various disputes.[343] The ICJ held, though not in the context of UNCLOS, the "interpretation or application" of a treaty to indicate, *inter alia*, the jurisdiction to determine whether a party has breached the treaty.[344] Some scholars have even found a distinction between "interpretation" and "application" to be unnecessary since relevant clauses employ these two composite terms and either one would render a dispute subject to the jurisdiction of the judicial forum.[345] Other jurists have similarly pointed out that "the two elements constitute a compendious term of art generally covering all disputes as to rights and duties having their source in the

---

339 Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory) (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 13, 10–11 (Dec. 16).

340 *Id.*

341 Ranjeva, *supra* note 89, at 1340.

342 Tzeng, *supra* note 4, at 505.

343 *Id.*

344 Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 31 (Nov. 6).

345 Serdy (art.279), *supra* note 108, at 1815, ¶ 7; Treves (2017), *supra* note 5, at 1847, ¶ 10.

doi:10.6342/NTU201903686

controlling."[346] By the same token, a court or tribunal's "jurisdiction is limited to that conferred on it" and does not include the jurisdiction to determine breaches of rules of international law beyond the treaty.[347]

In any event, a dividing line is necessary to tell apart disputes concerning the interpretation or application of UNCLOS and disputes that do not.[348] This "depends on the relationship between the claim and the treaty on which the claim is sought to be based."[349] The task to determine whether a dispute falls within the limits of a treaty's jurisdiction calls for an interpretation of the said treaty.[350]

2. Application of the VCLT to UNCLOS Article 288(1)

Articles 288 set out the requirement that disputes concerning the "interpretation or application" of UNCLOS are subject to compulsory procedures under Section 2 of UNCLOS. The jurisdictional clause appears ambiguous. Equivocal or unambiguous legal texts must undergo interpretation to ascertain its meaning or confirm its clarity.[351] UNCLOS provisions regarding subject-matter jurisdiction and its limitations undoubtedly call for interpretation in accordance with rules codified in Articles 31 and 32 of the VCLT.

a. The Text

The text of Article 288(1) only prescribes that disputes subject to compulsory jurisdiction must be disputes concerning "the interpretation or application" of

---

[346] GARCÍA-REVILLO, *supra* note 28, at 39 (citing Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, 1988 I.C.J. Rep. 12, 59 (Apr. 26) (separate opinion of Judge Shahabuddeen)).

[347] Tzeng, *supra* note 4, at 505 (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), *supra* note 96, ¶ 271; Oil Platforms (Iran v. U.S.), *supra* note 344, ¶ 42).

[348] GARCÍA-REVILLO, *supra* note 28, at 39.

[349] Oil Platforms (Iran v. U.S.), 1996 Judgment, I.C.J. Rep. 803, 822, 824 (Dec. 12) (separate opinion of Judge Shahabuddeen).

[350] GARCÍA-REVILLO, *supra* note 28, at 40–1.

[351] POPA, *supra* note 222, at 91.

doi:10.6342/NTU201903686

UNCLOS. Some academic literature discusses the issue of this thesis on the premise that such disputes are ones that are governed by UNCLOS.[352] Similarly, some have argued that Article 288(1) in no way suggest exclusion of territorial sovereignty disputes given the absence of such terms thereto.[353] The terms of Article 288(1) is thus equivocal in informing whether territorial sovereignty disputes concern the interpretation or application of UNCLOS.

b. The Context

To shed light on the meaning of Article 288(1), namely, whether UNCLOS distinguishes between so-called "UNCLOS dispute" and "non-UNCLOS dispute," the context of the provision must be given weight. The preamble and annexes of a treaty are part of the context.[354] The last paragraph to the preamble of UNCLOS states: "[A]ffirming that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."[355] The preamble indicates UNCLOS makes a distinction between disputes that are addressed by the Convention and those that are not. Territorial sovereignty disputes are not resolved by provisions of UNCLOS, hence, are not "UNCLOS disputes" concerning the interpretation or application of UNCLOS.

Article 297 and 298 are also part of the context of Article 288(1). Based on the text of Article 297, no automatic exception for territorial sovereignty disputes is contained thereto. Article 297(1) sets out three types of disputes that must be subject to compulsory jurisdiction. While Article 297(2) and (3) allows compulsory jurisdiction to be exercised over marine scientific research and fisheries, it also preclude States' obligation of submitting to compulsory procedures any dispute arising out of its exercise of certain rights with respect to marine scientific research in the exclusive economic zone or on the continental shelf, or any dispute relating to its sovereign rights with respect to the living

---

352 *See, e.g.*, Oxman, Beckman, Wood and Klein in Part III, Chapter IV.

353 *See, e.g.*, Kateka and Wolfrum in Part III, Chapter IV.

354 VCLT, *supra* note 223, art. 31(2).

355 UNCLOS, *supra* note 3, Preamble.

doi:10.6342/NTU201903686

resources in the exclusive economic zone. However, nowhere in Article 297 is a dispute of territorial sovereignty excluded.

Though Article 297 does not mention anything of territorial claims, some contend the non-inclusion of such disputes does not necessarily suggest the drafters consented to compulsory jurisdiction over them.[356] Thus, the exclusionary clause should be read into Article 297 despite the lack of explicit reference. Others suggest that since territorial sovereignty dispute was left out of Article 297, it is not excluded from compulsory jurisdiction.[357] There appear to be no grounds to take recourse to the preparatory works of UNCLOS, for Article 297 unequivocally contains no such exception and its ordinary meaning does not render it ambiguous or otherwise absurd. In any event, the drafting history of UNCLOS indicates that the intention of the drafters to include territorial claims in Article 297 did not prevail.[358] The fact that the proposal to include territorial sovereignty dispute in Article 297 did not receive consensus reveals the parties did not intend to leave it out.[359] It was also expressed by many States during the drafting process that exceptions to compulsory jurisdiction are to "be interpreted restrictively."[360] The drafters intended to keep the possible exceptions available to the minimum and within a limited extent.[361] Therefore, Article 298 is to be construed as permitting exceptions narrower than those expressly allowed therein.[362] This demonstrates Article 298(1)(a)(i) intends to deal with specifically sea boundary disputes that involved sovereignty issues. The provision has since ruled out territorial sovereignty disputes from delimitation of sea boundaries. An *a contrario* reading of Article 298(1)(a)(i) would hence not

---

356 *See, e.g.*, Proelss in Part III, Chapter IV.

357 *See, e.g.*, Kateka and Wolfrum in Part III, Chapter IV.

358 Virginia Commentary, *supra* note 109, at 112.

359 *Id.*

360 *Id.*, at 92, ¶ 297.5.

361 *Id.*, at 115, ¶ 298.13; Rao (2007), *supra* note 5, at 881.

362 Virginia Commentary, *supra* note 109, at 115, ¶ 298.13; Rao (2007), *supra* note 5, at 881.

doi:10.6342/NTU201903686

exceed the terms of the provision to exclude *all* disputes concerning territorial sovereignty.

Nevertheless, the negotiating history of Article 297 and 298 appears to confirm the exclusion of land sovereignty disputes. As also noted in the drafting history, when drafts of the dispute settlement provision were presented during the negotiating process by the representative of El Salvador, who presented the draft of UNCLOS in the 1974 conference, he emphasized that "among the exceptions to which obligatory jurisdiction did not apply were the questions directly related to the *territorial integrity* of States.[363] Otherwise, the convention would go too far and might dissuade a number of States from ratifying and even signing it [emphasis added]."[364] In addition, some States feared that "under the guise of a dispute relating to a sea boundary delimitation, a party to a dispute might bring up a dispute involving claims to land territory or an island."[365] The relevant provision was thus amended as it exists in Article 298(1)(a)(i) now to accommodate this concern.[366]

c. Object and Purpose

The object and purpose of adopting dispute settlement provision can be found in the UNCLOS Preamble, which states UNCLOS is "prompted by the desire to settle [...] all issues relating to the law of the sea."[367] Even in light of supplementary means of interpretation in Article 32, the preparatory work of UNCLOS indicates that States hoped for continuous and increasing recourse to the dispute settlement procedures which would "permit the solution of the problems of interpretation and application in the future convention" as controversies were

---

[363] *51st Plenary Meeting*, *supra* note 130, at 213, ¶ 10.; Virginia Commentary, *supra* note 109, at, 88, ¶ 297.1.

[364] Virginia Commentary, *supra* note 109, at 88.

[365] *Id.*, at 117, ¶ 298.20.

[366] *Memorandum by the President of the Conference on document A/CONF.62/WP.10*, *supra* note 174, at 70.

[367] UNCLOS, *supra* note 3, Preamble.

doi:10.6342/NTU201903686

expected to inevitably rise from the new convention.[368] UNCLOS dispute settlement system was adopted to deal with problems which stem from the Convention itself. This implies that compulsory procedures did not want to address questions beyond what was regulated in UNCLOS.

B. Article 293

The text of Article 293(1) offers a distinct "two-tier" examination for jurisdiction and applicable law.[369] An UNCLOS Tribunal has to establish jurisdiction under Section 2 of UNCLOS Part XV.[370] The basis of jurisdiction is found under a separate provision under Section 2.[371] After jurisdiction is established, an UNCLOS Tribunal will apply the applicable law.[372]

The context of Article 293(1) indicates the same interpretation.[373] While Article 288 is placed under the title "Jurisdiction," Article 293 is placed under the heading "Applicable Law." The titles are clear in their distinction of the two provisions. The object and purpose of UNCLOS do not offer an interpretation to the contrary. In any event, even recourse to the preparatory works of UNCLOS does not reveal anything remotely related to whether Article 293(1) can be interpreted as a jurisdictional clause.[374]

The scope of Article 293 is contingent upon whether one views it a basis of jurisdiction.[375] The text of Article 293 only provides that applicable rules be consistent with UNCLOS. The context reveals that a number of UNCLOS

---

[368] *51st Plenary Meeting*, *supra* note 130, at 213, ¶ 10.

[369] Tzeng, *supra* note 4, at 519.

[370] UNCLOS, *supra* note 3, art. 293(1) (original text: *A court or tribunal having jurisdiction under this section[…].*").

[371] Tzeng, *supra* note 4, at 519.

[372] Article 293(1) (original text: *[…] shall apply this Convention and other rules of international law not incompatible with this Convention.*).

[373] Tzeng, *supra* note 4, at 519–20.

[374] Virginia Commentary, *supra* note 109, at 72–4.

[375] Tzeng, *supra* note 4, at 526–33.

doi:10.6342/NTU201903686

provisions incorporate ”other rules of international law,” though each provision may derive from different contexts and hence should not be subject identical interpretation.[376] Similarly, case law offers conflicting views.[377]

In response to invoking Article 293 as a means to expand compulsory jurisdiction, Oxman noted that “care should be taken to avoid conflating the question of applicable law with the question of jurisdiction. Under Section 2 of Part XV of the LOSC, jurisdiction is limited to disputes concerning the interpretation and application of the Convention.”[378] Michael Wood also stresses the importance in distinguishing between jurisdiction and applicable law, which “refers to the law to be applied by the international court or tribunal to decide a dispute over which it *has jurisdiction* [emphasis added].”[379] Wood contends that reference to Article 293 should not be used to extend the jurisdiction of UNCLOS Tribunals beyond disputes concerning the “interpretation and application” of UNCLOS, unless parties agree otherwise. Accordingly, UNCLOS Tribunals do not have jurisdiction over disputes arising under general international law.[380]

C. Article 298(1)(a)(i)

While Article 297 dealt with issues regarding the rights in the EEZ, other issues were addressed by Article 298.[381] In search of a basis for sovereignty issues, this thesis thus centers around Article 298(1)(a)(i), which is the sole provision in UNCLOS that contains a clause concerning land sovereignty.

Unless Sates opt-out by virtue of a declaration under Article 298(1)(a)(i), maritime boundary delimitation disputes are in principle subject to compulsory

---

[376] *Id.*, at 527.

[377] Tzeng, *supra* note 4, at 520–6 (discusses M/V Saiga No.2, Guyana v. Suriname, and M/V Virginia G cases, in which UNCLOS Tribunals invoked Article 293(1) as basis of jurisdiction).

[378] Oxman, *supra* note 5, at 414.

[379] Wood, *supra* note 286, at 356.

[380] *Id.*, at 357.

[381] Virginia Commentary, *supra* note 109, at 87–94, 109, 111.

doi:10.6342/NTU201903686

jurisdiction.[382] Even if a party or parties to a delimitation dispute exercise the right to opt-out from compulsory procedures, there is still an obligation to submit the dispute to (non-binding) conciliation,[383] unless the dispute "necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory."[384]

Four scenarios can be observed from Article 298(1)(a)(i) with respect to maritime delimitation disputes. First, a party has the right to choose to opt-out from compulsory procedures under Section 2 of UNCLOS Part XV. Thus, if no declaration is made pursuant to Article 298(1)(a)(i), delimitation disputes are in principle subject to compulsory jurisdiction. Second, delimitation disputes can only be submitted under UNCLOS Part XV by agreement when a party exercises its right to opt-out from compulsory jurisdiction. However, the party who opts out is obligated to submit the delimitation dispute to conciliation if any party to the dispute requests so. Third, a party who chooses to opt-out is not obligated to submit maritime delimitation disputes to conciliation if the dispute necessarily concerns territorial sovereignty. The fourth scenario, in which the Parties have not declared to opt-out from maritime delimitation dispute involving land sovereignty issues, attracts much debate.

The issue remains in question: If a maritime delimitation dispute involves a determination of territorial sovereignty but no declaration is made under Article 298(1)(a)(i), is the dispute subject to compulsory jurisdiction?

The context of Article 288(1) sheds little light on whether UNCLOS Tribunals should exercise jurisdiction over non-UNCLOS disputes. In regards to mixed disputes, an often relied upon contextual reading of Article 288(1) refers to Article 298(1)(a)(i). On the one hand, commentators have suggested that *a contrario sensu* interpretation of Article 298(1)(a)(i) suggest UNCLOS Tribunals

---

[382] Boyle, *supra* note 102, at 44.

[383] *Id.*

[384] UNCLOS, *supra* note 3, art. 298(1)(a)(i).

doi:10.6342/NTU201903686

can exercise jurisdiction over territorial sovereignty disputes in mixed disputes.[385] The exclusion clause indicates mixed disputes are within the jurisdiction of UNCLOS Tribunals. On the other hand, it can equally be said that Article 298(1)(a)(i) is a cautious reiteration of the general rule that mixed territorial sovereignty disputes are excluded from UNCLOS compulsory jurisdiction, including conciliation.[386]

It should be noted that mixed disputes were included in Article 298(1)(a)(i) because States feared that "under the guise of a dispute relating to a sea boundary delimitation, a party to a dispute might bring up a dispute involving claims to land territory or an island."[387]

However, the object and purpose of Article 298(1)(a)(i) seen in the drafting history of UNCLOS does not help with the split view on the issue at hand. Former ITLOS President Rao similarly observed that "[t]here is no clear statement in the preparatory work of the Convention on the meaning to be given to this clause."[388]

In light of the negotiating history, nothing about "State sovereignty" or "territorial sovereignty" appeared in the 1989 Virginia Commentary on Article 298.[389] In contrast, "territorial integrity of States" was explicitly mentioned in Article 297.[390] Thus, this thesis is skeptical as to whether a general conclusion can be drawn that Article 298 implies considerations of State sovereignty. The

---

[385] Wolfrum Statement, *supra* note 4, at 4, 6; Boyle, *supra* note 102, at 44; Treves (2006), *supra* note 280, at 77; Philippe Gautier, *The International Tribunal for the Law of the Sea: Activities in 2005*, 5 CHINESE J. INT'L L. 381, 389–90 (2006); Andrew Serdy, *Article 298:Optional exceptions to applicability of section 2, in* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 1925, ¶ 14 (Alexander Proelss ed., 2017).

[386] Tzeng, *supra* note 4, at 562–3; Proelss, *supra* note 14, at 54.

[387] Virginia Commentary, *supra* note 109, at 117, ¶ 298.20.

[388] Rao (2007), *supra* note 5, at 887.

[389] Virginia Commentary, *supra* note 109, at 109–10.

[390] *Id.*, at 88.

doi:10.6342/NTU201903686

more likely implication is that territorial sovereignty disputes were inherently excluded without having to stipulate so in explicit terms in Article 297.

V. Conclusion

It is commonly suggested that drafters of UNCLOS wanted to keep land sovereignty issues at bay. As obvious as this is to some commentators, however, it is equally arguable to arrive at another conclusion: drafters could easily have made it such exclusion explicit in the UNCLOS if they had intended to do so. An interpretation of Article 288(1) in light of relevant VCLT provisions, including Articles 297 and 298, did not necessarily come to a conclusion that excludes territorial sovereignty disputes, given the varying weight placed by each commentator on the relevant factors of treaty interpretation.

Some commentators support UNCLOS Tribunals' exercise of jurisdiction over territorial sovereignty claims (i.e. non-UNCLOS dispute), at least in relation to "mixed disputes" (i.e. disputes involving maritime boundary delimitation and territorial sovereignty).[391] Others stand by the notion that territorial sovereignty disputes are not subject to the jurisdiction of UNCLOS Tribunal, irrespective of its relation to maritime delimitation disputes as stipulated in Article 298(1)(a)(i).[392]

This thesis argues that a rigorous application of the factors cataloged in VCLT Article 31 and 32 arrives at a tenable conclusion that disputes ("solely/purely") concerning territorial sovereignty disputes are *not* subject to UNCLOS

---

[391] *See* discussion *supra* Part III. *See, e.g.*, Boyle, *supra* note 102, at 44; Gautier, *supra* note 385, at 389–90; Rao (2007), *supra* note 5, at 891–2; Treves (2006), *supra* note 281, at 77; Wolfrum Statement, *supra* note 4, at 2–6.

[392] *See* discussion *supra* Part III. *See, e.g.*, Sienho, *supra* note 6, at 689–90; Talmon, *supra* note 4, at 933, 947; Bing Bing Jia, *The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 57 GERMAN Y.B. INT'L L. 63–94 (2014). *See also* Stefan Talmon, *The South China Sea Arbitration: Is There a Case to Answer?*, *in* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 15–79 (Stefan Talmon & Bing Bing Jia eds., 2014).

doi:10.6342/NTU201903686

compulsory jurisdiction. In an analogous fashion, the interpretation of UNCLOS provisions indicates "mixed disputes" concerning both territorial sovereignty issues and UNCLOS issues should also be excluded from compulsory jurisdiction.

Indeed, the basis of jurisdiction over mixed disputes (i.e. involving both UNCLOS dispute and non-UNCLOS dispute) is relatively ambiguous under UNCLOS.[393] With regard to "mixed" territorial sovereignty disputes, proponents and opponents of exercising compulsory jurisdiction over sovereignty disputes have offered various arguments.[394] Some argue that any dispute concerning land sovereignty, pure or mixed, is completely excluded from UNCLOS compulsory dispute settlement.[395] Others consider such mixed disputes are subject to the compulsory jurisdiction.[396] Still, some are more reserved in contending that these mixed disputes may only be considered "concerning the interpretation or application of UNCLOS" under certain conditions.[397] What one should bear in mind is the balance between achieving the effectiveness of UNCLOS dispute settlement and the extent of States' consent to compulsory jurisdiction.[398]

The question of jurisdiction over territorial sovereignty disputes have not only received academic debate but have thus far been addressed by UNCLOS Tribunals in two cases. The interpretation of Article 288(1) in judicial decisions may play a role as a subsequent practice under the VCLT if a consistent practice is found over time. While a limited number of judicial decisions can hardly be

---

393 Qu, *supra* note 323, at 45.

394 Tzeng, *supra* note 4, at 571 (distinguishes among various conditions, which include requiring necessity or a nexus between the UNCLOS dispute and non-UNCLOS dispute).

395 *See* discussion *supra* Part III. *See, e.g.*, Jia, *supra* note 391, at 86; Sienho, *supra* note 6, at 689–90 (rejecting the exercise of jurisdiction over territorial sovereignty disputes irrespective of its relative weight in a dispute).

396 *See* discussion *supra*, Part III; *e.g.*, Boyle, *supra* note 102.

397 *See* discussion *supra*, Part III. *See, e.g.*, Buga, *supra* note 4.

398 *See, e.g.*, Natalie Klein, *Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions*, 15 CHINESE J. INT'L L. 403, 415 (2016) [hereinafter Klein (2016)]; Proelss, *supra* note 14, at 47–60; Marotti, *supra* note 4, at 383–406.

doi:10.6342/NTU201903686

viewed as subsequent practices, such decisions may nonetheless be indicative of the trajectory for future legal disputes over land sovereignty issues under UNCLOS compulsory dispute settlement. Consistency in the two cases may reinforce the interpretation of Article 288(1). Conversely, divergence in views may underscore the core issues of the question and leave ajar the door for unknown developments. With this in mind, it is hence, useful to explore the jurisdictional objections raised in the *Chagos* Arbitration (2015) and *South China Sea* Arbitration (2015).

doi:10.6342/NTU201903686

CHAPTER V: TERRITORIAL SOVEREIGNTY DISPUTES IN UNCLOS TRIBUNALS

As concluded in Chapter IV of this thesis, an interpretation of Articles 288(1) and 293 in the context of 298(1)(a)(i) offers a clear answer on the issue. Arguably, some consider UNCLOS provisions are of no avail in resolving the issue. Recourse to existing judicial decisions is appropriate to illuminate or confirm the interpretation in Chapter IV.[399]

In Chapter V, two arbitral awards are explored in the search of the appropriate interpretation of UNCLOS Article 288(1). The selected arbitral awards have distinct features in common. Namely, each arbitration is subject to the compulsory jurisdiction under UNCLOS and involves implicit or explicit discussion on the issue at hand. A perusal of the awards on the Tribunals' jurisdiction discloses the interpretation of Article 288(1) in practice and the possible legal ramifications thereof. The following Parts of this chapter focuses on what is relevant to this thesis. Notably, only the facts and claims surrounding subject-matter jurisdiction over territorial sovereignty dispute under Section 2 of Part XV UNCLOS are covered. Substantive matters (merits) of the cases are not discussed.

I. Chagos Arbitration (Mauritius v. UK)

The Chagos Tribunal is one of the few judicial decisions that parties and (or) the tribunals openly discussed the question of territorial sovereignty and the purview of the subject-matter jurisdiction under UNCLOS compulsory dispute settlement.

The two pertinent claims brought by Mauritius are as follows: First, the UK is not entitled to declare an MPA since it is not the "coastal State" within the meaning of, *inter alia*, Articles 2, 55, 56 and 76 of UNCLOS; Alternatively, in light of the

[399] VCLT, *supra* note 223, art. 32; Tzeng, *supra* note 4, at 563.

doi:10.6342/NTU201903686

commitments (i.e. the 1965 Undertakings) made by the UK, the UK is not entitled to unilaterally declare an MPA because Mauritius is a "coastal State" within the meaning of *inter alia* Articles 56(1)(b)(iii) and 76(8) of UNCLOS.

The case is relevant to this thesis for three reasons. First, the case was submitted by Mauritius under Annex VII of UNCLOS in accordance with the compulsory dispute settlement procedure in Section 2 of Part XV. Secondly, the claims brought forth by the Applicant State (Mauritius), though not formulated in terms that appear to call for a decision on territorial sovereignty, the Parties argue at length over the characterization of the claims as sovereignty disputes and its implication on the Tribunal's exercise of jurisdiction. Thirdly, the Chagos Tribunal address the Parties differing views and conducted an interpretation of Article 288(1), despite without explicit reference to the canons of treaty interpretation.

A. Background of The Chagos Arbitration

In 2010, Mauritius, an island nation located east of Madagascar in the Indian Ocean, instituted proceedings against the UK The matter, which concerned the Chagos Archipelago, was submitted to the Permanent Court of Arbitration under Annex VII of UNCLOS.

The Chagos Archipelago once entertained the presence of the French government as a dependency of the *Ile de France* (Mauritius) and subsequently the British, after France ceded Mauritius and all its dependencies (including the Chagos Archipelago) in the early 19th century.[400] Mauritius remained under the administration of the UK until 1965.[401] The British administration of the Chagos Archipelago, however, is disputed by Mauritius and the UK in terms of their economic relationship and the significance of the Chagos' dependency status.[402] While Mauritius contends that the Chagos Archipelago was under the British rule

[400] Chagos Arbitration, *supra* note 2, ¶¶ 57–60.

[401] *Id.*, ¶¶ 61–8.

[402] *Id.*, ¶ 62.

doi:10.6342/NTU201903686

as “a constituent part of Mauritius[…],” the UK argues that the Chagos Archipelago was “very loosely administered from Mauritius” and distinct from Mauritius.[403]

As Mauritius moved towards its independence on 12 March 1968,[404] Mauritius and the UK discussed the “detachment” of the Chagos Archipelago from the colony of Mauritius.[405] With an effort to support the UK and the US on the use of islands, such as the island Diego Garcia, for defense purposes, a series of negotiations took place among the three interested parties—the UK, the US, and Mauritius.[406] Eventually, the parties came to terms on allowing the Chagos Archipelago to “detach” from Mauritius and remain under British sovereignty.[407] The negotiations resulted in what is called the “1965 Lancaster House Undertakings (*hereinafter* 1965 Undertakings).”[408] In addition to the various undertakings provided in the Undertakings—including, request for economic support of certain agricultural commodities from the US, fishing rights, benefits of mineral and oil discovery, and compensation—the detachment of the Chagos Archipelago was conditioned on the return of the Chagos Archipelago when it is no longer required for defense purposes.[409] The establishment of the British Indian Ocean Territory (BIOT) effected the detachment on 8 November 1965.[410]

Following the detachment of the Chagos Archipelago in 1965, the UK established fisheries zone, issued fishing licenses to Mauritians and declared fisheries conservation and management, and environmental protection and preservation zones.[411] In establishing these zones, the UK and Mauritius exchanged

---

[403] *Id.*

[404] *Id.*, ¶ 68.

[405] *Id.*, ¶ 69 et seq.

[406] *Id.*, ¶¶ 69–87.

[407] *Id.*, ¶¶ 74–87.

[408] *Id.*

[409] *Id.*, ¶¶ 77, 85.

[410] *Id.*, ¶¶ 2, 81.

[411] *Id.*, ¶¶ 112–25.

doi:10.6342/NTU201903686

communications and convened a commission.[412] The Parties take contrasting views on the UK's actions.[413] Similarly, Mauritius occasionally reiterated its claim of sovereignty over the Chagos Archipelago.[414]

Prior to the establishment of a Marine Protected Area (MPA), the UK initiated a public consultation process regarding the creation of the MPA beginning on 10 November 2009 and ran until 5 March 2010.[415] In regard to the MPA, Mauritius and the UK also exchanged communications, in which Mauritius objected to such establishment.[416] Finally, on 1 April 2010, the UK unilaterally declared the formal establishment of the MPA through the "British Indian Ocean Territory Proclamation No. 1 of 2010.[417]

In terms of the dispute over the sovereignty of the Chagos Archipelago, Mauritius did not openly contest to the status of the Chagos Archipelago from 1968 to 1980.[418] The UK understood the absence of public claims by Mauritius as an indication that it did not question the BIOT (i.e. the Chagos Archipelago) was not part of the territory of Mauritius.[419] Whereas, Mauritius attributed its silence to the socio-economic background and reliance upon the UK at the time.[420] From 1980 onwards, Mauritius has contended it has sovereignty over the Chagos Archipelago in statements before the United Nations General Assembly and in bilateral communication, while the UK's response was consistent in maintaining British rule over the disputed area.[421] The Parties hold conflicting views on whether Mauritius' statements indicate a claim of sovereignty or mere

---

412 *Id.*

413 *Id.*, ¶ 125.

414 *Id.*, ¶ 119.

415 *Id.*, ¶ 126 et seq.

416 *Id.*

417 *Id.*, ¶ 152 (some parts of the Proclamation can be seen in ¶ 287 of the Arbitral Award).

418 *Id.*, ¶ 100.

419 *Id.*

420 *Id.*

421 *Id.*, ¶ 103.

doi:10.6342/NTU201903686

restatement of the 1965 Undertakings.[422] Thereafter, the Chagos Archipelago was incorporated and adopted in Mauritius' domestic laws and regulations on maritime zones, against which the UK protested.[423] Meanwhile, the UK acceded to international conventions, including the 1982 UNCLOS and 1995 Fish Stock Agreement (FSA), and extended their territorial scope to the Chagos Archipelago.[424] Mauritius objected to the extension of the 1995 FSA.[425] In 2008, Mauritius deposited its geographic coordinates to the UN, including those of the Chagos Archipelago, and in 2009, the outer limits of the continental shelf to the Commission on the Limits of the Continental Shelf (CLCS).[426] The UK voiced its objection and thereafter the Parties entered into talks but to no avail in resolving their differing views.[427]

B. Mauritius' First Submission

1. The Parties' Arguments

In the First Submission, Mauritius inquires how the term "coastal State" is to be interpreted and applied under UNCLOS.[428] The Tribunal recognizes that nothing in UNCLOS provides how the "coastal State" is determined in cases where the land sovereignty is in dispute.[429] In other words, identifying the coastal State for the purpose of UNCLOS would require recourse to rules outside the realm of UNCLOS. Mauritius and the UK argue over whether UNCLOS Tribunals (i.e. judicial forums under Article 287) may apply "exterior sources of law" (other than UNCLOS) and address such matters.[430]

---

[422] *Id.*

[423] *Id.*, ¶¶ 103–5.

[424] *Id.*, ¶ 106.

[425] *Id.*

[426] *Id.*, ¶¶ 107–11.

[427] *Id.*

[428] *Id.*, ¶¶ 163–203.

[429] *Id.*, ¶ 203.

[430] *Id.*

doi:10.6342/NTU201903686

The Tribunal points out the subject-matter jurisdiction is governed by Article 288(1) of UNCLOS.[431] Neither Party has raised Article 297 to claim automatic exception of the First Submission, nor made any optional declaration to exclude certain disputes from compulsory jurisdiction under Article 298.[432] Thus, the issue here is whether Mauritius' First Submission is a dispute "concerning the interpretation or application" of UNCLOS within the scope of the Tribunal's jurisdiction under Article 288(1).[433]

The Parties delve into how they interpret Article 288(1), as well as other relevant provisions, to include or exclude the First Submission.

a. Mauritius' Argument

Mauritius submits its First Submission is a dispute "concerning the interpretation or application" of UNCLOS, and thus falls within the ambit of the Tribunals' jurisdiction under Article 288(1).[434] Mauritius places great emphasis on Article 298(1)(a)(i) and 293 to support a finding of jurisdiction.

i. Article 288

Mauritius argues that it merely seeks the Tribunal to determine whether a State qualifies as the coastal State for the purpose of the UNCLOS. It does not attempt to "force a sovereignty dispute into the confines of the Convention" and extend jurisdiction to disputes other than those concerning the interpretation and application of UNCLOS.[435] Rather, it asks that in a dispute concerning the interpretation or application of UNCLOS, "what questions of public international law may be "sufficiently closely connected to that dispute that they are questions

---

[431] *Id.*, ¶ 204.

[432] *Id.*, ¶¶ 205–6.

[433] *Id.*, ¶¶ 161, 206.

[434] *Id.*, ¶ 175–6.

[435] *Id.*

doi:10.6342/NTU201903686

the Tribunal can and must consider."[436] While Mauritius does not argue all territorial sovereignty issues fall within the scope of Article 288(1), it contends that sovereignty disputes are not inherently excluded from compulsory procedures entailing binding decisions.[437]

ii. Article 293

Mauritius submits that Article 293 permits UNCLOS Tribunals to apply other rules of international law necessary to resolve "issues closely linked or ancillary to questions arising directly under the Convention."[438] Such issues are also considered ones concerning the interpretation or application of UNCLOS.[439] According to Mauritius, it should first be determined whether there's a dispute falling within the scope of Article 288(1) and if the Tribunal finds it so, then the Tribunal shall apply UNCLOS and other rules of international law not incompatible with UNCLOS.[440] Mauritius refers to cases such as *Guyana v. Suriname* and *M/V Saiga No.2* to suggest that other rules of international law have been applied.[441]

iii. Article 298(1)(a)(i)

Mauritius finds further support for jurisdiction in the implication of an *a contrario* reading of Article 298(1)(a)(i). Mauritius contends that UNCLOS does not exclude jurisdiction over "mixed disputes," over which an UNCLOS Tribunal may exercise "incidental or ancillary jurisdiction."[442] Essentially, Mauritius submits that Article 298(1)(a)(i) does not suggest mixed disputes can only arise in the context of maritime delimitation. Maritime delimitation is merely an

---

[436] *Id.*, ¶ 177.

[437] *Id.*, ¶ 178.

[438] *Id.*, ¶¶ 177, 182.

[439] *Id.*, ¶ 182.

[440] *Id.*

[441] *Id.*, ¶ 183.

[442] *Id.*, ¶ 189.

doi:10.6342/NTU201903686

obvious example. Any issue that "cannot be determined in isolation without reference to territory" is a mixed dispute subject to compulsory jurisdiction.[443]

The inclusion of an opt-out clause in Article 298(1)(a)(i) implies mixed disputes are covered by UNCLOS jurisdiction.[444] Otherwise, it would not have been necessary to adopt the optional exclusion provision in the first place. Mauritius refers to the drafting history of Article 298(1)(a)(i) where States' proposal to include land sovereignty disputes in Article 297 failed to reach consensus.[445]

Mauritius concludes not all sovereignty disputes are automatically included, but are not automatically excluded. A dispute relating to land sovereignty falls within Article 288(1) when it "must necessarily be dealt with in order to solve a dispute that is within the Convention."[446]

b. UK's Argument

The UK contends the absence of jurisdiction on the ground that the First Submission falls beyond the four corners of Article 288(1) for three main reasons. As discussed further below: Firstly, an interpretation of Article 288(1) fails to include a dispute of UNCLOS that is "predicated on the determination of a long-standing dispute over a sovereignty that [Mauritius] wishes to be decided by reference to sources exterior to the Convention."[447] Secondly, an a *controrio* interpretation of Article 298(1)(a)(i) does not support reading it in favor of jurisdiction over disputed territorial sovereignty claims.[448] Thirdly, the implication of Article 293 to allow jurisdiction over non-UNCLOS disputes (i.e.

---

443 *Id.*, ¶ 190.

444 *Id.*, ¶ 191.

445 *Id.*, ¶¶ 179, 191.

446 *Id.*, ¶ 193.

447 *Id.*, ¶ 174.

448 *Id.*, ¶¶ 187–93.

doi:10.6342/NTU201903686

disputes decided by rules outside of UNCLOS) related to those of UNCLOS interpretation or application is untenable.[449]

i. The Ordinary meaning of Article 288(1)

The UK begins with an interpretation of the ordinary meaning to Article 288(1). Aside from the proviso to Article 288(1) set out in Section 1 and Section 3 of Part XV UNCLOS,[450] the context of the provision—Article 288(2)—implies another restriction. As stipulated in Article 288(2), even jurisdiction over *related agreements* with explicit reference to Part XV are constrained to those "*related to the purposes of this Convention*." By the same token, "jurisdiction over disputes which fall to be decided under agreements *unrelated* or customary international law" must also be constrained.[451]

As part of the context of Article 288(1), the same conclusion is implicit from Article 297, in which certain categories of disputes concerning the exercise of sovereign authority are excluded. The UK does not find it reasonable the same States that adopted Article 297 would want UNCLOS Tribunals to decide "the anterior and far more sensitive issues."[452] The construction of text indicates the scope of subject-matter jurisdiction is limited to those related to the Convention, and as such, "disputes concerning matters that are wholly exterior to the Convention do not fall within Article 288(1).[453] Presenting Mauritius' claim as a dispute over determining who the coastal State is does not render otherwise.[454]

---

449 *Id.*, ¶ 184 et seq.

450 UNCLOS, *supra* note 3, art. 286.

451 Chagos Arbitration, *supra* note 2, ¶ 169.

452 Chagos Marine Protected Area, Hearing on Jurisdiction and Merits, PCA Reference MU-UK 677,¶¶ 7–13 (Vol. 6, May 1, 2014) [hereinafter Hearing on Jurisdiction and Merits].

453 Chagos Arbitration, *supra* note 2, ¶ 169.

454 *Id.*

doi:10.6342/NTU201903686

The claim at hand is one where "questions of sovereignty lie at the heart;" hence, it is not one concerning the interpretation or application" of UNCLOS.[455]

ii. Characterization of Mauritius' Claim

In characterizing Mauritius' claim, the UK separates an UNCLOS claim from issues ancillary or incidental to an UNCLOS claim. As far as Mauritius' contention of other claims made under Annex VII Tribunals have extended jurisdiction beyond UNCLOS is concerned, the UK draws a distinction between the dispute at hand and *Guyana v. Suriname* and *M/V Saiga No.2* cases.[456] The UK argues that in both cases "some incidental issues arose in relation to what was *plainly* a dispute as to the interpretation or application of UNCLOS," whereas, in the *Chagos* case, "sovereignty is the principal issue."[457] If the Tribunal decides on the issue of territorial sovereignty and rules in favor of Mauritius, "there would be no UNCLOS case left… to decide."[458] As for Mauritius' view that the claim is a "mixed dispute," the UK rejects in full and finds Mauritius' reliance on Article 298(1)(a)(i) untenable.[459]

iii. Article 293

The UK argues Mauritius' invocation of Article 293 to be incorrect in allowing UNCLOS Tribunals to decide disputes with reference to rules of international law other than UNCLOS.

The UK emphasizes that Article 293 is not itself a basis of jurisdiction,[460] nor does it support an expansion of jurisdiction under Article 288(1).[461] Its reference

---

[455] *Id.*, ¶ 170.

[456] *Id.*, ¶ 173.

[457] *Id.*

[458] *Id.*; Hearing on Jurisdiction and Merits, *supra* note 451, at 677, ¶¶ 2–5.

[459] Chagos Arbitration, *supra* note 2, ¶ 174.

[460] *Id.*, ¶ 186 (drawing reference from judicial decision of the ICJ and PCA where the courts and tribunals have expressly distinguished between the notion of jurisdiction and applicable law).

[461] *Id.*, ¶¶ 184–5.

doi:10.6342/NTU201903686

to "other rules of international law not incompatible with this Convention" is to "dispel any doubt" that UNCLOS Tribunals "may have recourse to such secondary rules as the law of treaties, State responsibility […]," and may apply other rules of international law when a provision explicitly provides such application.[462]

iv. Article 298(1)(a)(i)

In response to Mauritius' heavily relied upon proviso to Article 298(1)(a)(i), the UK stresses the extensive debate surrounding whether issues of territorial sovereignty may be subject to compulsory procedures when incidental to maritime boundary issue is not relevant because Article 298(1)(a)(i) is confined to issues involving "delimitation of maritime boundary."[463]

In refuting Mauritius' reliance on Article 298, the UK puts forth four main points. Firstly, on the basis of the "general exclusion of unsettled territorial sovereignty disputes from compulsory dispute settlement," Article 298(1)(a)(i) is merely a clarification that such exclusion equally applies "in the context where such a dispute would fall for consideration […] in the context of mandatory conciliation." Secondly, even an *a contrario* reading of Article 298(1)(a)(i) does not hold up Mauritius' argument, for the provision governs disputes over maritime delimitation and historic bays or titles. Any *a contrario* argument would still be confined to these disputes.[464] Thirdly, the UK argues Mauritius' interpretation of Article 298(1)(a)(i) to be illogical. While States agreed to incorporate an opt-out clause, which excludes territorial disputes from mandatory conciliation when they arise in the context of maritime delimitation claims, it would not make much sense to suggest the same States were "willing to agree to the compulsory determination of such disputes in the far broader context of claim made wherever the Convention refers to a coastal state."[465] Lastly, the negotiating history of

---

[462] *Id.*, ¶ 185.

[463] *Id.*, ¶¶ 174, 194.

[464] *Id.*, ¶ 195.

[465] *Id.*; Hearing on Jurisdiction and Merits, *supra* note 451, at 682,¶¶ 14–9.

doi:10.6342/NTU201903686

Article 298(1)(a)(i) referred to by Mauritius were all discussed in the context of maritime delimitation disputes. The records do not indicate that a dispute of land sovereignty could be raised in the context of determining who is the coastal State, because such disputes were not considered.[466]

2. The Tribunal's Decision

The *Chagos* Tribunal understands Mauritius submission to request the Tribunal to interpret and apply the term "coastal State" for the purpose of UNCLOS. However, UNCLOS does not depict how a coastal State is identified in the event that land sovereignty fronting the coast is in dispute.[467] From the outset, the Tribunal begins its discussion on the premise that:

> [T]he identity of the coastal state for the purpose of the Convention would be a matter to be determined through the application of rules of international law lying outside the international law of the sea.

Mauritius' submission in asking whether the Tribunal "may apply such exterior sources of law and address such matters," it poses the question on the scope of subject-matter jurisdiction under UNCLOS.[468]

In answering the question whether Mauritius' First Submission is a dispute "concerning the interpretation or application" (i.e. under 288(1)) of UNCLOS, the *Chagos* Tribunal tackles it through a two-tier examination. First, the Tribunal undergoes a characterization of the First Submission to determine the "nature" of the submitted claim.[469] Once the Tribunal finds that the submission is "at its core, a matter of territorial sovereignty," it then proceeds to examine "to what extent does Article 288(1) permit a tribunal to determine issues of disputed land

---

[466] Chagos Arbitration, *supra* note 2, ¶ 196.

[467] *Id.*, ¶ 203.

[468] *Id.*

[469] *Id.*, ¶ 206.

doi:10.6342/NTU201903686

sovereignty as a necessary precondition" to a dispute of UNCLOS rights and obligations.[470]

a. Characterization of the First Submission

The *Chagos* Tribunal envisions a two-step process to ascertain the "nature" of a claim. In addition to according particular attention to the Applicant's formulation of claim, the Tribunal should: (1). "determine on an objective basis the dispute dividing the parties, by examining the position of both parties;" and (2). in the process "isolate the real issue in the case and [to] identify the object of the claim."[471]

The Tribunal surveys the records in relation to the First Submission and identifies existing disputes between Mauritius and the UK as follows: (1). the sovereignty of the Chagos Archipelago, (2). The manner in which the UK's MPA was declared and its implications for the 1965 Undertakings, and (3). Identity of the "coastal State" of the Chagos Archipelago.[472] While the second dispute is distinct from the question of sovereignty and not relevant to the jurisdiction of the First Submission,[473] the Tribunal hence focuses on the first and third.

The Tribunal then "evaluates where the relative weight of the dispute lies." The Tribunal was caught between identifying whether the Parties' dispute "primarily concerns" sovereignty or the interpretation and application of the term "coastal State."[474] In other words, the question is which of the disputes is merely a manifestation and forms only one aspect of the other.[475]

In light of Mauritius' statements and records documenting the Parties' dispute over sovereignty of the Chagos Archipelago, the Tribunal found the concern of

---

[470] *Id.*

[471] *Id.*, ¶ 208; Nuclear Tests (N.Z. v. Fr.), *supra* note 57, at, 466, ¶ 30.

[472] Chagos Arbitration, *supra* note 2, ¶ 211.

[473] *Id.*, ¶ 210.

[474] *Id.*, ¶ 211.

[475] *Id.*

doi:10.6342/NTU201903686

the submission lies in the sovereignty dispute, and the implications put forth by Mauritius in finding it as the coastal State of the Chagos Archipelago do not follow from the "narrow dispute" over the term "coastal State."[476] The Tribunal concludes the dispute is "properly characterized as relating to land sovereignty over the Chagos Archipelago."[477]

b. The Tribunal's Jurisdiction

While the First Submission is characterized as, "at its core," a dispute over land sovereignty, this does not answer the question of jurisdiction.[478] The Tribunal views the submission as a dispute over land sovereignty that "touches in some ancillary manner on matters regulated by [UNCLOS]."[479] The Tribunal proceeds to discuss whether Article 288(1) allows the exercise of jurisdiction over such a dispute.

In the Tribunal's view, the Parties' debate over an *a contrario* reading of Article 298(1)(a)(i) does not inform to what extent are territorial sovereignty disputes subject to compulsory jurisdiction.[480] The absence of a clear answer in the negotiating records of UNCLOS suggests no UNCLOS drafting participant "expected that a long-standing dispute over territorial sovereignty would ever be considered a dispute 'concerning the interpretation or application of [UNCLOS]'."[481] Accordingly, no land sovereignty dispute falls within Article 288(1). The Tribunal relies on three main reasons as follows.

First, the Tribunal infers from the manifestation of Articles 297 and 298 the drafters' distrust in compulsory dispute settlement. The automatic and optional exception clauses are indicative of the drafters' intention to leave out sensitive issues. The "inherent sensitivity" of territorial sovereignty disputes is even greater

---

[476] *Id.*

[477] *Id.*, ¶ 212.

[478] *Id.*, ¶ 213.

[479] *Id.*

[480] *Id.*, ¶¶ 214–5.

[481] *Id.*, ¶ 215.

doi:10.6342/NTU201903686

than issues of sovereign right and jurisdiction, and maritime delimitation. It would be unreasonable to hold that the drafters had intended to accept compulsory jurisdiction over "separate claims" of "more fundamental issues of territorial sovereignty under Article 288(1)."[482] If the drafters had so intended, they would have also adopted an opt-out clause of land sovereignty disputes in Article 298.[483]

Moreover, an *a contrario* reading of Article 298(1)(a)(i) does not warrant an interpretation that territorial disputes are otherwise subject to compulsory jurisdiction.[484] On the one hand, Article 298(1)(a)(i) only relates to disputes involving maritime boundary and historic titles or bays. On the other hand, an *a contrario* reading would "at most" purport that an issue of land sovereignty might be subject to compulsory jurisdiction if it were "genuinely ancillary" to a dispute over maritime delimitation, or historic titles or bays.[485] It would run counter to the drafters' intent to construe Article 298(1)(a)(i) to assume jurisdiction over land sovereignty under the disguise of defining the term "coastal State."[486]

As a general rule, the jurisdiction under Article 288(1) may be extended to "making such findings of fact or ancillary determinations of law as are necessary" to resolve a dispute concerning the interpretation or application of UNCLOS.[487] If the real issue and object of a claim do not relate to the interpretation or application of UNCLOS, no incidental connection between the claim and other matters regulated by UNCLOS would be sufficient to render the whole dispute within the ambit of Article 288(1).[488] This does not exclude the possibility that a minor issue of territorial sovereignty could be ancillary to a dispute concerning

---

[482] *Id.*, ¶ 216.

[483] *Id.*, ¶ 217.

[484] *Id.*, ¶ 218.

[485] *Id.*

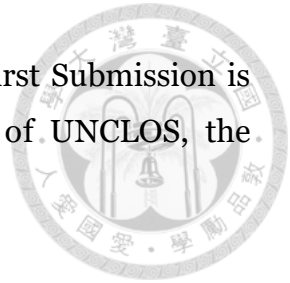
[486] *Id.*, ¶ 219.

[487] *Id.*, ¶ 220.

[488] *Id.*

doi:10.6342/NTU201903686

the interpretation or application of UNCLOS.[489] Given the First Submission is not a dispute concerning the interpretation or application of UNCLOS, the Tribunal need not consider further.



C. Mauritius' Second Submission

1. The Parties' Arguments

Mauritius submits the UK is not entitled to unilaterally declare an MPA or other maritime zones because Mauritius has rights as a coastal State under UNCLOS.[490] The Parties differ in whether the First and Second Submission are distinct from each other, and whether the Tribunal's jurisdiction extends to the Second Submission.[491]

a. Mauritius' Argument

Mauritius distinguishes its Second Submission from the First. The former requests the Tribunal to determine that Mauritius has "rights as a coastal State," while the latter submits the UK is not "the coastal State" for the purpose of UNCLOS.[492] Mauritius asks the Tribunal to decide based on the UK's undertakings, which includes the return of the Chagos Archipelago to Mauritius when it is no longer needed for defense purposes.[493] Mauritius contends the 1965 Undertakings accords it the attributes of a coastal State.[494] Mauritius argues that the Tribunal need not consider the question of land sovereignty over the Chagos Archipelago.[495]

---

[489] *Id.*, ¶ 221.

[490] *Id.*, ¶ 222.

[491] *Id.*, ¶ 228.

[492] *Id.*, ¶ 226.

[493] *Id.*, ¶ 227.

[494] *Id.*

[495] *Id.*

doi:10.6342/NTU201903686

b. UK's Argument

The UK argues the Tribunal is without jurisdiction to decide on Second Submission for the same reason as the First Submission. Namely, the Second Submission is also asking the Tribunal to address sovereignty issues.[496] The UK puts forth two reasons in objecting to the Tribunal's jurisdiction. First, the Second Submission requires the Tribunal to interpret and apply the 1965 Undertakings (i.e. other sources of alleged international law exterior to UNCLOS)[497], which Mauritius claims to establish "some reversionary interest in sovereignty" that infers certain attributes of a coastal State.[498] Secondly, Mauritius submits it has rights as "a" coastal State, but nowhere in UNCLOS allows more than one coastal State.[499]

2. The Tribunal's Decision

The Tribunal agrees the First and Second Submissions are presented differently. A determination of Mauritius having the rights as a coastal State would be to find the UK is less than fully sovereign over the Chagos Archipelago.[500] The Tribunal once again evaluated where the relative weight of the dispute lies. In identifying the dispute between the Parties, the Tribunal looked beyond formulation and considered the context of the submission and the manner in which it was presented. Similar to the First Submission, the Tribunal finds the dispute over sovereignty of the Chagos Archipelago to be "predominant."[501] The issue of Mauritius having attributes of a coastal State is merely an aspect of the larger dispute over sovereignty.[502]

---

[496] *Id.*, ¶ 223.

[497] *Id.*, ¶ 224.

[498] *Id.*

[499] *Id.*, ¶ 225.

[500] *Id.*, ¶ 229.

[501] *Id.*

[502] *Id.*, ¶¶ 211, 226 (describing the evaluation of the First and Second Submission as "representing a manifestation" of the dispute and "forming one aspect of a larger question").

doi:10.6342/NTU201903686

While the Parties are at odds over the manner in which the MPA was declared,[503] "the object of [the Second Submission]" is to "bolster Mauritius claim to sovereignty.[504] In both First and Second Submission, Mauritius seeks a relief to declare that the UK is not entitled to declare the MPA. The Tribunal concludes the Second Submission is characterized as relating to the land sovereignty of the Chagos Archipelago; and hence, for the same reason as the First Submission, the Tribunal is without jurisdiction.[505]

D. Dissenting Opinion of Judge Wolfrum and Kateka

The dissenting opinion pointed out the Tribunal did not formulate and adhere to the doctrine laid down by the jurisprudence it had invoked.[506] Judge Wolfrum and Kateka do not consider territorial sovereignty disputes *per se* were disputes concerning the "interpretation or application" of UNCLOS.[507] The dissenting opinion took the view that the dispute in *Chagos* was not one over territorial sovereignty.[508]

Judge Wolfrum and Kateka do not agree with the view that territorial sovereignty disputes are inherently excluded from Article 288(1). The dissenting opinion considers it "permissible to decide *incidentally* about sovereignty issues [...] having recourse to general international law or specific international agreements (emphasis added)."[509]

The dissenting opinion suggests that since the Parties' dispute falls within the scope of compulsory jurisdiction (i.e. an UNCLOS dispute that concerns Article

---

[503] *Id.*, ¶ 230 (The Tribunal holds the same view in the First Submission).

[504] *Id.*

[505] *Id.*,

[506] Chagos Dissenting Opinion, *supra* note 4, ¶¶ 3–8.

[507] Talmon, *supra* note 4, at 933.

[508] Chagos Dissenting Opinion, *supra* note 4, ¶ 9.

[509] *Id.*, ¶ 45.

doi:10.6342/NTU201903686

56 of UNCLOS), the question of incidental jurisdiction over sovereignty disputes may be raised. The dissenting opinion focused more on the wording of Mauritius' submissions,[510] and opined a broader view requiring merely a nexus between the "UNCLOS dispute" and territorial sovereignty dispute (non-UNCLOS). Unlike the majority opinion, the dissenting opinion suggests an "incidental connection" would suffice to allow UNCLOS Tribunals to exercise jurisdiction over the territorial sovereignty issues. The "incidental connection" approach adopted by the dissenting opinion does not distinguish between major and minor issues as did the majority. Rather, the dissenting opinion discussed the possibility of deciding land sovereignty issues in general.[511]

Both the majority and dissenting opinions of the *Chagos* Arbitration extend UNCLOS jurisdiction to "ancillary" territorial sovereignty issues.[512] The opinions, however, arrive at contrasting conclusions.[513] The majority view holds that the dispute itself was over territorial sovereignty, rather than an issue ancillary to an UNCLOS dispute. The dissenting opinion considers the dispute was one concerning Article 56 of UNCLOS with ancillary territorial sovereignty issues. Neither view offers further reasoning as to why the territorial sovereignty issue is necessary in resolving Submissions 1 and 2 or why territorial sovereignty issue is merely ancillary.[514] However, one issue is in agreement: territorial sovereignty disputes are not automatically excluded from compulsory jurisdiction. Such disputes may be subject to compulsory jurisdiction if they are "ancillary" to disputes "concerning the interpretation or application of UNCLOS."[515] In this regard, the Tribunal left open the possibility that UNCLOS Tribunals could find

---

[510] Talmon, *supra* note 4, at 933–4.

[511] *Id.*, 935–6.

[512] Gervasi, *supra* note 323, at 197.

[513] Chagos Arbitration, *supra* note 2, ¶ 220; Chagos Dissenting Opinion, *supra* note 4, ¶ 45.

[514] Chagos Arbitration, *supra* note 2, ¶ 220; Chagos Dissenting Opinion, *supra* note 4, ¶ 45.

[515] Zou & Ye, *supra* note 317, at 338–9.

doi:10.6342/NTU201903686

jurisdiction over non-UNCLOS disputes.[516] However, the extent to which a dispute is considered "ancillary"[517] and what is meant by "minor" is obscure.[518]

E. Analysis

The *Chagos* Arbitration reveals the Tribunal's interpretation of the jurisdictional provision at issue and the characterization of disputes that are not relevant to territorial sovereignty. The UK, Mauritius and the Tribunal do not suggest disputes involving territorial sovereignty are automatically excluded from compulsory procedures. Each has argued differently in terms of mixed disputes. What can be concluded from the Tribunal's reasoning is Article 288(1) excludes "pure" land sovereignty disputes that are essentially the real issue and object of the claim. Compulsory jurisdiction over mixed territorial sovereignty disputes remains feasible.

From the UK's view, land sovereignty disputes may appear in three forms: as the "principal" issue of a claim, ancillary or incidental to an UNCLOS dispute, or part of a "mixed disputes."[519] The first refers to claims in which land sovereignty is the principal issue. Such dispute is not considered a dispute concerning the interpretation or application of UNCLOS under Article 288(1). Not only would a decision on the territorial sovereignty issue require reference to rules beyond the Convention, but also resolve the dispute altogether without needing to further rule on the claim.[520] There would then be no UNCLOS dispute left for the Tribunal to decide. The first form stands in contrast to the second, in which land

---

[516] Talmon, *supra* note 4, at 935; Tzeng, *supra* note 4, at 566–7. (referring to such ground of jurisdiction as "the principle of effectiveness").

[517] Lan Ngoc Nguyen, *The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?*, 31 INT'L J. MARINE & COASTAL L. 120, 132–5 (2016).

[518] Talmon, *supra* note 4, at 935.

[519] *See supra* Part I, Chapter V. (referring to "mixed disputes" as ones involving land sovereignty under Article 298(1)(a)(i)).

[520] AKEHURST'S, *supra* note 12, at 162 (observes that the status as a coastal State is not addressed by UNCLOS, but is instead the result of "a valid title to land sovereignty").

doi:10.6342/NTU201903686

sovereignty issue is only "ancillary or incidental" to the UNCLOS dispute in question. As an ancillary issue, a reference to rules outside of UNCLOS is permissible and the dispute as a whole would fall within Article 288(1). The last one is where land sovereignty issues exist in disputes set out in Article 298(1)(a)(i). Such an issue must occur in relation to the type of disputes expressly stated in Article 298(1)(a)(i), which is not present in the *Chagos* case.

Mauritius does not argue all land sovereignty disputes are covered by UNCLOS compulsory dispute settlement. Nor are such disputes inherently excluded from compulsory jurisdiction. Land sovereignty issues are subject to jurisdiction under Article 288(1) when it is "necessary" to resolve "issues closely linked or ancillary to questions arising directly under the Convention."

While the Tribunal invoked the balancing test from previous ICJ jurisprudence to characterize the dispute, commentators have found the test in determining the nexus between Mauritius' claims and the UNCLOS was to a degree based on the Tribunal's discretion.[521] The "preponderance test" allows a "significant degree of flexibility" and operates on a "case-by-case" basis in determining whether a dispute falls within the Tribunal's subject-matter jurisdiction.[522]

The *Chagos* majority found ("pure") territorial sovereignty disputes *per se* were beyond the scope of jurisdiction,[523] but further discussed whether sovereignty issues ancillary to disputes regulated by UNCLOS fall within the Tribunal's jurisdiction.[524]

The Tribunal distinguishes disputes of land sovereignty into three types.[525] Firstly, *pure territorial sovereignty disputes*, of which its real issue and object do

---

[521] *See*, *e.g.*, James Harrison, *Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation*, 48 OCEAN DEV. & INT'L L. 269, 277 (2017).

[522] *Id.*

[523] David A. Colson & Brian J. Vohrer, *In re Chagos Marine Protected Area (Mauritius v. United Kingdom)*, 109 AM. J. INT'L L. 845, 851 (2015).

[524] Zou & Ye, *supra* note 317, at, 338–9; Qu, *supra* note 323, at 45.

[525] *See supra* Part I, Chapter V.

doi:10.6342/NTU201903686

not concern the interpretation or application of UNCLOS (i.e. non-UNCLOS dispute), are outside the scope of the Tribunal's jurisdiction.[526] The Tribunal finds the weight of the First Submission lies "primarily" in the territorial sovereignty of the Chagos Archipelago. As such, the real issue and object of Mauritius' First Submission are to seek a decision on the territorial sovereignty of the Chagos Archipelago and not a dispute concerning the interpretation or application of UNCLOS. The sole issue of the First Submission is the dispute of territorial sovereignty over the Chagos Archipelago and hence, the Tribunal cannot exercise its jurisdiction.

Second, land sovereignty issues or other non-UNCLOS issues are permissible so long as they are "ancillary" and "necessary" to resolve the "UNCLOS dispute," which is the real issue and object of the claim in question.[527] The First Submission does not satisfy the premise of this general rule, because it is not an "UNCLOS dispute" in the first place. If the dispute is not one concerning the interpretation or application of UNLCOS, incidental connection to territorial sovereignty issues would not suffice to render the entire dispute subject to compulsory jurisdiction.[528]

Third, an UNCLOS dispute over maritime delimitation or other UNCLOS disputes explicit in Article 298(1)(a)(i) may include consideration of land sovereignty issues when they are "genuinely ancillary" to the UNCLOS dispute.[529] With respect to the Parties' debate over Article 298(1)(a)(i), the Tribunal rejects the land sovereignty issue in the First Submission amounts to one "genuinely ancillary" to a dispute of maritime delimitation or historic title that is permissible under the provision. In understanding the extent to which Article 298(1)(a)(i) allows consideration of sovereignty over land territory, the Tribunal seems to use

---

[526] Chagos Arbitration, *supra* note 2, ¶¶ 208–12.

[527] *Id.*, ¶ 220.

[528] *Id.*

[529] *Id.*, ¶ 218.

doi:10.6342/NTU201903686

the term—"genuinely ancillary"—to mean the equivalent of "necessarily [involving] the concurrent consideration" in Article 298(1)(a)(i).

The *Chagos* Tribunal did not expand the scope of subject-matter jurisdiction to include territorial sovereignty dispute.[530] The Tribunal did, however, hinted the possibility of "incidental jurisdiction" over "minor issues of territorial sovereignty" "ancillary" to a dispute concerning the interpretation or application of UNCLOS.[531] This thesis observes such minor territorial sovereignty issues is an example of the second aforementioned type of dispute, which the Tribunal refers to as "ancillary determinations […] as are necessary to resolve the dispute." The Tribunal does not provide any actual example of what "minor issues of territorial sovereignty" are. One interesting question raised by Talmon is how land sovereignty issues would ever only be "ancillary" or "incidental" to UNCLOS disputes if they are also "necessary" to resolve the dispute, and how UNCLOS disputes involving such issues would be excluded from compulsory conciliation under Article 298(1)(a)(i) but at the same time be subject to incidental jurisdiction of UNCLOS Tribunals.[532]

II. South China Sea Arbitration (the Philippines v. China)

The South China Sea arbitral award is another important key to unraveling how Article 288(1) should be interpreted. Similar to the *Chagos* Arbitration, the South China Sea Arbitration was submitted by the Philippines in accordance with the compulsory dispute settlement procedure in Section 2 of Part XV under Annex VII of UNCLOS. In addition, the Philippines' claim did not appear to relate to territorial sovereignty upon initial observation. Lastly, the Tribunal's decision on jurisdiction provides a stark contrast to the previous decision.

---

[530] Klein (2016), *supra* note 398, at 408.

[531] *Id.*, at 415.

[532] Talmon, *supra* note 4, at 936.

doi:10.6342/NTU201903686

More specifically, the Arbitration can illuminate whether the South China Sea Tribunal deviated from or followed the *Chagos* Arbitration. Essentially, the arbitral awards may either be a corollary to the result of treaty interpretation in Chapter IV or a discrepancy thereto.

A. Background of the South China Sea Arbitration

The Philippines and China are both contracting parties to UNCLOS.[533] China made a declaration to opt-out of Article 298(1)(a)–(c) on 25 August 2006, whereas the Philippines made no such declaration.[534] The Philippines instituted proceeding against China on 22 January 2013, pursuant to compulsory dispute settlement in Article 286 and 287 of UNCLOS.[535]

The Philippines requests the Tribunal to rule on three inter-related matters, which amount to 15 submissions.[536] First, the Philippines seeks declarations that the Parties' rights and obligations are governed by UNCLOS and China's nine-dash line is inconsistent with UNCLOS.[537] Second, it seeks determinations of characterization of maritime features located in the South China Sea under UNCLOS.[538] Third, it seeks declarations that China's interference with the Philippines' exercise of rights and freedoms violated UNCLOS provisions.[539]

In the Philippines' view, UNCLOS is not concerned with territorial disputes.[540] The Philippines maintains it does not seek rulings on the territorial sovereignty aspect of its dispute with China, nor is it requesting a claim of maritime

---

533 UNCLOS Status, *supra* note 87 (The Philippines ratified UNCLOS on 8 May 1984 and China ratified on 7 June 1996).

534 *Id.*

535 South China Sea Arbitration, *supra* note 1, ¶¶ 2, 6.

536 *Id.*, ¶¶ 7, 99–102.

537 *Id.*, ¶ 4.

538 *Id.*, ¶ 5.

539 *Id.*, ¶ 6.

540 *Id.*, ¶ 8.

doi:10.6342/NTU201903686

delimitation.[541] In China's view, in addition to consistently refusing to accept or participate in the arbitration,[542] China on occasion objects to the Tribunal's jurisdiction over what it characterizes as territorial sovereignty disputes over maritime features.[543]

Throughout the proceedings, China never appeared before the Tribunal or submitted counter-memorial or relevant documents.[544] However, China has in several instances articulated its position on the arbitration.[545] These include public statements and diplomatic Note Verbales to the Philippines and the members of the Tribunal.[546]

B. Jurisdictional Issue of the Case

Before giving an overview of the Parties' main argument on the subject-matter jurisdiction over alleged territorial sovereignty disputes, it should first be noted that the Tribunal must first satisfy itself of jurisdiction prior to considering the substantive matters of the case.

The non-participation of China does not constitute a bar to the proceedings.[547] Nonetheless, in the absence of China's participation, the Tribunal has a duty to satisfy itself that it has jurisdiction before rendering its decision on the merits.[548] The Tribunal finds that China's statements and communications as "equivalent to or as constituting preliminary objection."[549] The Tribunal holds that these documents "effectively constitute a plea" of jurisdiction.[550] One the one hand, to

---

[541] *Id.*

[542] *Id.*, ¶ 10.

[543] *Id.*, ¶ 14.

[544] *Id.*, ¶ 112.

[545] *Id.*, ¶ 10.

[546] *Id.*, ¶¶ 14, 27, 56, 64, 83.

[547] *Id.*, ¶¶ 11, 112–3.

[548] *Id.*, ¶¶ 12–3; UNCLOS, *supra* note 3, Annex VII, art. 9.

[549] South China Sea Arbitration, *supra* note 1, ¶¶ 104, 121–2.

[550] *Id.*, ¶ 104.

doi:10.6342/NTU201903686

safeguard China's procedural rights, the Tribunal assures China's full opportunity to be heard and to present its case through a number of measures.[551]

On the other hand, the Tribunal ensures the Philippines does not suffer disadvantages from China's non-appearance.[552] Though the Tribunal requests the Philippines to produce written arguments on the Tribunal's jurisdiction,[553] it does not limit itself to consider only the issues raised in China's statements.[554] The Tribunal addresses potential issues that may hinder its jurisdiction. The protection of rights strikes a balance between the Parties.[555]

The core difference between the Parties in relation to procedural matters is whether the Tribunal has jurisdiction to rule the case. In short, the Tribunal must first decide whether the Philippines's submission is permissible under Article 288(1) (i.e. disputes concerning the interpretation or application of UNCLOS);[556] if so, whether the dispute satisfies the preconditions set out in Section 1 of Part XV UNCLOS in accordance with Article 286.[557] Lastly, if it concerns the interpretation or application of UNCLOS and meets the relevant preconditions, whether Section 3 of Part XV, which includes, *inter alia,* Article 297 and 298, poses limitations on the Tribunal's exercise of jurisdiction pursuant to Article 286.[558]

Given this thesis centers around defining the scope of UNCLOS Tribunals' subject-matter jurisdiction, and specifically the extent of the jurisdictional scope under Article 288(1), the following survey of the South China Sea Award will concentrate on the first and last issue: Whether the Philippines' submissions

---

[551] *Id.*, ¶¶ 115–7.

[552] *Id.*, ¶¶ 118–20.

[553] *Id.*, ¶ 13.

[554] *Id.*, ¶ 123.

[555] *Id.*, ¶¶ 115–22.

[556] *Id.*, ¶¶ 130–78.

[557] *Id.*, ¶¶ 189–353.

[558] *Id.*,¶¶ 354–412.

doi:10.6342/NTU201903686

constitute disputes within the ambit of Article 288(1), and whether such disputes are subject to automatic limitation or excluded voluntarily by the Parties. The primary task in reviewing the *South China Sea* Arbitration is to observe the rule adopted by the Tribunal in characterizing a dispute and its underpinning rationales in finding that the dispute does not concern territorial sovereignty.

1. The Parties' Arguments

The position of both Parties implies the notion that UNCLOS Tribunals do not have subject-matter jurisdiction over disputes concerning territorial sovereignty.[559] The Parties are divided on how the dispute in question should be characterized: one of territorial sovereignty or one concerning the interpretation or application of the Convention.

a. The Philippines' Argument

The Philippines argues its claim of China's activities and maritime features occupied by China in the South China Sea are concerning the interpretation or application of UNCLOS.[560] The Philippines objects to China's position in characterizing the dispute as one over sovereignty or maritime delimitation. It maintains the essence of its Submission relates to the inconsistency of the alleged "historic rights" of China.[561] The Philippines does not request the Tribunal to decide on the extent of sovereignty over the land territory of China or any other State.[562]

Though the Philippines concedes the existence of a dispute between the Parties over the sovereignty of maritime features in the South China Sea, it views sovereignty as merely one element of the dispute.[563] A dispute having different elements does not preclude some elements from falling within the Tribunal's

---

[559] *Id.*, ¶¶ 133, 142.

[560] *Id.*, ¶ 151.

[561] *Id.*, ¶ 140.

[562] *Id.*, ¶ 141.

[563] *Id.*, ¶ 142.

doi:10.6342/NTU201903686

jurisdiction.[564] Moreover, the Philippines distinguishes the present case from the *Chagos* Arbitration, in which both Mauritius and the UK agreed Mauritius' Submission required a prior determination of sovereignty.[565] In contrast, the Philippines neither seeks such finding nor do the Submission require so.

The Philippines addresses the nature of the three categories of Submissions in turn and concludes all Submissions concern the interpretation or application of UNCLOS.[566] First, Submission relating to the historic rights of China does not require a prior determination of sovereignty[567]. The question on China's historic rights within the "9-dash line" exceeding the extent of potential maritime entitlement under UNCLOS can be addressed "even assuming that China is sovereign over all of the insular features it claims."[568]

Secondly, the Philippines refutes the need to determine sovereignty prior to considering the maritime entitlements generated by the features.[569] The determination of maritime entitlement depends on ascertainment of their status (i.e. character and nature), irrespective of which Party has or may have sovereignty over the maritime features.[570] Additionally, the Philippines' selection of over specific maritime features of the Spratly Islands (Nansha Islands) in its claim is the result of pragmatic concern:

> [I]f the largest of the Spratly features is incapable of generating an EEZ and continental shelf, then it is most unlikely that any of the other features will be able to do so.[571]

---

[564] *Id.*

[565] *Id.*

[566] *Id.*, ¶ 140.

[567] *Id.*, ¶ 143.

[568] *Id.*

[569] *Id.*, ¶ 144.

[570] *Id.*

[571] The South China Sea, (Phil. v. China), PCA Case No. 2013–19, Day 1, Hearing on Jurisdiction and Admissibility 89 (UNCLOS Annex VII Arb. Trib. July 7, 2015), http://www.pca-cpa.org (last visited Aug. 7, 2019).

doi:10.6342/NTU201903686

Moreover, determination of features as low-tide elevations is based on Article 13(1) of UNCLOS, and hence concerns the interpretation or application of UNCLOS.[572] The incidental result of making determinations regarding low-tide elevation is that sovereignty is vested in one or another State.[573]

As for China's unlawful interference with the exercise of sovereign rights and jurisdiction of the Philippines, the Philippines' Submission is "premised on China's maximum permissible entitlement under the Convention."[574] Again, these Submissions are without regards to sovereignty and are "entirely without prejudice to China's territorial assertions, or indeed the territorial assertions of any other State."[575]

Also, the Philippines rejects China's characterization of the dispute as one concerning maritime boundary delimitation. In the Philippines' view, China's assertion is rooted in its confusion over entitlement to maritime zones, and delimitation of overlapping maritime zone.[576] A question of maritime delimitation is exclusive to the States concerned. And it arises only when there are overlapping maritime entitlements. In line with this distinction, the existence of overlapping maritime entitlement must first be established before delimitation can take place. Such prior determination of maritime entitlement does not thus become "an integral part" of the delimitation dispute.[577] The two questions are separate. The Philippines finally concludes by identifying the existence of dispute in each Submission.[578]

---

572 South China Sea Arbitration, *supra* note 1, ¶ 144.

573 *Id.*

574 *Id.*, ¶ 145.

575 *Id.*

576 *Id.*, ¶ 146.

577 *Id.*

578 *Id.*, ¶ 147.

doi:10.6342/NTU201903686

b. China's Argument

China's position on the Philippines' Submissions is primarily reflected in its 2014 Position Paper.[579] China's position is based on two main arguments. First, China contends as follows:

> The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which does not concern the interpretation or application of the Convention.[580]

Accordingly, in deciding the Philippines' claims:

> [T]he Arbitral Tribunal would inevitably have to determine, directly or indirectly, the sovereignty over both the maritime features in question and other maritime features in the South China Sea.[581]

Second, even assuming the subject-matter of the dispute concerned the interpretation or application of the Convention, China argues:

> [T]he subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, inter alia, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures.[582]

---

[579] *Id.*, ¶ 133.

[580] 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 ¶ 4 (Dec. 7, 2014), https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/ (last visited Aug. 7, 2019) [hereinafter PRC Position Paper].

[581] *Id.*, ¶ 29.

[582] *Id.*, ¶¶ 3–4.

doi:10.6342/NTU201903686

China responds to the Philippines' Submissions in the three categories divided by the Philippines and addresses each individually,[583] before expressing its view on the second argument as an alternative.[584]

With respect to the first category of Submissions concerning the extent of China's historic rights, China maintains that "only after the extent of China's territorial sovereignty in the South China Sea is determined can a decision be made on whether China's maritime claims in the South China Sea have exceeded the extent allowed under the Convention."[585] China emphasizes "sovereignty over land territory is the basis for the determination of maritime rights" and the Preamble of UNCLOS calls for "due regard for the sovereignty of all States" as "a prerequisite for the application of the Convention to determine maritime rights of the States Parties."[586] Accordingly, the Submissions reflect a dispute over sovereignty for the Tribunal would not be in a position to determine the extent of China's maritime rights and whether its claims exceed what is allowed under UNCLOS, unless it first determines the sovereignty over the maritime features.[587]

In terms of the second category of Submissions concerning the status of certain maritime features, China equally submits the determination of the status of maritime features constitutes a dispute over sovereignty.[588] In China's view, "a maritime feature *per se* possesses no maritime rights or entitlement."[589] The Tribunal cannot decide whether maritime claims based on the feature accords with the Convention if the sovereignty over the maritime feature is undecided.[590] The same goes for characterizing features as low-tide elevations. Whether features "can be appropriated as territory is in itself a question of territorial

---

583 *Id.*, ¶¶ 8, 10, 15, 26; South China Sea Arbitration, *supra* note 1, ¶ 134.

584 PRC Position Paper, *supra* note 580, ¶¶ 57–75.

585 *Id.*, ¶ 10; South China Sea Arbitration, *supra* note 1, ¶ 135.

586 PRC Position Paper, *supra* note 580, ¶ 29.

587 *Id.*, ¶ 13.

588 *Id.*, ¶ 15; South China Sea Arbitration, *supra* note 1, ¶ 136.

589 PRC Position Paper, *supra* note 580, ¶ 17.

590 *Id.*, ¶¶ 16–7.

doi:10.6342/NTU201903686

sovereignty."[591] China contends the Philippines's claims attempt to undermine its sovereignty over the entire Spratly Islands (Nansha Islands).[592]

As for the remaining Submissions, China contends the legality of China's action rests on the sovereignty of relevant maritime features and maritime rights derived therefrom.[593] China argues the Philippines' claims are built on the premise of settled territorial sovereignty.[594] Only when sovereignty over the maritime features is established can the Submissions on China's alleged encroachment of the Philippines' sovereign rights and jurisdiction be decided upon.[595]

Even assuming the Submissions constitute a dispute concerning the interpretation and application of UNCLOS, China argues, alternatively, the Philippines' claims are excluded from the Tribunal's jurisdiction under Article 298.[596] China claims the Submissions "include maritime claims, the legal nature of maritime features, the extent of relevant maritime rights, and law enforcement activities at sea," which are "part and parcel of maritime delimitation."[597] In China's position, the Submissions are a request for maritime delimitation in disguise.[598] The claims seeking declarations of certain maritime features as part of the Philippines' EEZ and continental shelf and China's interference of the Philippines' exercise of sovereign rights and jurisdiction are "an attempt to seek

---

[591] *Id.*, ¶ 25.

[592] *Id.*, ¶ 22.

[593] South China Sea Arbitration, *supra* note 1, ¶ 137.

[594] PRC Position Paper, *supra* note 580, ¶ 27.

[595] *Id.* (In China's words: "*The premise for this claim must be that the spatial extent of the Philippines' maritime jurisdiction is defined and undisputed, and that China's actions have encroached upon such defined areas*.").

[596] *Id.*, ¶ 75; South China Sea Arbitration, *supra* note 1, ¶ 138.

[597] *Id.*, ¶ 66; South China Sea Arbitration, *supra* note 1, ¶ 139.

[598] PRC Position Paper, *supra* note 580, ¶ 69.

doi:10.6342/NTU201903686

a recognition [...] that the relevant maritime areas are part of the Philippines' EEZ and continental shelf.[599]

2. The Tribunal's Decision on Jurisdiction

The Tribunal recognizes that Article 288 limits the scope of UNCLOS Tribunals' subject-matter jurisdiction to "disputes concerning the interpretation or application of UNCLOS."[600] For the Tribunal to exercise jurisdiction, it must determine whether the submissions raised by the Philippines constitute a dispute under Article 288(1).

The Tribunal deals with this main jurisdictional issue of the case in two parts. First, the Tribunal must establish a dispute exists between the Parties.[601] Once the existence of a dispute is established, the Tribunal must then further identify and characterize the dispute as one concerning the interpretation or application of UNCLOS.[602] The Tribunal begins with the characterization of the Philippines' Submissions as a dispute concerning the interpretation or application of UNCLOS.

a. Characterization of Submissions

In characterizing the Philippines' Submissions, the Tribunal adopts an objective approach to "isolate the real issue in the case and to identify the object of the claim."[603] The Tribunal considered both Parties' arguments, in which the Philippines argues its claims against China's activities and maritime features occupied by China in the South China Sea concern the interpretation or application of UNCLOS, and China protests against the characterization of the dispute.[604] Based on the preceding contentions, the Tribunal addresses the

---

[599] *Id.*

[600] South China Sea Arbitration, *supra* note 1, ¶¶ 130, 148.

[601] *Id.*, ¶¶ 131, 149.

[602] *Id.*, ¶¶ 131, 150.

[603] *Id.*, ¶ 150; *see also* Nuclear Tests (N.Z. v. Fr.), *supra* note 57, at 466, ¶ 30.

[604] South China Sea Arbitration, *supra* note 1, ¶ 151.

doi:10.6342/NTU201903686

question in two-fold: 1). whether the Submissions concern disputes of sovereignty; and if not, 2). whether the Submissions constitutes disputes over maritime boundary delimitation.

i. Not a Dispute of Sovereignty

At the outset, the Tribunal concurs a dispute over land sovereignty of certain maritime features in the South China Sea does exist between the Parties.[605]

With respect to the first question, the Tribunal does not find sovereignty the appropriate characterization of the Philippines' Submissions. In the Tribunal's view, the Parties relationship is extensive and multifaceted.[606] The Parties' dispute having in one aspect a sovereignty issue does not prevent the Tribunal from considering other aspects of the dispute.[607] Only under either of the two following circumstances would the Tribunal consider the Submission related to sovereignty: 1). the resolution of the claims requires it to first decide on sovereignty, either expressly or implicitly; or 2). the actual objective of the claims is to advance the Philippines' position in the Parties' dispute over sovereignty.[608] Neither situation exists in the present case.

The Tribunal accepts the Philippines' view that the Submissions can be dealt with even on the assumption of China's sovereignty over the Spratly Islands and Scarborough Shoal. The Tribunal does not consider a decision in favor of the Philippines Submissions would affect the sovereignty claim of either Party as the *Chagos* Arbitration did.[609] The Tribunal does, however, agree the Philippines' narrow selection of features in its claims may have implications for its substantive claims. In this respect, the Tribunal finds it "necessary to consider the maritime zones generated by *any* feature in the South China Sea *claimed by China*,

---

[605] *Id.*, ¶ 152.

[606] *Id.*

[607] *Id.*

[608] *Id.*, ¶ 153.

[609] *Id.*

doi:10.6342/NTU201903686

whether or not such feature is presently occupied by China [emphasis added]."[610]

ii. Not a Dispute of Maritime Delimitation

With respect to whether the dispute in question is one concerning maritime delimitation, the Tribunal answers in the negative. The Tribunal agrees with the Philippines' argument that maritime entitlement is a distinct question from maritime delimitation. Maritime boundaries delimitation arises when States have overlapping entitlement. The Philippines' does not seek a claim of delimitation. The Tribunal will address the Submission on the premise certain areas form a part of the Philippines' maritime zone only if it determines no overlapping entitlement exists. The Tribunal reserves its decision on jurisdiction in the merits for such determination depends on the substantive decision of entitlement.

b. The Existence of Dispute

The existence of a dispute is also based on an objective determination.[611] A mere assertion or denial of the existence of the dispute is insufficient to prove either view.[612] It must be demonstrated that one party opposes the other's claim.[613] The existence of the dispute must also exist at the time of the proceedings.[614] The

---

[610] *Id.*, ¶ 154.

[611] *Id.*, ¶ 149 (citing Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, 1950 I.C.J. Rep. 56, 74 (Mar. 30)).

[612] *Id.* (citing the Advisory Opinion of 1950 to illustrate how the existence of a dispute is determined).

[613] *Id.* (citing South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1962 I.C.J. Rep. 319, 328 (Dec. 21), which followed the same objective determination set out in the previous 1950 Advisory Opinion).

[614] *Id.*

doi:10.6342/NTU201903686

Tribunal considers on an objective basis and concluded the existence of disputes with respect to the Submissions raised by the Philippines is well-founded.[615]

C. Analysis

This thesis finds the following features of the *South China Sea* Arbitration noteworthy.

Firstly, the *South China Sea* Tribunal adopts the same objective approach in characterizing the Philippines' submissions and examines the real issue and object of the claims.

Secondly, the Tribunal assesses the case on the assumption that UNCLOS does not deal with issues of territorial sovereignty.[616] Both Parties, the Philippines and China, asserts implicitly and explicitly the same argument: territorial sovereignty issues are not subject to the Tribunal's jurisdiction. This is evident in China's statements to the same effect and the Philippines' consistent claim that it does not ask the Tribunal to decide on sovereignty issues.

Thirdly, on the issue of the distinction between the *Chagos* Arbitration and the *South China Sea* Arbitration. The *South China Sea* Tribunal did not consider, though the Parties in *Chagos* agree the claim require a determination on sovereignty, the UK and Mauritius' arguments are both based on the general rule that a sovereignty dispute does not fall within Article 288(1). The *Chagos* Parties advance their respective arguments on a common view: there is a possibility that "mixed disputes" involving both sovereignty issues and UNCLOS issues may be permissible. The Tribunal is correct in stating the *Chagos* case reached its conclusion on the ground that the Submission would have required an implicit decision. Nonetheless, the *South China Sea* Tribunal fails to spot its similarity to the *Chagos* case in this respect.

---

[615] *Id.*, ¶¶ 158–78.

[616] *Id.*, ¶ 8.

doi:10.6342/NTU201903686

Fourthly, the Tribunal's decision on an assumption of sovereignty is paradoxical to its understanding of the Tribunal's jurisdiction. One of the Philippines' arguments, which the Tribunal later accepted, is that the submissions do not require a determination on sovereignty, since the Tribunal could decide on the assumption that sovereignty lies with China. At the same time, the Tribunal and the Philippines both acknowledge the existence of a dispute over the land sovereignty between the Parties, as well as other neighboring coastal States.[617] It can hence be concluded despite the Tribunal's position in rejecting jurisdiction over the determination of land sovereignty, its ultimate decision is nevertheless implicitly predicated on such determination—China having sovereignty over the maritime features.[618]

Lastly, the *South China Sea* Tribunal, arguably, seems to have extended jurisdiction to disputes concerning the rights and interests of third parties. At the Hearing on the Merits, the Philippines raises Itu Aba (Taiping) Island of the Spratly Islands to support its argument for maritime entitlement of specific features.[619] The Tribunal is well-aware Taiwan currently controls Itu Aba.[620] The Tribunal's characterization thus warrants the question as to whether the Award would have a binding effect on for Taiwan. In terms of the Award's legally binding effect, the Submissions of the Philippines do not include a claim over Itu Aba and its characterization is not made in the Tribunal's decision. In this regard, the Tribunal's finding over Itu Aba should have no binding effect on Taiwan—a third party.

---

[617] *Id.*, ¶¶ 3, 141.

[618] Gervasi, *supra* note 323, at 200.

[619] The South China Sea, (Phil. v. China), Award, PCA Case No. 2013–19, ¶¶ 400, 426 (UNCLOS Annex VII Arb. Trib. July 12, 2016), http://www.pca-cpa.org (last visited Aug. 7, 2019).

[620] *Id.*, ¶ 401.

doi:10.6342/NTU201903686

III. A Comparative Analysis of the Cases

The outcome of the Tribunals' determination sheds light on whether the Tribunals' findings are consistent with the interpretation of Article 288(1), as discussed in Chapter IV, and if discrepancies exist, what are the implications on the interpretation of UNCLOS Parties' intention.

Observing the two cases side by side, this chapter concludes with the following assessment.

In terms of similarities, the following points can be identified. First, both Tribunals are formed under Annex VII of UNCLOS; the applicants of the cases instituted proceedings against a Permanent Member of the UN; and both Tribunals had to consider whether UNCLOS Tribunals may exercise jurisdiction over a maritime dispute that implicates territorial sovereignty issues, which are not disputes concerning the interpretation or application of UNCLOS, and hence are beyond the scope of the Tribunals' subject-matter jurisdiction.[621] The Tribunals dealt with whether the case was one that concerned sovereignty or "the interpretation and application of the Convention."[622]

Secondly, the *South China Sea* Tribunal refers to the same rule as the *Chagos* Tribunal in characterizing the Philippines' claims. Both Tribunals take into account the Applicant's "real issue and object of claim," but resulted in opposite rulings. Thirdly, both Tribunals indentify the existence of a "long-standing" dispute over territorial sovereignty.[623]

With respect to the dissimilar aspects of the arbitral awards, this thesis makes the following observation. Firstly, regarding the factual background of the dispute over territorial sovereignty. The *Chagos* Arbitration discusses extensively the

---

[621] Peter Tzeng, *Ukraine v. Russian and Philippines v. China: Jurisdiction and Legitimacy*, 46 DENV. J. INT'L L. & POL'Y 1, 3 (2017) [hereinafter Tzeng (2017)].

[622] Nguyen, *supra* note 517, at 129–31.

[623] Chagos Arbitration, *supra* note 2, ¶ 215; South China Sea Arbitration, *supra* note 1, ¶ 3.

doi:10.6342/NTU201903686

background of the dispute between the UK and Mauritius. The *South China Sea* Arbitration notes the existence of disputes among various coastal States but does not offer further discussion.

Thirdly, the submissions of both cases implicate prior determination on sovereignty but result in conflicting findings. The *Chagos* Tribunal finds the coastal State of the Chagos Archipelago calls for a prior determination on sovereignty; whereas, the *South China Sea* Tribunal case proceeds on the premise that sovereignty of the maritime features in question is in the hands of either China or the Philippines. Such a premise infers from an implicit and prior determination of sovereignty over the maritime features that only one of the two Parties has sovereignty.[624] The Philippines' argument and the Tribunal's reasoning induces this premise. Just as the Philippines argues, the Tribunal holds that a decision on the Submissions could be rendered, regardless which of the two States has sovereignty over the maritime features.

Fourthly, in interpreting Article 288(1) and relevant provisions, the Tribunals' emphasize on different elements. The *Chagos* Tribunal relies on a textual reading of relevant provisions and their negotiating history. The Tribunal also focuses on the historical record of the dispute and the implications of a finding on Mauritius' submission.[625] Whereas, the *South China Sea* Tribunal did not take into account of drafting history and the Tribunal's preceding jurisprudence.[626] The *South China Sea* Tribunal did not conduct an interpretation of the jurisdictional clauses. It allocates most of its reasoning to whether the Philippines' submissions would first require a decision on sovereignty, and whether the actual objective of the

---

[624] Gervasi, *supra* note 323, at 200 (noting that the cases are similar in that the *Chagos* Tribunal decided on Mauritius' fourth submission on the assumption of the United Kingdom's sovereignty over the Chagos Archipelago, whereas, the *South China Sea* Tribunal ruled on the assumption that China has sovereignty).

[625] Tzeng (2017), *supra* note 621, at 5; Chagos Arbitration, *supra* note 2, ¶ 221.

[626] Zou & Ye, *supra* note 317, at 340–1.

doi:10.6342/NTU201903686

dispute is to advance Mauritius' sovereignty claim.[627] The Tribunal examined in length why a prior determination of territorial sovereignty was not necessary.

Fifthly, the *Chagos* Tribunal's emphasis is placed on an analysis of the law, whereas, the *South China Sea* Tribunal focuses on the application to the facts of the case. The preceding Tribunal explores in detail whether territorial sovereignty disputes can be read into Article 288(1) of UNCLOS, and discusses the extent to which such disputes are permissible. The latter Tribunal examines whether the submissions in question require a prior determination of sovereignty based on a given notion that UNCLOS does not address sovereignty issues. The *South China Sea* Tribunal does not, however, discuss why sovereignty issues are beyond the scope of jurisdiction.

Lastly, the outcome of the Awards and their position on the scope of jurisdiction are completely different. One the one hand, neither the *Chagos* Arbitration or its Parties take the position that UNCLOS compulsory jurisdiction *necessarily* excludes territorial sovereignty disputes, but all suggest, though for various reasons and conditions, the possibility of allowing jurisdiction over sovereignty issues. On the other hand, the *South China Sea* Tribunal and the Parties all argue that UNCLOS excludes sovereignty issues from compulsory jurisdiction, but arrive at a different conclusion in characterizing the submissions.

[627] Tzeng (2017), *supra* note 621, at 6; South China Sea Arbitration, *supra* note 1, ¶ 153.

doi:10.6342/NTU201903686

CHAPTER VI: CONCLUSION

In light of the "universal consensus" reached in the drafting of UNCLOS, the adoption of a compromissory clause for compulsory jurisdiction is with no doubt "a major achievement."[628] Despite States' preference for diplomatic recourse makes judicial settlement a rare choice, Section 2 of UNCLOS Part XV ensures, unless otherwise provided, a dispute resolution body would consider maritime disputes with a flexible choice of procedures.[629] However, the subject-matter jurisdiction of Section 2 is by no means extensive.[630] Disputes are subject to a number of thresholds.

Notably, recent cases have given rise to pertinent issues of jurisdiction *ratione materiae* under Section 2 of Part XV.[631] Some of the assessments made by UNCLOS Tribunals in identifying the characteristics of disputes cast into doubt the nature of disputes concerning "the interpretation or application of UNCLOS." Legal scholarship has advanced arguments both in favor and against identifying territorial sovereignty disputes as concerning the "interpretation or application" of UNCLOS. Yet, few commentators expressly resort to a rigorous application of the canons of treaty interpretation in proposing their arguments, if any.

The basis of subject-matter jurisdiction is without a doubt the consent of States. To ascertain the precise scope of States' consent, treaty interpretation offers a starting point well-founded in international law. An ideal approach to a guide for resolving future controversies is to refer explicitly to the VCLT in interpreting UNCLOS jurisdictional provisions. A strict application of the methods contained in Article 31 to 33 of the VCLT, as well as customary international law, would encourage solid bases of reasoning rooted in international law and strengthen

---

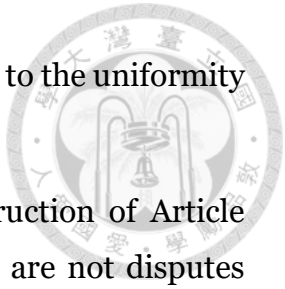
628 Churchill (2017), *supra* note 97, at 223.

629 Jensen & Bankes, *supra* note 98, at 210.

630 Harrison, *supra* note 521, at 278–9.

631 Jensen & Bankes, *supra* note 98, at 211.

doi:10.6342/NTU201903686



legitimacy in arguments. Most importantly, it would contribute to the uniformity of the UNCLOS dispute settlement system.

In applying the canons of treaty interpretation to the construction of Article 288(1), this thesis argues that territorial sovereignty disputes are not disputes concerning the interpretation or application of UNCLOS. The ordinary meaning of Article 288(1) fails to support the view that such disputes were intended by the negotiating parties to be resolved through compulsory procedures by UNCLOS Tribunals. Supplemental treaty interpretation materials also confirm this construction. Any other reading of Article 288(1) would run counter to the intention of the parties, exceeding their scope of consent to mandatory jurisdiction under UNCLOS Part XV. Accordingly, pure territorial sovereignty disputes are excluded.

As for mixed disputes concerning territorial sovereignty and UNCLOS issues, it has been argued such mixed disputes are otherwise subject to compulsory jurisdiction. Arguably, mixed disputes fall within the scope of compulsory jurisdiction by virtue of UNCLOS Article 298(1)(a)(i). Some arbitral tribunals and commentators have advanced "incidental jurisdiction" to claim jurisdiction over sovereignty issues incidental to disputes concerning the interpretation or application of UNCLOS.[632]

In a manner consistent with the result of interpretation in Chapter IV, this thesis concludes that territorial sovereignty disputes are excluded from compulsory jurisdiction, either in pure or mixed land sovereignty disputes. The construction of the jurisdictional clause in the UNCLOS is clear on the lack of jurisdiction over land sovereignty disputes. The exclusion of land sovereignty disputes does not discriminate between disputes that do or do not also concern UNCLOS issues.

---

[632] Tzeng, *supra* note 4, at 499–575. *Cf.* Talmon, *supra* note 4, at 934–6 (expressing skepticism towards allowing jurisdiction by recourse to "incidental jurisdiction" given the "significance that States ascribe to questions of territorial sovereignty").

doi:10.6342/NTU201903686

So far, the practices of UNCLOS Tribunals are not consistent in deciding in conformity with the inherent exclusion of land sovereignty disputes. The *Chagos* Arbitration correctly characterize the submissions as a question of which Party, Mauritius or the UK has sovereignty over the Chagos Archipelago. The *Chagos* Tribunal entertained the possibility of "incidental jurisdiction," which allows UNCLOS Tribunals to decide on mixed territorial sovereignty disputes. The *South China Sea* Arbitration adhered to the principle that sovereignty disputes are inherently beyond the scope of UNCLOS compulsory jurisdiction. The *South China Sea* Tribunal's characterization of the submissions as UNCLOS disputes is less convincing.

This thesis suggests the three following factors are relevant to the discrepancies in judicial decisions and interpretation of UNCLOS jurisdictional provisions.

Firstly, the content of jurisdictional provisions under UNCLOS hinges upon the parties and the bench. Whether territorial sovereignty disputes fall within UNCLOS compulsory jurisdiction depends on how parties or UNCLOS Tribunals formulate their submissions or interpretation of relevant provisions so as to include or exclude such disputes.[633] Judges and arbitrators may be inclined to construe UNCLOS provision based on their experience in the participation of the UNCLOS III and not according to the canons of the VCLT.[634]

Secondly, the rule employed by UNCLOS Tribunals to characterize the claims of the case does not guarantee a wholly objective determination. In identifying the real issue and object of the submission, the UNCLOS Tribunals enjoy a degree of discretion. This is evident from the characterization of submissions in *Chagos* and *South China Sea* Arbitrations.

---

[633] *See, e.g.*, Boyle, *supra* note 102, at 44–5; Treves (2006), *supra* note 280, at 77; Churchill (2006), *supra* note 139, at 401; Talmon, *supra* note 4, at 933–4; Harrison, *supra* note 520, at 275–9.

[634] COLLIER & LOWE, *supra* note 118, at 94.

doi:10.6342/NTU201903686

Thirdly, recent practices reveal the possibility of incidental jurisdiction. There is still ambiguity in the extent to which incidental jurisdiction may apply. In this regard, the *Chagos* Arbitration contributes to the uncertainty of jurisdiction over territorial sovereignty.

Ultimately, the exercise of discretion by UNCLOS Tribunals at each stage of the proceeding—interpretation, characterization, and application—is volatile and will dictate the outcome of the question and raise questions of legal certainty. It is in light of the principle of State consent that this thesis argues UNCLOS Tribunals shall refrain from expanding compulsory jurisdiction, even if a land sovereignty issue is ancillary to the UNCLOS dispute. The corollary of the inherent exclusion of territorial sovereignty issues from UNCLOS is that any dispute involving a consideration of unsettled territorial sovereignty dispute—whether ancillary to or necessary for resolving an UNCLOS dispute—is beyond the scope of compulsory jurisdiction. Essentially, the pursuit of effectiveness in recourse to UNCLOS dispute settlement system cannot run counter to its foundation—State consent—which is what gives life to international adjudication.

doi:10.6342/NTU201903686

BIBLIOGRAPHY

Books

Adede, A.O. (1987). *The System for Settlement of Disputes under the UN Convention on the Law of the Sea*. Leiden, The Netherlands: Springer Netherlands.

Amerashinghe, C.F. (2009). *Jurisdiction of Specific International Tribunals*. Leiden, The Netherlands: Martinus Nijhoff Publishers.

Amerashinghe, C.F. (2011). *International Arbitral Jurisdiction*. Leiden, The Netherlands: Martinus Nijhoff Publishers.

Anderson, D. (2016). Peaceful Settlement of Disputes under UNCLOS. In Barrett, J. & Barnes, R. (Eds.) *Law of the Sea: UNCLOS as a Living Treaty* (pp. 385–415). London, UK: The British Institute of International and Comparative Law.

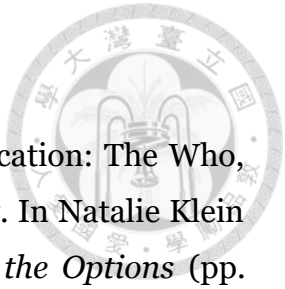
Aust, A. (2013). *Modern Treaty Law and Practice* (3rd ed.). Cambridge, UK: Cambridge University Press.

Beckman, R. (2014). Part XV and South China Sea. In Jayakumar, S., Koh, T. & Beckman, R. (Eds.) *The South China Sea Dispute and Law of the Sea* (pp. 229–264). Massachusetts, USA: Edward Elgar Publishing.

Bilder, R. (2007). Adjudication: International Arbitral Tribunals and Courts. In I. William Zartman (Ed.) *Peacemaking in International Conflict: Methods and Techniques* (pp. 195–226). Washington, DC: United States Institute of Peace Press.

Bjorge, E. (2015). The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties. In Bianchi, A., Peat, D., Windsor, M. (Eds.) *Interpretation in International Law* (pp. 189–204). Oxford, UK: Oxford University Press.

doi:10.6342/NTU201903686



Book Chapters

Brilmayer, L. & Faure, A. (2014). Initiating Territorial Adjudication: The Who, How, When, and Why of Litigating Contested Sovereignty. In Natalie Klein (Ed.) *Litigating International Law Disputes: Weighing the Options* (pp. 193–229). Cambridge, UK: Cambridge University Press.

Brown, C. (2013). Inherent Powers in International Adjudication. In Romano, C. P.R., Alter, K. J. & Shany, Y. (Eds.) *The Oxford Handbook of International Adjudication* (pp. 828–847). Oxford, UK: Oxford University Press.

Churchill, R.R. (2006). Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade. In Freestone, D., Barnes, R. & Ong, D.M. (Eds.) *The Law of the Sea: Progress and Prospects* (pp.388–416). Oxford, UK: Oxford University Press.

Collier, J. & Lowe, V. (1999). *The Settlement of Disputes in International Law: Institutions and Procedures*. Oxford, UK: Oxford University Press.

Crawford, J. (2012). *Brownlie's Principles of Public International Law* (8th ed.). Oxford, UK: Oxford University Press.

Elias, T.O. (1974). *The Modern Law of Treaties*. Leiden. The Netherlands: A.W. Sijthoff.

García-Revillo, M. (2015). *The Contentious and Advisory Jurisdiction of the International Tribunal for the Law of the Sea*. Leiden, The Netherlands: Brill.

Gervasi, M. (2019). The Interpretation of the United Nations Convention on the Law of the Sea in the Chagos Marine Protected Area Arbitration: The Influence of the Land Sovereignty Dispute. In Del Vecchio, A. & Virzo, R. (Eds.) *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (pp. 191–223). Cham, Switzerland: Springer International Publishing.

doi:10.6342/NTU201903686

Karim, M.S. (2014). Litigating Law of the Sea Disputes Using the UNCLOS Dispute Settlement System. In Natalie Klein (Ed.) *Litigating International Law Disputes: Weighing the Options* (pp. 260–283). Cambridge, UK: Cambridge University Press.

Klein, N. (2005). *Dispute Settlement in the UN Convention on the Law of the Sea*. Oxford, UK: Oxford University Press.

Lagoni, R. (2017). Preamble. In Proelss, A. (Ed.) *United Nations Convention on the Law of the Sea: A Commentary* (pp. 1–16). Oxford, UK: Hart Publishing.

Marotti, L. (2019). Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals. In Del Vecchio, A. & Virzo, R. (Eds.) *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (pp. 383–406). Cham, Switzerland; Springer.

Merrills, J.G. (2017). *International Dispute Settlement* (6th ed.). Cambridge, UK: Cambridge University Press.

Nordquist, M.H., Rosenne S. & Sohn, L.B. (Eds.) (1989). *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol. 5). Leiden, The Netherlands: Martinus Nijhoff Publishers.

Orakhelashvili, A. (Ed.) (2018). *Akehurst's Modern Introduction to International Law* (8th ed). New York, USA: Routledge.

Oxman, B. (2014). Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals. In Rothwell, D. R., Elferink, A. G. O., Scott, K. N., & Stephens, T. (Eds.) *The Oxford Handbook of the Law of the Sea* (pp. 394–415). Oxford, UK: Oxford University Press.

Paulus, A. (2010). International Adjudication. In Besson, S. & Tasioulas, J. (Eds.) *The Philosophy of International Law* (pp. 207–224). Oxford, UK: Oxford University Press.

doi:10.6342/NTU201903686

Popa, L.E. (2018). *Patterns of Treaty Interpretation as Anti-Fragmentation Tools: A Comparative Analysis with a Special Focus on the ECtHR, WTO and ICJ*. Cham, Switzerland: Springer International Publishing.

Ranjeva, R. (1991). Settlement of Disputes. In Dupuy, R.-J. & Vignes, D. (Eds.) *A Handbook on the New Law of the Sea* (Vol. 2, pp. 1333–1401). Dordrecht, The Netherlands: Martinus Nijhoff Publishers.

Rao, P.C. (2007). Delimitation Disputes under UNCLOS. In Ndiaye T. M. & Wolfrum, R. (Eds.) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (pp. 877–897). Leiden, The Netherlands: Martinus Nijhoff Publishers.

Serdy, A. (2017). Article 279: Obligation to settle disputes by peaceful means. In Proelss, A. (Ed.) *United Nations Convention on the Law of the Sea: A Commentary* (pp. 1813–1817). Oxford, UK: Hart Publishing.

Serdy, A. (2017). Article 281: Procedure where no Settlement has been reached by the parties. In Proelss, A. (Ed.) *United Nations Convention on the Law of the Sea: A Commentary* (pp. 1820–1824). Oxford, UK: Hart Publishing.

Serdy, A. (2017). Article 298: Optional exceptions to applicability of section 2. In Proelss, A. (Ed.) *United Nations Convention on the Law of the Sea: A Commentary* (pp. 1918–1932). Oxford, UK: Hart Publishing.

Shany, Y. (2013). Jurisdiction and Admissibility. In Romano, C. P.R., Alter, K. J. & Shany, Y. (Eds.) *The Oxford Handbook of International Adjudication* (pp. 779–805). Oxford, UK: Oxford University Press.

Sinclair, I. (1984). *The Vienna Convention on the Law of Treaties* (2nd ed.). Manchester, UK : Manchester University Press.

Talmon, S. (2014) The South China Sea Arbitration: Is There a Case to Answer?. In Talmon, S. & Jia, B.B. (Eds.) *The South China Sea Arbitration: A Chinese Perspective* (pp, 15–79). Oxofrd, UK: Hart Publishing.

doi:10.6342/NTU201903686

Treves, T. (2006). What Have The United Nations Convention And The International Tribunal For The Law Of The Sea To Offer As Regards Maritime Delimitation Disputes?. In Lagoni, R. & Vignes, D. (Eds.) *Maritime Delimitation* (pp. 63–78). Leiden, The Netherlands: Martinus Nijhoff Publishers.

Treves, T. (2017). Article 286: Application of procedures under this section. In Proelss, A. (Ed.) *United Nations Convention on the Law of the Sea: A Commentary* (pp. 1844–1849). Oxford, UK: Hart Publishing.

Villiger, M.E. (2009). *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden, The Netherlands: Martinus Nijhoff Publishers.

von Bogdandy, A. & Venzke, I. (2014). *In Whose Name: A Public Law Theory of International Adjudication*. Oxford, UK: Oxford University Press.

Zengerling, C. (2013). *Greening International Jurisprudence. Leiden*. The Netherlands: Martinus Nijhoff Publishers.

Journal Articles

Adede, A.O. (1975). Settlement of Dispute Arising Under the Law of the Sea Convention. *The American Journal of International Law*, 69(4), 798–819.

Allen, S. (2017). Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction. *Ocean Development & International Law,* 48(3–4), 313–330.

Boyle, A. (1997). Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction. *International & Comparative Law Quarterly*, 46(1), 37–54.

Buga, I. (2012). Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals. *The International Journal of Marine and Coastal Law*, 27(1), 59–95.

doi:10.6342/NTU201903686

Churchill, R. (2017). The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use. *Ocean Development & International Law,* 48(3–4), 216–238.

Colson, D.A. & Vohrer, B.J. (2015). In re Chagos Marine Protected Area (Mauritius v. United Kingdom). *The American Journal of International Law*, 109(4) , 845-851.

Fitzmaurice, G. (1957). The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points. *British Yearbook of International Law*, 33, 203–293.

Gautier, P. (2006). The International Tribunal for the Law of the Sea: Activities in 2005. *Chinese Journal of International Law*, 5(2), 381–396.

Guilfoyle, D. (2018). The South China Sea Award: How Should We Read the UN Convention on the Law of the Sea?. *Asian Journal of International Law,* 8(1), 51–63.

Harrison, J. (2017). Defining Disputes and Characterizing Claims: Subject-Matter Jurisdiction in Law of the Sea Convention Litigation. *Ocean Development & International Law,* 48(3–4), 269–283.

Jacobs, F.G. (1969). Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference. *International & Comparative Law Quarterly*, 18(2), 318-346 (1969)

Jensen, Ø. & Bankes, N. (2017). Compulsory and Binding Dispute Resolution under the United Nations Convention on the Law of the Sea: Introduction. *Ocean Development & International Law,* 48(3–4), 209–215.

Jia, B.B. (2014). The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges. *German Yearbook of International Law*, 57, 63-94.

Klein, N. (2016). Expansions and Restrictions in the UNCLOS Dispute Settlement Regime: Lessons from Recent Decisions. *Chinese Journal of International Law*, 15(2), 403–415.

doi:10.6342/NTU201903686

Klein, N. (2017). The Vicissitudes of Dispute Settlement under the Law of the Sea Convention. *The International Journal of Marine and Coastal Law*, 32(2), 332–363.

McDorman, T.L. (2000). Global Ocean Governance and International Adjudicative Dispute Resolution. *Journal of Ocean and Coastal Management*, 43, 255–275.

Nguyen, L.N. (2016). The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?. *The International Journal of Marine and Coastal Law*, 31, 120–143.

Oda, S. (1995) Dispute Settlement Prospects in the Law of the Sea. *International & Comparative Law Quarterly*, 44(4), 863-872.

Oxman, B.H. (1981). The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980). *The American Journal of International Law*, 75(2), 211- 256.

Parlett, K. (2017). Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals. *Ocean Development & International Law*, 48(3–4), 284–299.

Proelss, A. (2018). The Limits of Jurisdiction Ratione Materiae of UNCLOS Tribunals. *Hitotsubashi Journal of Law and Politics*, 46, 47–60.

Qu, W. (2016). The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond. *Ocean Development & International Law*, 47(1), 40–51.

SHI, J. (2010). MARITIME DELIMITATION IN THE JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE. *CHINESE JOURNAL OF INTERNATIONAL LAW*, 9(2), 271–291.

Sofaer, A.D. (2016). The Philippine Law of the Sea Action against China: Relearning the Limits of International Adjudication. *Chinese Journal of International Law*, 15(2), 393-402.

doi:10.6342/NTU201903686

Talmon, S. (2016). The Chagos Marine Protected Area Arbitration: Expansion of The Jurisdiction of UNCLOS Part XV Courts and Tribunals. *International & Comparative Law Quarterly*, 65(4), 927–951.

Talmon, S. (2016). The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility. *Chinese Journal of International Law*, 15(2), 309–391.

Thirlway, H. (1999). The Law and Procedure of the International Court of Justice 1960–1989: Part Nine. *British Yearbook of International Law*, 69(1), 1–83.

Tzeng, P. (2016). Jurisdiction and Applicable Law Under UNCLOS. *Yale Law Journal*, 126, 242–260.

Tzeng, P. (2016). Supplemental Jurisdiction under UNCLOS. *Houston Journal of International Law*, 38(2), 499–575.

Tzeng, P. (2017). Ukraine v. Russian and Philippines v. China: Jurisdiction and Legitimacy. *Denver Journal of International Law & Policy*, 46(1) 1–19.

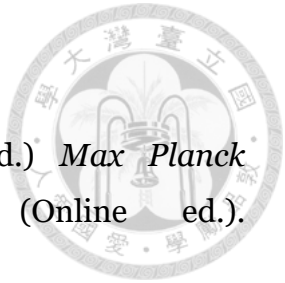
Volbeda, M.B. (2006). The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS. *Texas International Law Journal*, 42, 211–240.

Wood, M. (2007). The International Tribunal for the Law of the Sea and General International Law. *The International Journal of Marine and Coastal Law*, 22(3), 351–367.

Yee, S. (2014). The South China Sea Arbitration (The Philippines v. China): Potential Jurisdictional Obstacles or Objections, *Chinese Journal of International Law* 13(4), 663–739.

Zou, K. & Ye, Q. (2017). Interpretation and Application of Article 298 of the Law of the Sea Convention in Recent Annex VII Arbitrations: An Appraisal. *Ocean Development & International Law,* 48(3–4), 331–344.

doi:10.6342/NTU201903686



Online Sources

Garrido-Muñoz, A. (2018). Dispute. In Wolfrum, R. (Ed.) *Max Planck Encyclopedia of Public International Law* (Online ed.). http://opil.ouplaw.com.

Mensah, T.A. (1998). The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea. In *Max Planck Yearbook of United Nations Law* (Vol. 2, Online ed. pp. 307–323). https://doi.org/10.1163/187574198X00109.

Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, Status of Treaties, United Nations Treaty Collection, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXI-5&chapter=21&clang=_en.

Pallet, A. (2014). Judicial Settlement of International Disputes. In Wolfrum, R. (Ed.) *Max Planck Encyclopedia of Public International Law* (Online ed.). http://opil.ouplaw.com.

Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (7 December 2014). https://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/.

Rao, P.C. (2011). Law of the Sea, Settlement of Disputes. In Wolfrum, R. (Ed.) *Max Planck Encyclopedia of Public International Law* (Online ed.). http://opil.ouplaw.com.

Rosenne, S. (2006). International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications. In Wolfrum, R. (Ed.) *Max Planck Encyclopedia of Public International Law* (Online ed.). http://opil.ouplaw.com.

Thirlway, H. (2006). Compromis. In Wolfrum, R. (Ed.) *Max Planck Encyclopedia of Public International Law* (Online ed. August 2006). http://opil.ouplaw.com.

doi:10.6342/NTU201903686

Treves, T. (2008). Introductory Note to the 1958 Conventions on the Law of the Sea. http://legal.un.org/avl/ha/gclos/gclos.html.

United Nations Convention on the Law of the Sea, Status of Treaties, United Nations Treaty Collection. https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en.

Wolfrom, R. (2006). Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, President of the International Tribunal for the Law of the Sea, 23 October 2006. https://www.itlos.org/press-media/statements-of-the-president/statements-of-president-wolfrum/.

Cases, Arbitral Awards and Advisory Opinions

Arctic Sunrise (Netherlands v. Russia), Award, PCA Case No. 2014-02 (Permanent Court of Arbitration 14 August 2015).

Chagos Marine Protected Area (Mauritius v. UK), Award, PCA Case No. 2011-3 (UNCLOS Annex VII Arb. Trib. 18 Mar. 2015), http://www.pca-cpa.org.

Continental Shelf (Libya v. Malta), Judgment, I.C.J. Reports 1985, 13 (3 June).

Fisheries Jurisdiction (Spain v. Canada), Judgment, I.C.J. Reports 1998, 432 (4 December).

Guyana v. Suriname, Award, PCA Case No. 2004-4 (UNCLOS Annex VII Arbitral Tribunal 17 September 2007).

Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory) (Germany v. Poland), 1927 P.C.I.J. (Ser. A) No. 13, 10-11 (16 December).

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, 56 (30 March).

Kasikili/Sedudu Island (Botswana v. Namibia), Judgment, I.C.J. Reports 1999, 1045 (13 December).

doi:10.6342/NTU201903686

M/V Saiga (No.2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, 10 (1 July).

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Judgment, I.C.J. Reports 1986, 14 (27 June).

MOX Plant (Ireland v. United Kingdom), Order No.3 (Permanent Court of Arbitration 24 June 2003).

Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974, 253 (20 December).

Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, 457 (20 December).

Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2015, 592 (24 September).

Oil Platforms (Iran v. U.S.), Judgment, I.C.J. Reports 1996, 803 (12 December) (separate opinion of Judge Shahabuddeen).

Oil Platforms (Iran v. U.S.), Judgment, I.C.J. Reports 2003, 161 (6 November).

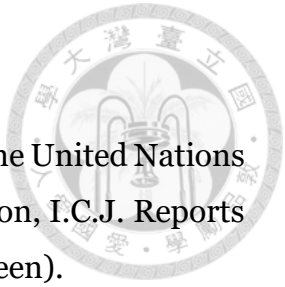
South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Judgment, I.C.J. Reports 1962, 319 (21 December).

Territorial Dispute (Libyan/ Chad), Judgment, I.C.J. Reports 1994, 6 (3 February).

The South China Sea (The Philippines v. China), Award on Jurisdiction and Admissibility, PCA Case No. 2013-19 (UNCLOS Annex VII Arbitral Tribunal 29 October 2015).

The South China Sea, (The Philippines v. China), Award, PCA Case No. 2013-19 (UNCLOS Annex VII Arbitral Tribunal 12 July 2016).

doi:10.6342/NTU201903686



Relevant Case Opinions and Documents

Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988, 12 (26 April) (separate opinion of Judge Shahabuddeen).

Chagos Marine Protected Area (Mauritius v. UK), PCA Case No. 2011-3 (UNCLOS Annex VII Arb. Trib. 18 March 2015) (dissenting and concurring opinion by Judge Kateka, J. & Judge Wolfrum, R.), http://www.pca-cpa.org.

Chagos Marine Protected Area, Hearing on Jurisdiction and Merits, PCA Reference MU-UK (Vol. 6, 1 May 2014).

The South China Sea, (The Philippines v. China), PCA Case No. 2013-19, Day 1, Hearing on Jurisdiction and Admissibility 89 (UNCLOS Annex VII Arb. Trib. 7 July 2015), http://www.pca-cpa.org.

Treaties and Conventions

Convention on Fishing and Conservation of the Living Resources of the High Seas (29 April 1958), 559 U.N.T.S. 285.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965), 575 U.N.T.S. 159.

International Convention for the Prevention of Pollution from Ships (2 November 1973), 1340 U.N.T.S. 61.

International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965), 660 U.N.T.S. 195.

Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (29 April 1958), 450 U.N.T.S. 169.

Charter of the United Nations (26 June 1945), 1 U.N.T.S. XVI.

Statute of the International Court of Justice (18 April 1946), 33 U.N.T.S. 993.

Convention on the Continental Shelf (29 April 1958), 499 U.N.T.S. 311.

doi:10.6342/NTU201903686

Convention on the High Seas (29 April 1958), 450 U.N.T.S. 11

Vienna Convention on the Law of Treaties (22 May 1969), 1155 U.N.T.S. 331.

United Nations Convention on the Law of the Sea (10 December 1982), 1833 U.N.T.S. 396.

Convention on the Territorial Sea and the Contiguous (29 April 1958), 516 U.N.T.S. 205.

UN Documents

185th Plenary Meeting, U.N. Doc. A/CONF.62/SR.185 (1982). In [1984] XVII *Official Records of the Third United Nations Conference on the Law of the Sea*.

51st Plenary Meeting, U.N. Doc. A/CONF.62/SR.51 (1974). In [1975] I *Official Records of the Third United Nations Conference on the Law of the Sea*.

International Law Commission Report on the Work of its Fifty-Eighth Session, U.N. Doc. A/CN.4/L.682 (2006).

Memorandum by the President of the Conference on document A/CONF.62/WP.9, U.N. Doc. A/CONF.62/WP.9/Add.1 (1976). In [1976] V *Official Records of the Third United Nations Conference on the Law of the Sea*.

Memorandum by the President of the Conference on document A/CONF.62/WP.10, U.N. Doc. A/CONF.62/WP.10/Add.1 (1977). In [1978] VIII *Official Records of the Third United Nations Conference on the Law of the Sea*.

Organization of the second session of the Conference and allocation of items: report of the General Committee, U.N. Doc. A/CONF.62/28 (1974). In [1975] III *Official Records of the Third United Nations Conference on the Law of the Sea*.

doi:10.6342/NTU201903686

Report of the International Law Commission to the General Assembly, 19 U.N. GAOR Supp. No. 9, U.N. Doc. A/5809 (1964). In [1964] 2 *Yearbook of the International Law Commission,* 173, U.N. Doc. A/CN.4/173.

Report of the International Law Commission to the General Assembly, 21 U.N. GAOR Supp. No. 9, U.N. Doc. A/6309/Rev.1 (1966). In [1966] 2 *Yearbook of the International Law Commission,* 173, U.N. Doc. A/CN.4/191.

Report of the President on the work of the informal plenary meeting of the Conference on the settlement of disputes, U.N. Doc. A/CONF.62/L.59 (1980). In [1982] XIV *Official Records of the Third United Nations Conference on the Law of the Sea*.

UNGA Resolution 2625 (XXV) on Principles of International Law concerning Friendly Relations and Co-operation Among States (24 October 1970), A/RES/25/2625.

Miscellaneous

Article 19. Interpretation of Treaties. *The American Journal of International Law*, 29(S2). 937–977 (1935).

Draft Convention on the Law of Treaties. *The American Journal of International Law*, 29(S2), 657-665 (1935).

doi:10.6342/NTU201903686