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WORLD MARITIME UNIVERSITY

Malmö, Sweden

**How do the compulsory dispute settlement
procedures of the United Nations Convention on the
Law of the Sea deal with disputes concerning land
sovereign issues?**

By

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Japan

A dissertation submitted to the World Maritime University in Partial
Fulfilment of the requirements for the award of the degree of

MASTER OF SCIENCE

In

MARITIME AFFEARS

(MARITIME LAW AND POLICY)

2017

Declaration

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature): 森正雄貴

(Date): 18 September 2017

Supervised by: *



World Maritime University

Abstract

Title of Dissertation: **How do the compulsory dispute settlement procedures of the United Nations Convention on the Law of the Sea deal with disputes concerning land sovereign issues?**

Degree: **MSc**

This study explores two cases the Chagos Marine Protected Area Arbitration, PCA case number 2004-04, (Mauritius v. The United Kingdom) (henceforth Chagos case) and the South China Sea Arbitration, PCA case number 2013-19, (The Republic of Philippines v. The People's Republic of China) (henceforth South China Sea case), brought before the Arbitral Tribunal constituted under the United Nations Convention on the Law of the Sea (UNCLOS) Annex VII.

As one of the main issues of these two cases, in disputes where problems relating to the applicability of UNCLOS and territorial sovereignty deriving from some sources other than the Convention itself were mixed, it was contested whether the Arbitral Tribunal had jurisdiction over the claims. This seems to reflect different approaches to the extent to which national legal systems and states should be bound by UNCLOS. This resulted in different judgments, even though admitting that issues of sovereignty were involved in both cases. In the Chagos case, the Arbitral Tribunal found itself without jurisdiction to take care of some claims made by Mauritius by virtue of the sovereign dispute between the Parties. On the other hand, in the South China Sea case, the Arbitral Tribunal observed that it had jurisdiction over most of the submissions, contrary to objections created by China.

This study examines why there may have been different approaches and reveals the reason why sovereignty issues are not always the reason that causes its jurisdiction to be lost when a court or tribunal pursuant to UNCLOS hands down a judgement on jurisdiction. It makes a decision after careful consideration regarding the nature of the dispute. As facts and circumstances differ, so do the decisions.

KEYWORDS: Law of the sea, Dispute settlement, Jurisdiction, Sovereignty, Chagos Archipelago, South China Sea

List of Abbreviations

ASEAN	Association of Southeast Asian Nations
BIOT	British Indian Ocean Territory
EEZ	Exclusive Economic Zones
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
MPA	Marine Protected Area
PCA	Permanent Court of Arbitration
UNCLOS	United Nations Convention on the Law of the Sea
UNCLOS I	The First United Nations Conference on the Law of the Sea
UNCLOS II	The Second United Nations Conference on the Law of the Sea
UNCLOS III	The Third United Nations Conference on the Law of the Sea

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CHAPTER 1

Introduction

UNCLOS was established over a long period of negotiation through the third United Nations Conference on the Law of the Sea (UNCLOS III), which had been held from 1973 to 1982, incorporating the interests of various countries. It entered into force on 16 November 1994 and is known as "the Constitution of the Ocean" today. The range of the Convention is rather broad and it consists of 320 articles, 17 parts and 9 annexes. They define comprehensive and fundamental matters concerning the Ocean in general, such as territorial water, contiguous zone, high sea and some others.

Before the Convention came into play, the Ocean was divided into two parts, based on territorial water and high sea, by the predecessors of UNCLOS, which were the 1958 Geneva Conventions on the law of the Sea. UNCLOS is distinguished by segmenting the Ocean and expanding the functional division of the Ocean through the adoption and inclusion of new systems such as exclusive economic zones (EEZ) and the deep sea floor. The Ocean is segmented. However, it inevitably encompasses the potentiality to cause conflicts when vessels cross the oceans and engage in various activities.

Part XV of UNCLOS prescribes "settlement of dispute" and "compulsory procedures entailing binding decision" are provided for in Section 2, which is "the most important set of the jurisprudential ruling in the modern history of the international law of the sea" (Schoenbaum, 2016, pp. 451). Not a few interstate disputes arise out of a problem of maritime resources and boundary resulting from the advent of the Convention. Considering the number of States ratifying it, which 168 states have done so as of June 2016, the mechanism of compulsory judicial settlement 'built-in' UNCLOS itself has significant meaning in order to solve conflicts between States because, normally, in a case of conflict between States, international trials cannot be instituted unless there is consent among the Parties.

There are, however, limitations and exceptions to take advantage of the compulsory jurisdiction and they are obscure and complicated. The following

questions are often contested to clarify jurisdiction of a court or tribunal. First, whether the parties to a dispute concerning the interpretation or application of the Convention fulfil “general provisions” set out in Section 1 of Part XV: they are obliged to solve the problem by “peaceful means” pursuant to the UN Charter and “exchange views” to find a solution by negotiation or any peaceful ways in the dispute; a general, regional or bilateral agreement is given priority to the procedures set out in Part XV because of the importance of Parties’ autonomy (Merrills, 2017, pp. 178). UNCLOS imposes on disputing States to follow Section 1 as the first action for a settlement of a dispute. Second, Section 2 is commonly considered as “the essence of the Convention’s dispute settlement procedures” (Churchill, 1999, pp. 454). It sets out “compulsory procedures entailing binding decisions”. Where a dispute is one concerning the interpretation or application of the Convention, a court or tribunal under it is able to have jurisdiction over the dispute. Accordingly, whether a dispute is related to the interpretation or application is often contested. The third problem is whether various kinds of “limitations and exceptions”, provided for in Section 3, are applicable to Section 2. “The exceptions and limitations primarily relate to the exercise of the traditional freedoms of the high seas in the EEZ and on the continental shelf” (Klein, 2009, pp. 121). The States Parties to the Convention may choose certain disputes that are closely linked to an inherent right of the State to withdraw from mandatory proceedings in accordance with Section 2.

There are many points to explore in Part XV of UNCLOS. However, this dissertation focuses on the question of ‘mixed disputes’, which are those that “involve law of the sea issues addressed by the Convention as well as other issues” according to the definition by Oxman (2017, pp. 400). In particular, the interpretation or application of the Convention and land sovereignty issues in mixed disputes are subject of this study. First, do disputes containing concern of sovereignty to a greater or lesser extent fall within the scope of the dispute settlement procedures in UNCLOS, namely, the question is whether or not land sovereignty issues are the interpretation or application of the Convention. Second, if there is some degree of tolerance to territorial issues, how much can be accepted? Third, this dissertation

reveals the relationship between sovereignty issues and the clauses setting out exceptions to Section 3.

The Chagos case and the South China Sea case, in particular regarding “Award on jurisdiction and admissibility”, are good examples to answer these problems. Starting by reviewing the history of the dispute settlement regime, this dissertation goes through key provisions of Part XV of the Convention to affirm the system of obligatory settlement and discusses the difference between a traditional interstate dispute settlement and the UNCLOS dispute settlement procedure. Then, case studies about the two cases are individually conducted. Finally, a comparative study is carried out by making use of the outcome to find what leads to different decisions. Although, as recent updates in relation to the Chagos Archipelago dispute the UN General Assembly adopted a resolution requesting the International Court of Justice (ICJ) to render an advisory opinion at its 71st session (UN, July 22, 2017) and regarding the South China Sea case the merits, Award, was already issued on 12 July 2016, this dissertation does not touch upon them because they go beyond the intended scope of the research. The aim of the dissertation does not intend to resolve respective disputes themselves but to figure out jurisdictional issues of a court or tribunal under UNCLOS in disputes that are linked with land sovereignty issues.

States have to keep the importance of *the rule of law at sea* in mind to ensure safe and secure passage on the peaceful ocean. All States are required to follow peaceful means based on international law in order to resolve problems instead of having recourse to the use of force.

CHAPTER 2

Literature Review

Since the international society had been concerned about various problems arising from the utilisation of the oceans, UNCLOS contributes to establishing a more peaceful Ocean and strengthens the rule of law at sea. On the other hand, there are criticisms that some provisions seem to be obscure and the understanding of them relies upon state practice and courts' decisions that vary.

On 20 December 2010, Mauritius initiated an arbitration procedure, pursuant to Article 287 and Annex VII, Article 1 of UNCLOS, against the United Kingdom in response to setting up a Marine Protected Area (MPA) around the Chagos Archipelago. In the case, the Permanent Court of Arbitration (PCA) in The Hague played the role as Registry. The Tribunal held that it did not have jurisdiction over two claims out of four made by Mauritius because of the fact that they were principally land sovereign disputes.

Nguyen (2016) analysed this case, focusing on its jurisdictional issue because the Chagos case was the first arbitration under Part XV of UNCLOS, which awarded a dispute apparently concerning a territorial sovereign issue. In the Chagos case, Nguyen examined the process of the Arbitral Tribunal in order to identify the limitation which its jurisdiction reaches and observed that the difference between the Tribunal and dissenting judges has to be paid attention to. The majority of the judges considered that the Mauritian claims were substantially related to sovereignty issues. However, Nguyen argues that it could have been possible that the tribunal has jurisdiction over some proposal of Mauritius because Mauritius merely sought the Tribunal to interpret the terms in UNCLOS, so the arbitral tribunal should have had more focus on the claim itself. Qu (2016) also examined the case with special attention on the characteristics of the dispute, which the author called mixed disputes, and contended that the Tribunal had better refrain from exercise its jurisdiction in case mixed disputes because of the inherent sensitivity of the territorial sovereignty, the drafting history of the Convention and an *a contrario*

reading of Article 298(1)(a)(i). Besides, it does not result in a solution to the actual cause of the dispute.

The South China Sea case was brought before the PCA in The Hague by the Republic of the Philippines (the Philippines) against the People's Republic of China (China) under Annex, Part XV of UNCLOS, on 22 January 2013. Since China expressed a plea regarding the Tribunal's jurisdiction, it separately issued "Award on Jurisdiction and admissibility" in 2015 and "Award" in 2016.

Zimmermann and Bäumlner (2013) examined the "award on jurisdiction and admissibility" of the South China Sea case focusing primarily on complex provisions laid down in Part XV for limitations and exceptions from the dispute settlement system. For instance, a unilateral reference of a dispute to the UNCLOS dispute settlement system, performing an obligation of a peaceful settlement under Section 1 and restriction of the compulsory dispute settlement regime under Section 3 are touched upon in the article. Their conclusions raised the possibility of political risk of this case using the *Nicaragua* case, which led the US to withdraw of acceptance of the ICJ's compulsory jurisdiction. Zimmermann and Bäumlner, however, addressed the importance of utilisation of international tribunals in order to achieve peaceful solutions and consideration not only to western tradition but also to any other traditions. Tamada (2015) analysed also the "award on jurisdiction and admissibility", in which the Tribunal handed down a judgement as for whether it had jurisdiction over the case, then took particular note of types of disputes contested in the case. According to his analysis, this dispute was divided into three types by the Arbitral Tribunal, 1) entitlement dispute, 2) sovereignty dispute and 3) delimitation dispute, so that it was able to recognise its jurisdiction over the claims that were proposed by the Philippines. These claims were intentionally narrowed as a strategy in order to get the tribunal to have jurisdiction.

Klein (2016) researched on recent decisions pursuant to the dispute settlement system of UNCLOS, such as Chagos, Arctic Sunrise and South China Sea, to discuss jurisdictional issues that arise from provisions of Part XV and touched upon the scope of jurisdiction. However, it did not compare the Chagos case and the

South China Sea case to find a reason why the Tribunal handed down different decisions.

In respect of the cases mentioned above, there are many individual analyses of the two outcomes and limitations and exceptions that are derived from the provisions. However, it appears that no comparative study has taken place in order to provide criteria whether a claim is considered when it involves territorial sovereignty issues which are not clearly stated in the Convention resulting in exclusion from compulsory procedure under Part XV of UNCLOS. In the Chagos case, the Tribunal took into account broad background of the Mauritius' claims while in the South China Sea case it seems that the Tribunal put more focus on the Philippines' claims. The question, here, is that is there any factors taking into consideration in rendering a decision as for its jurisdiction beyond the interpretation and application of the convention? Therefore, the primary purpose of this dissertation is to find the reason to decide that what kind of issue falls outside the compulsory procedure of UNCLOS and when and how the nature of the dispute concerns territorial sovereignty.

CHAPTER 3

Development of dispute settlement procedure on the Law of the Sea

The Seas have played an important role in the history of mankind, such as forming the boundary between countries and regions, and connecting the world through people exchange and ocean trade. Also, since the Ocean has abundant living resources and natural resources, this can produce huge profits from its use, so that the interests of countries often collide. Therefore, establishing a comprehensive rule regarding the Ocean often had come to face with difficulty. Establishing a convention for the determination of maritime rights fatally involves the possibility of creating a conflict between countries having the same interest in question. Thus, in order to ensure the effectiveness of the Convention and make it more effective, practical resolution of the dispute arising from the Convention is essential.

A. UNCLOS I

In the beginning of the UN era, the international society was eager to codify international law. UN established the International Law Commission (ILC) in 1947 and this body tackled preparatory work for writing the draft on the high sea and territorial sea. The Commission had created a report including most of the points concerning the law of the sea issues at that time. Based on the report, the First United Nations Conference on the Law of the Sea (UNCLOS I) was held in Geneva in 1958. The Conference adopted four Conventions and an optional Protocol on dispute settlement. Not many states, however, supported the Protocol. At that stage, the Conventions, which were the outcomes of UNCLOS I did not contain dispute settlement procedures in themselves. Instead, it was adopted separately as a protocol. According to the analysis of Churchill, the reason why would be "perhaps partly because they went further than the existing obligation which customary law imposed on States" (Churchill, 1999, pp. 15).

B. UNCLOS II, III

Subsequent to UNCLOS I the Second United Nations Conference on the Law of the Sea (UNCLOS II), to which the UN General Assembly requested contemplation of the unsettled question as to the breadth of maritime zones, was convened at Geneva in 1960. It had not come to an agreement. (Treves, 2017, pp.14).

The Third United Nations Conference on the Law of the Sea (UNCLOS III), which had been held in New York from 1973 until 1982, adopted the United Nations Convention on the Law of the Sea in the last year of the Conference. Development of the law of the sea was greatly accelerated by the Convention which succeeded in the codification of the customary law that had been playing a dominant role in this field until the advent of UNCLOS. New regimes and a framework for the Ocean were established, such as exclusive economic zones, regulations on the use of the seabed, archipelagic states and some others (Churchill, 1999, pp. 13-8,120). Moreover, it is a remarkable progress that the Convention includes compulsory dispute settlement procedures. It has been criticised that various norms are included in UNCLOS and there are still many different views on the interpretation and application of its provisions, so having a system to solve disputes arising from the Convention has significant meaning. Tanaka also refers to the importance of the procedure, "It is particularly significant that the LOSC sets out the compulsory dispute settlement procedures as an integrated part of the Convention" (Tanaka, 2015, pp. 417).

According to Merrills, while some insisted the same mechanism of settlement of disputes by an optional protocol should be employed, it was not introduced to the achievement of UNCLOS III. Instead, compulsory dispute settlement procedures were incorporated in the new Convention, because of the fact that "the interpretation and application of an instrument containing so many innovations were bound to generate dispute which could only be resolved by the use of a third-party procedure" (Merrills, 2017, pp. 179).

CHAPTER 4

Settlement of dispute under UNCLOS.

The proceedings provided for in Part XV of UNCLOS are divided into three parts. Section 1 stipulates general provisions on cardinal principles regarding the procedures. Section 2 sets out the compulsory dispute settlement procedures. Section 3 lays down limitations and exceptions to applicability of the compulsory procedure. “Despite the general reluctance of States to bind themselves to use particular dispute settlement procedures, UNCLOS III adopted an elaborate system for the settlement of marine dispute” (Churchill, 1999, pp. 453).

A. Section 1

All UN member States are at least obliged to peacefully settle international disputes instead of trying to resolve the conflict by using force. As noted above, since UNCLOS is a convention adopted as a result of the diplomatic conference held by the United Nations, the principles of the Charter of United Nations are strongly reflected (Kawano, 2016, pp. 6). For example, the most important idea that is the peaceful settlement of disputes prohibiting recourse to “the threat or use of force” as set out in paragraph 4 of Article 2 of the Charter is implied in Section 1 of UNCLOS by imposing the member States to settle disputes by peaceful means. Article 279, the first article of this part, obliges States Parties to the Convention to settle disputes by peaceful means pursuant to paragraph 3 of Article 2 of the Charter, which reads that “[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered” and find a solution based on paragraph 1 of Article 33 of the Charter, which is laid down as follows:

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.

Article 280 of UNCLOS guarantees parties to a dispute to have the right to select peaceful means to settle disputes by their own choice. “This emphasis on the parties’ autonomy is, of course, consistent with general practice”, which is free of choice of means (Merrills, 2017, pp. 178). The parties’ autonomy is greatly paid attention.

If there is an agreement upon a peaceful settlement by disputing parties’ own choice, the proceedings of Part XV apply only where no settlement has been made (Article 281). Where a general, regional or bilateral agreement in order to submit a dispute to a procedure entailing binding decisions exists, such procedure should be applied instead of the regime of dispute settlement under Part XV (Article 282). This means that if Parties are not willing to follow the UNCLOS dispute settlement regime, there is a possibility not to use the regime by an agreement that they made ahead as a precaution.

Parties to a dispute are obliged to exchange views concerning its settlement by negotiation or other peaceful means under Article 283, which is “clearly designed to emphasise consultation and provide the obligation to use peaceful means with a procedural buttress” (Merrills, 2017, pp. 178). Conciliation can be held under Article 284 when parties to a dispute accept and reach an agreement on its conciliation procedure.

B. Section 2

Section 2 is generally thought of the core of the dispute settlement of UNCLOS. Where a dispute cannot be resolved in a way chosen by the Parties to a dispute under the provisions of Section 1, Section 2 shall be applied in accordance with Article 286 and the dispute proceeds to “compulsory procedures entailing binding decisions”. Pursuant to Article 287, four forums are designed for dispute settlement and the Member States can select freely one or more forums from the options by a written declaration as follows:

- (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.

The ICJ is talked more about another chapter. The International Tribunal for the Law of the Sea (ITLOS), whose Statute is laid down in Annex VI, is a newly established tribunal under UNCLOS. In the process of drafting the Convention, the members considered that a new tribunal which is composed of judges who are familiar with maritime issues that would arise out of UNCLOS other than the ICJ because some States were doubtful as for the competence of the ICJ to deal with the issues (Klein, 2009, pp.54). ITLOS, arbitral tribunals under Annex VII and special arbitral tribunal under Annex VIII are open to entities other than States under Article 20 of Annex VI, Article 13 of Annex VII or Article 4 of Annex VIII while the access to the ICJ is only open to State under Article 35 of the Statute.

Arbitral tribunals under Annex VII are composed of “arbitrators” who have experience “in maritime affairs and enjoying the highest reputation for fairness, competence and integrity” (Article 2 of its Annex), whereas a special arbitral tribunal constituted in accordance with Annex VIII are made up of experts who have enough knowledge in the relevant field. In this light, it can be said that special arbitral tribunals under Annex VIII are “technical rather than legal” (Churchill, 1999, pp. 457). According to Yanai, former president of ITLOS, the Arbitral Tribunal is different from conciliation. A result of the tribunal binds the States Parties and they should honestly comply with it. Therefore, the Arbitration Tribunal is also a court which is able to make a binding decision. (Yanai, 2012, pp. 8). UNCLOS contains provisions which set out a process and establish the fora so as to settle disputes arising from the Convention itself. According to Article 288, a court or tribunal above “shall have jurisdiction over any dispute concerning the interpretation or application of this Convention”, which means where a dispute is not considered as a matter of “interpretation or application of this Convention”, they do not have jurisdiction to decide the case.

C. Section 3

However, in order to invoke the procedures in accordance with Section 2, States Parties to the dispute have to bear in mind that there are many limitations and

exceptions to be complied with and they should not conflict with them, which is provided for in Section 3, "Limitations and exceptions to applicability of section 2". These provisions were established to avoid being brought a case strongly linked with a right that a State does not want to compromise before the trial under the Convention, which will encourage many countries to accept UNCLOS (Churchill, 1999, pp. 455). If there were no such exceptions, states would hesitate to consent to become a member of the Convention. This point also reflects the importance of national sovereignty in this context.

Article 297 prescribes the limit to the application of section 2. A variety of conditions and exceptions are enumerated in the Article. However, they are a reflection of one simple view that certain outcomes of exerting the sovereign rights or jurisdiction "especially those concerning the exercise of discretion, should not be subject to challenge in any form of adjudication". Accordingly, compulsory procedure entailing binding decision applies only to disputes regarding an improper use or contravention of traditional right in the maritime domain. For example, marine scientific research and fishery disputes are supposed to be submitted to conciliation under Annex V (Merrills, 2017, pp. 182). They are primarily a matter for bilateral negotiation and should thus be left at this scale.

Section 3 also provides additional exceptions to enable States Parties by written declaration to exempt certain disputes from the compulsory dispute settlement procedures with regard to any or all of the options laid down in Article 298, paragraph 1. There are three optional exceptions: 1) dispute concerning "sea boundary delimitations, or those involving historic bays or titles", 2) dispute concerning "military activities, including military activities" and "law enforcement activities", 3) "disputes in respect of which the Security Council of the United Nations is exercising the functions". The exceptions mentioned in Section 3 are merely a reflection of territorial sovereignty and military activities that have been traditionally considered as sensitive matters touching upon exercise of national sovereignty (Merrills, 2017, pp. 184). Klein noted that "[r]ather than allowing all dispute of interpretation and application of the Convention to be submitted to

mandatory third-party procedures, Part XV had to be designed to protect the primary interests at stake for each issue area” (2009, pp. 27).

CHAPTER 5

International courts and jurisdiction

A. International dispute settlements

One of the most fundamental doctrines of international society is that States are sovereign and have sovereignty. It is generally understood that “all States have equal status within the international legal system” (Allen, 2015, pp. 4). The concept of sovereignty has not faced a big change ever since Vattel stated that “A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom” in the eighteenth century (Crawford, J., & Brownlie, I, 2012, pp. 12). Every state has sovereignty on the equal international plane. Namely there is not a vertically structured relationship in the international society for States that consist of its members. For this reason, no State, no matter how small, is forced to appear before a court unless a state agrees to be bound by the court’s jurisdiction over the case that it is involved.

A court needs to have jurisdiction to hear cases. It is “essentially the power to decide according to law (*jus dicere*) a dispute of particular nature between specific parties” (Thirlway, 2016, pp. 35). If it is concluded in a case brought before a court or tribunal that the matter falls outside the scope of a treaty on which an applicant relies in order to initiate a proceeding, the proceeding is terminated. Determining a court’s or tribunal’s jurisdiction is important to commence dispute settlement procedures. This is a substantive theory of settlement of disputes by international law. On the other hand, this principle makes it complicated to adjudicate interstate disputes. Conflicts come to surface as there are, naturally, different opinions between disputing States. It is often difficult to obtain consent to proceed to judicial proceedings. The question of how to impose international law upon a state infringing it occurs where all State are treated as equals. It is therefore important how disputing States reach an agreement to bring the case before an international court or tribunal. Thus, some conventions have methods to deal with disputes arising from the convention itself, so that the Member States are able to have recourse to the forums provided by the convention.

B. Difference in applicable law between the ICJ statute and UNCLOS

The ICJ, which is one of the principal organs of the UN established by the UN charter, is probably the most well-known international judicial body. The ICJ is not comparable to a domestic court that has comprehensive jurisdiction. It is more proper to describe that it is “a standing mechanism available for the peaceful settlement of dispute between States” (Thirlway, 2016, pp. 3). Article 38 paragraph 1 of the Statute of the International Court of Justice sets out its function which is “to decide in accordance with international law such disputes as are submitted to it”. The applicable law by the Court when it makes a decision is “international law”, which is enumerated in the same paragraph such as international conventions, international custom, general principles of law and judicial decisions and the teachings, where a court is constituted under its Statute.

In the UNCLOS dispute settlement regime, Article 288 in Part XV of the Convention provides for jurisdiction as “[a] court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part” as well as “the interpretation or application of an international agreement related to the purpose of the Convention”. It has jurisdiction with regard to "the interpretation or application" of the Convention, which means if a case attempting to make use of the dispute settlement regime is not related to it, a court or tribunal constituted by the Convention is not capable of hearing the case, which means that it does not have jurisdiction over such case. In case there is a question as to jurisdiction, it should be decided by paragraph 4 of Article 288 that lays down that “[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.”

C. Difference in jurisdiction between the ICJ statute and UNCLOS

The ICJ has jurisdiction over a case only when States parties to a dispute consent to bring the case before the Court. Nevertheless, paragraph 2 of Article 36 of the ICJ statute, which is known as the “optional clause”, refers to the an acceptance of the compulsory jurisdiction of the Court, States are not obliged to declare their acceptance. Obligatory settlement by the ICJ does not work all the time.

On the other hand, after a State becomes a party to UNCLOS, as a basic concept, it is regarded that the State has expressed a will to agree upon the regime of obligatory settlement where certain conditions are satisfied (Kawano, 2016, pp. 7). In other words, “consent to be bound by UNCLOS includes consent to compulsory procedures entailing binding decisions (subject to Section 1 and 3 of Part)” (Klein, 2009, pp. 53). When they ratified the Convention, an agreement to resolve disputes resorting to the procedure of the Convention has been created because the procedure has been built into the Convention.

Where a validly written declaration has not done, it is deemed to have accepted an arbitral arbitration under Annex VII by paragraph 3 of Article 287 and Paragraph 5 reads that “If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree. Even if the other State refuses to accept the obligatory settlement, it does “not constitute a bar to the proceedings” by Article 9 of the Annex. In addition, Article 309 of UNCLOS basically does not allow to make any reservations or exceptions to the Convention. A state must be subject to the compulsory dispute settlement procedures as far as a party to it. The dispute settlement mechanism is designed to ensure that disputes at least can reach arbitral tribunals under Annex VII.

For these reasons, the range of the Courts’ jurisdiction differs and may depend on what kind of reference is employed. First, while the ICJ as constituted by its Statute possesses broad jurisdiction over various kinds of cases regarding international law in general, a court or tribunal under UNCLOS has jurisdiction only over disputes concerning “the interpretation or application of this Convention”. According to Gates, the ICJ Statute “exists apart from the Convention and has its own authorizing statute, the ICJ has a comparative advantage over ITLOS in that it can apply other substantive sources of international law besides UNCLOS” (2017, pp.298). In addition, a case is subject to less limitation or exceptions when it is authorised by the Statute that it is done by UNCLOS. Tanaka explains this taking a good example as follows:

Where a dispute is submitted in accordance with the compulsory procedures in the LOSC, the Court's jurisdiction is subject to the limitations and exceptions set out in Article 297 and 298. However, if a party to a dispute submits the dispute to the ICJ on the basis of the optional clause, the scope of the Court's jurisdiction is subject to the clause (Tanaka, 2015, pp. 430)

The dispute settlement procedures of UNCLOS should be in conformity with a number of limitations and exceptions.

Second, unlike the ICJ Statute, as long as disputing Parties are members to the Convention, States are able to bring disputes before a court or tribunal under UNCLOS. Even if the other State refuses to accept the obligatory settlement, it does "not constitute a bar to the proceedings" by Article 9 of the Annex. This is an important difference between ordinal dispute settlements pursuant to the ICJ statute and the UNCLOS regime. If disputing Parties consent to submit a case to a court, they are able to submit it to any court. But, since there is a dispute between the parties and they conflict each other, reaching an agreement is hard to obtain. For this reason, UNCLOS assures a judicial settlement by introducing the mechanism of compulsory settlement that at least disputes are brought before the Arbitral Tribunal under Annex VII by a unilateral submission. Paragraph 5 of Article 287 provides that "If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree".

CHAPTER 6

Does a dispute concerning territorial sovereignty fall within the ambit of UNCLOS?

It is generally said that section 2 of Part XV does not cover disputes related to a territorial sovereignty issue because there are no provisions to decide the sovereignty over a geographic feature. UNCLOS only refers to the definitions, for example, how to draw a baseline to determine maritime zones such as territorial water or what is an island or a rock. Accordingly, disputes with respect to a sovereignty issue are not a dispute concerning the interpretation or application of the Convention, which is not subject to the compulsory dispute settlement procedures under UNCLOS. It is thought that disputes concerning land sovereignty issues are not included in it (Merrills, 2017, pp. 183).

One question arises as a result of the perception above. If disputes are linked to other issues, for instance, sovereign disputes, how would this be treated, or is any form of legal tribunals under the Convention incapable of dealing with such a case? According to Oxman, such so-called mixed disputes should be divided into three situations in order to distinguish the nature of the dispute. First, without relying on the dispute settlement procedures of UNCLOS, States may choose to bring a mixed dispute before the ICJ, arbitration or any kind of international forums. Jurisdiction of the court or tribunal stems from an instrument selected by the Parties, so the range of jurisdiction can be different from one derived from UNCLOS, even if such dispute could contain the interpretation or application of the Convention. Second, Article 288 paragraph 2 stipulates that “an international agreement related to the purpose of the Convention” should be subject to the obligatory settlement and this agreement could be the basis of jurisdiction. Thus, it seems to be possible to deposit a mixed dispute to ITLOS or an arbitration under Annex VII. The third situation concerns whether a unilateral reference of a mixed dispute involving a land sovereignty issue is applicable to the Convention’s compulsory procedures. As mentioned previously, it does not appear to fall within the scope of the system of obligatory settlement because of the fact that “land sovereignty questions are not addressed by the LOSC

and that there is no indication that becoming party to the LOSC entails consent to adjudicate disputes regarding over land territory”. However, it might be feasible that the court or tribunal is able to have jurisdiction over a dispute if the land sovereignty in question is not substantive to the main subject of it (Oxman, 2017, pp. 400).

The Arbitral Tribunal under UNCLOS decided that it did not have jurisdiction over some submissions made by Mauritius in the Chagos case because they are fundamentally related to a sovereign issue. On the other hand, it approved its jurisdiction in the South China Sea case, despite the Tribunal finding that the Philippines's claims were concerned with territorial sovereignty to some extent. Both cases involved questions of land sovereignty but the results differed. Some disputes generated by the Convention are inevitably connected with a territorial sovereignty issue. To know about the scope of the jurisdiction of a court or tribunal it is helpful to promote among states to make use of the procedures to settle disputes by the rule of law. Comparing these two cases, as indicated, the dissertation examines the feature how a court or tribunal constituted pursuant to the Convention decides as to whether they have jurisdiction to hear a case and whether the international law has a certain standard.

CHAPTER 7

Chagos Marine Protected Area Arbitration (Mauritius v. the United Kingdom)

A. The history of the dispute

Mauritius brought a dispute concerning the Chagos Archipelago against the United Kingdom before an Arbitral Tribunal under Annex VII to UNCLOS on 20 December 2010. The Chagos Archipelago was separated from Mauritius, which was then under colonial rule by the United Kingdom, with relation to the establishment of the British Indian Ocean Territory (BIOT) on 8 November 1965 (Chagos, 2015, para. 2). The United Kingdom built a Marine Protected Area (MPA) around the Chagos Archipelago, which was governed by it as the BIOT (para. 5). In response to this, Mauritius argued that the act of the United Kingdom to create the MPA was in contravention of the Convention (para. 6).

Mauritius' final submission was composed of four parts:

- (1) the United Kingdom is not entitled to declare an "MPA" or other maritime zones because it is not the "coastal State" within the meaning of inter alia Articles 2, 55, 56 and 76 of the Convention; and/or
- (2) having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an "MPA" or other maritime zones because Mauritius has rights as a "coastal State" within the meaning of inter alia Articles 56(1)(b)(iii) and 76(8) of the Convention; and/or
- (3) the United Kingdom shall take no steps that may prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius in respect of any full submission that Mauritius may make to the Commission regarding the Chagos Archipelago under Article 76 of the Convention; and
- (4) The United Kingdom's purported "MPA" is incompatible with the substantive and procedural obligations of the United Kingdom under the Convention, including inter alia Articles 2, 55, 56, 63, 64, 194 and 300, as well as Article 7 of the Agreement for the Implementation of the

Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 August 1995 (para. 158).

The United Kingdom responded to Mauritius' submission requesting the Tribunal: (i) "to find that it is without jurisdiction over each of the claims of Mauritius; (ii) in the alternative, to dismiss the claims of Mauritius"

The Tribunal, as for Mauritius' first submission, considered that it was "properly characterized as relating to land sovereignty over the Chagos Archipelago". According to the Tribunal's view, it was "simply one aspect of this larger dispute" that different understandings existed in terms of coastal state (para. 212). The second submission was regarded as not falling within the ambit of the Tribunal's jurisdiction, because of the same reason with the first submission (para. 230). In respect of Mauritius' fourth submission, the Tribunal held that it has jurisdiction to handle the submission pursuant to relevant provisions of UNCLOS (para. 323) and the decision was in favour of Mauritius. Fishing rights of Mauritius were admitted in the Territorial Sea in accordance with The United Kingdom's undertaking at Lancaster House (para. 456). The Tribunal observed that "the declaration of the MPA was not in accordance with the provisions of the Convention (para. 544). However, it was not a question regarding sovereignty issue which the United Kingdom expressed with the term "non-sovereignty claims" so this dissertation does not mention the Fourth Submission. With regard to Mauritius' third submission, the Tribunal concluded that "there is no dispute between the Parties regarding this issue" (para. 349) so it did not carry out examining jurisdictional issue under UNCLOS with respect to the third submission.

This dissertation only focuses on Mauritius' first and second submissions because it was contested whether they were related to territorial sovereignty.

B. First submission

The Tribunal understood the point of Mauritius' first submission to be as "Mauritius is not, it emphasizes, attempting to force a sovereignty dispute into the confines of the Convention". Rather, it focused its emphasis on whether the United

Kingdom is a “coastal state” in conformity with the meaning of UNCLOS. It can be said that the way that the terms are used in the Convention is obvious from the context. It is a distinction from a land-locked state (para. 176). Nevertheless, there are no provisions to identify the coastal State “in cases where sovereignty over the land territory fronting a coast is disputed” (para. 203). Mauritius did not intend to stretch the Tribunal’s jurisdiction to an issue beyond the interpretation or application of the Convention (para. 176). In addition, Mauritius contended by making the fine distinction that:

“[t]he starting point is not the a priori question of whether Mauritius does or does not have sovereignty The correct starting point is whether or not this part of Mauritius’ claim concerns the interpretation or application of the Convention” (Final Transcript, 1002:1-3).

Then, whether there were any other points of international law under Article 293, “the interpretation or application of an international agreement related to the purposes of this Convention” that were possibly involved in the dispute was also submitted by Mauritius (para. 177).

Since either of the Party to the dispute did not have recourse to “automatic exception” prescribed in Article 297 and make any declaration pursuant to Article 298, what should be dealt with in the Tribunal was whether or not the submission was based on a dispute concerning the interpretation or application of the Convention. The Tribunal considered that Mauritius’ first submission was composed of two parts:

first, what is the nature of the dispute encompassed in Mauritius’ First Submission? Second, to the extent that the Tribunal finds the Parties’ dispute to be, at its core, a matter of territorial sovereignty, to what extent does Article 288(1) permit a tribunal to determine issues of disputed land sovereignty as a necessary precondition to a determination of rights and duties in the adjacent sea? (para. 206).

In order to determine its jurisdiction, the Tribunal referred to *Fisheries Jurisdiction (Spain v. Canada)* to say that the position of both parties is to take into account

where a dispute is examined and *Nuclear Tests (New Zealand v. France)* to emphasize the importance of “to isolate the real issue in the case and to identify the object of the claim” (para. 208). Then, the record and history that Mauritius had challenged its sovereignty over the Chagos Archipelago against the United Kingdom before various courts caught the attention of the Tribunal. Moreover, it pointed out that “the pleadings in these proceedings are replete with assertions of Mauritian sovereignty over the Chagos Archipelago” (para. 209).

On the other hand, “the manner in which the MPA was declared” and “the implications of the MPA for the Lancaster House Undertakings” were recognized as disputes that needed to be considered with relation to Mauritius’ Fourth Submission because they were not the matter of sovereignty (para. 210).

The different views of the Parties were obvious in terms of identification of the "coastal state" so deciding where to put more focus on was important for the Tribunal in order to identify the Parties’ dispute. In other words, the point that needed to be taken into account when the Tribunal made a decision was as follows:

Is the Parties’ dispute primarily a matter of the interpretation and application of the term “coastal State”, with the issue of sovereignty forming one aspect of a larger question? Or does the Parties’ dispute primarily concern sovereignty, with the United Kingdom’s actions as a “coastal State” merely representing a manifestation of that dispute?

It concluded that the latter was the character of the dispute based on the fact that “There is an extensive record, extending across a range of fora and instruments, documenting the Parties’ dispute over sovereignty” unlike insufficient evidence to prove that the dispute was associated with “the United Kingdom’s implementation of the Convention”. In addition, the fact that Mauritius expected the effect of the Award beyond merely the implication or application of the Convention was found in the words of Mauritius’ counsel. In the Tribunal’s view, “These are not the sort of consequences that follow from a narrow dispute regarding the interpretation of the words “coastal State” for the purposes of certain articles of the Convention”(para. 211).

For these reasons with respect to Mauritius' First Submission, the Tribunal found that the Submission was "properly characterized as relating to land sovereignty over the Chagos Archipelago" so the Tribunal did not have jurisdiction. The dispute concerning the meaning of "coastal state" in UNCLOS was "simply one aspect of this larger dispute" (para. 212).

It is still not clear that "the extent to which Article 288(1) accords the Tribunal jurisdiction in respect of a dispute over land sovereignty" from the conclusion above. Further analysis was done by the Tribunal and it stated that the Parties' debates regarding "an *a contrario* reading of Article 298(1)(a)(i)", which means that "land sovereignty is generally within the jurisdiction of a Part XV court or tribunal"(para. 214), did not get the point because "The negotiating records of the Convention provide no explicit answer regarding jurisdiction over territorial sovereignty" (para. 215).

Furthermore, the sovereignty of States is an extremely sensitive matter touching upon territorial sovereignty, so it is not reasonable to count on what a State declaring to withdraw some dispute settlement procedures under Article 298 accepts as? more substantive issues of territorial sovereignty (para. 216). It additionally addressed that if drafters intended to include such claims within the ambit of the procedure under Part XV, there should be explicitly "an opt-out for States not wishing their sovereignty claims to be adjudicated" (para. 217).

The Tribunal held that:

At most, an *a contrario* reading of the provision supports the proposition that an issue of land sovereignty might be within the jurisdiction of a Part XV court or tribunal if it were genuinely ancillary to a dispute over a maritime boundary or a claim of a historic title (para. 219).

The term "genuinely ancillary" would be one of the important requirements to decide its jurisdiction in case a dispute apparently is linked with territorial sovereignty.

From *Nuclear Tests (New Zealand v. France)*, the idea of "the real issue in the case" and the "object of the claim" was invoked to support the Tribunal opinion

on what a genuinely ancillary matter is. In its view, where they are not connected with the interpretation or application of UNCLOS, “an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).” (para. 220). Also, “a minor issue of territorial sovereignty” does not always prevent building jurisdiction over a case where it is considered as an ancillary factor of a dispute concerning the interpretation or application of the Convention (para. 221).

C. Second Submission

In the Tribunal's decision with respect to Mauritius' Second Submission, the importance of having the consideration to “the context of the submission” and “the manner in which it has been presented” was stated. Then, the Second Submission was also considered as a dispute regarding sovereignty over the Chagos Archipelago and that was the main reason of the Submission. It was “merely an aspect of this larger dispute” that Mauritius purported to bring a question of the interpretation or application of the term “coastal state” (para. 229). *Nuclear Tests (New Zealand v. France)* case was again touched upon to distinguish the true “object of the claim” and it was considered as to sustain the claim to sovereignty over the Archipelago in the Second Submission. For the same reason as its First Submission was recognised as a dispute concerning territorial sovereignty over the Chagos Archipelago, the Tribunal held that it did not have jurisdiction to deal with Mauritius Second Submission (para. 230).

CHAPTER 8

The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China), Award on Jurisdiction and Admissibility

A. Introduction to the dispute

On 22 January 2013, pursuant to Article 287 and Annex VII of UNCLOS, the Philippines initiated an arbitral procedure against China in order to settle a dispute concerning historic rights, maritime entitlement and unlawful acts in the South China Sea (South China Sea, 2015, para. 2). This case was heard at PCA in Hague. The tribunal issued its Award on Jurisdiction and Admissibility on 29 October 2015. The Philippines asked the tribunal to make three things containing inter-states matters clear. First, it argued that the Parties' each right and obligations should be based on the Convention. Since "historic rights", which is the main reason for China to support its legitimacy of so-called "nine-dash line", were not in conformity with the Convention, China's claims are null and void (para. 4). Second, the Philippines sought adequate characterization of geographical features in the area (para. 5). Third, the Philippines alleged that the enforcement of its sovereign rights and freedom pursuant to UNCLOS were offended by interference from China (para. 6). Eventually, the claims of Philippines consisted of 15 specific submissions at the final version of the Philippines Memorial of 30 March 2014 (hereafter "the Memorial") (para. 7).

The tribunal was aware that "the Philippines has stated at all stages of this arbitration that it is not asking this Tribunal to rule on the territorial sovereignty aspect of its disputes with China" and "it is not asking this Tribunal to delimit any maritime boundaries" because China had declared not to accept dispute settlement regarding maritime boundary delimitation under Part XV of the Convention (para. 8). China never appeared in the Tribunal throughout the process. Instead, China articulated its non-acceptance of and non-participation in the arbitration by a "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" (hereafter "China's Position Paper"), which was asserted by the Chinese

Ministry of Foreign Affairs on 7 December 2014, and The Chinese Ambassador to the Netherlands sent two letters to the members of the Tribunal to show China's position. It was also affirmed from beginning to end that the said actions taken by the government of China never showed any intention of participating in the Tribunal (para. 10). However, Article 9 of Annex VII to the Convention has a provision regarding "Default of appearance", which lays down that "[a]bsence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings". It did not bother the Tribunal to proceed to the Arbitration. China remained a party to the Arbitration and shall be bound by the decision of the Tribunal under Article 11 of Annex VII (para. 11).

China had contended that the Tribunal does not have jurisdiction and its ground was composed of three reasons touched upon in China's position Paper as follows. First of all, the territorial sovereignty over several maritime features is the subject matter. Therefore, the case falls without the scope of the Convention and is not related to the interpretation or application of UNCLOS. Second, both States Parties to the dispute have already agreed upon settlement of relevant disputes. Third, even if the case were subject to the procedure of the Convention as the Memorial concerns the interpretation or application of UNCLOS, the subject matter would still be linked with maritime delimitation. China has withdrawn from the dispute settlement procedure in respect to maritime delimitation (para. 14).

In its Procedural Order No. 4 of 21 April 2015, paragraph 1.1.1, the Tribunal stated that the communications by China including the Position Paper and the Letter to the Netherlands "effectively constitute a plea concerning this Arbitral Tribunal's jurisdiction" and "will be treated as such for the purposes of this arbitration". Thus, it decided to "rule on any plea concerning its jurisdiction as a preliminary question" apart from its merits.

The Tribunal only handled jurisdictional matters in the Award on Jurisdiction and admissibility, which meant the claims themselves were not addressed in it. If the Tribunal found itself without jurisdiction, the proceeding was terminated at that point. Yet, where the Tribunal had jurisdiction over any of the claims, they were

supposed to proceed to the merits. In case the matters of jurisdiction were so closely linked with the merits, the Tribunal could not decide them as “preliminary questions”, it was supposed to defer these issues to the merits. (para. 16).

The Tribunal concluded that it had jurisdiction over 7 submissions out of 15 in the Memorial and the rest of the submissions were considered in conjunction with the merits of the Philippines claims (para. 397-412).

B. The Philippines requests and submission and China’s argument

As a matter of course, since the mandatory adjudication of Part XV is a regime under UNCLOS, disputes that can be solved by these procedures should be limited to one concerning interpretation or application of the Convention. However, Disputes concerning the interpretation or application of the Convention are not considered to include the issue of territorial sovereignty. As for disputes relating to the interpretation or application of the Convention, it is difficult to distinguish between a dispute over sovereignty on the territory and the title to a certain geographic feature, or conflict concerning maritime delimitation in the case of overlap. Therefore, if the Philippines discusses the territorial rights of islands, rocks, low tide altitude a little, the arbitration court concludes that it has no jurisdiction over such dispute (Kawano, 2016, pp. 7).

The Tribunal reaffirmed that “the Tribunal is required to determine, first, whether there is a dispute between the Parties concerning the matters raised by the Philippines and, second, whether such a dispute concerns the interpretation or application of the Convention” (para. 131).

Thus, the Philippines had to create its requests and submission in order not to touch upon these issues. Chapter 7 of the Memorial is dedicated to explaining why the Tribunal has jurisdiction over the case. As a conclusion of the Chapter, the Philippines contended that "All aspects of the disputes raised in the Philippines’ Amended Statement of Claim concern the interpretation and application of UNCLOS”. It seems that the Philippines paid great attention to the jurisdictional issue in order not to lead the case to territorial sovereignty. In addition, The Philippines’ final submission in the same Memorial (the Submission) in which is referred to as “Submission of the Republic of the Philippines” alleges that “China’s

maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea” (para. 101).

The Philippines again mentioned that the case should be considered within the mechanism of UNCLOS.

On the other hand, China argued in China’s Position paper that there are two aspects of the characterisation of jurisdiction of the dispute, one of which is about territorial sovereignty. It addressed that “the essence of the subject-matter of the arbitration is territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention.” (China’s Position Paper, para. 4), (para. 133).

The Philippines’ position on the dispute mentioned in the Award is that:

With respect to sovereignty, the Philippines accepts that a dispute concerning sovereignty over maritime features in the South China Sea exists between the Parties and acknowledges that the Philippines’ “disputes with China in the South China Sea have more than one layer.” However, the Philippines considers that this is entirely irrelevant to the Tribunal’s jurisdiction, because “[n]one of [the Philippines’] submissions require the Tribunal to express any view at all as to the extent of China’s sovereignty over land territory, or that of any other state.” (para. 141).

It will be notable that the Philippines addressed that the case was not related to the sovereignty issue despite the fact that it agreed that there is a dispute concerning sovereignty over certain geographic features. The Philippines insisted that maritime entitlement of a maritime geographic feature was able to be identified without deciding which country has sovereignty over it because it is only concerned with the interpretation or application of the Convention.

C. The Tribunal’s decision

The Tribunal held that “There is no question that there exists a dispute between the Parties concerning land sovereignty over certain maritime features in the South China Sea” and the diplomatic communications between the Parties also

underpinned the existence of a dispute over sovereignty. However, it did not consider that “it follows from the existence of a dispute over sovereignty that sovereignty is also the appropriate characterisation of the claims the Philippines has submitted in these proceedings”. The Tribunal did not regard sovereignty issues as a main ground of the dispute, even though a dispute can be associated with “several distinct matters” and “multi aspects”. Furthermore, the Tribunal quoted from the view of the ICJ in *the United States Diplomatic and Consular Staff in Tehran* that there are no reasons to “decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important” (para. 152).

If the claims referred to in the Memorial demand the Tribunal to decide either following two aspects, it could be said that the intention of the Philippines claims is derived from concern as to territorial sovereignty:

- (a) the resolution of the Philippines’ claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or
- (b) the actual objective of the Philippines’ claims was to advance its position in the Parties’ dispute over sovereignty.

The tribunal took notice of the attitude that the Philippines “expressly and repeatedly requested” in order to avoid to take into consideration the above-mentioned conditions and concluded that the Philippines' Submission did not "require an implicit determination of sovereignty".

Moreover, the difference between this case and the *Chagos* case was referred to as follows:

The Tribunal does not see that success on these Submissions would have an effect on the Philippines’ sovereignty claims and accepts that the Philippines has initiated these proceedings with the entirely proper objective of narrowing the issues in dispute between the two States.

In the Tribunal’s view, the first and second claims submitted by Mauritius “would have required an implicit decision on sovereignty” and “sovereignty was the true object of Mauritius’ claim” (para. 153).

D. Types of dispute

According to Tamada, the strategy taken by the Philippines was to set this case as a dispute concerning entitlement dispute in order to separate the case from sovereignty disputes and delimitation disputes. First, an entitlement dispute is one as to whether a certain maritime feature creates entitlements to territorial water, EEZ and continental shelf. There are definitions in the Convention, so this sort of dispute is subject to it. The forum under Part XV has jurisdiction. Second, it is called sovereignty dispute that there is a conflict between two or more States regarding sovereignty over a certain maritime geographic feature, in other words, which State is entitled to possess the feature in question. UNCLOS does not contain any provisions to decide which state owns sovereignty over a maritime feature. Thus, a court or tribunal under it also does not have jurisdiction over such dispute because its jurisdiction is confined the interpretation or application of the Convention. Where there are no provisions to take care of a problem in UNCLOS, it cannot be the interpretation or application of the Convention. Third, a case in respect to a maritime boundary or maritime delimitation is named as a delimitation dispute which can be subject to optional exceptions, Article 298.

In the South China Sea case, the Philippines alleged that this dispute is an entitlement dispute, not a sovereign and delimitation dispute. One of the purposes of the Philippines was to establish jurisdiction. Indeed, the Tribunal was in favour of the Philippines claim.

In paragraph 152 of the present Award, as previously stated, it invoked the *United States Diplomatic and Consular Staff in Tehran* and observed that even if there is one aspect that plays an important role in a case, it does not mean to eliminate another aspect to be taken into account. However, this decision does not properly answer the question why it is possible to distinguish an entitlement dispute from a sovereignty and delimitation dispute (Tamada, 2015, pp. 152).

CHAPTER 9

Comparative examination of the two cases

The Chagos case is the first case that was awarded by invoking the compulsory dispute settlement procedures under Part XV, section 2 (Nguyen, 2016, pp. 121). There were also some cases brought before the ICJ with respect to a problem arising out of provisions of UNCLOS, but they were constituted by the ICJ statute. These cases had nothing to do with the compulsory dispute settlement procedure under UNCLOS. For example, the ICJ rendered a decision on the delimitation of the continental shelf between Colombia and Nicaragua acknowledging Article 76 of UNCLOS as a basis of its decision although Colombia is not a member of the Convention (Gates, 2017, pp.298).

Part XV remains ambiguous because it is not clearly stated in the text, whether the forums in accordance with UNCLOS have compulsory jurisdiction over a case that seems to have a connection with territorial sovereignty. Thus, comparing the two cases, the Chagos case and the South China Sea case, this section finds what led them to different conclusions.

A. Land sovereignty issue

If claims are related to land sovereignty, the arbitral tribunal does not have jurisdiction to hear them. This is because “the Convention [UNCLOS] is not concerned with territorial dispute”, which is clearly stated in Award on Jurisdiction and Admissibility of the South China Sea case (South China Sea, 2015 para. 5). And, later, in the merit of the Arbitration, it more clearly held that “the Convention [...] does not address the sovereignty of States over land territory” (South China Sea, 2016, para. 8)

In accordance with the 1969 Vienna Convention on the Law of the Treaties provides for “Supplementary means of interpretation” in Article 32, the preparatory work of the Convention can work as supplementary means of interpretation. The tribunal examined the drafters’ intention on whether or not land sovereignty falls within the scope of UNCLOS and it concluded that no evident answer in the record of negotiation on the Convention showed that “none of the Conference participants

expected that a long-standing dispute over territorial sovereignty would ever be considered to be a dispute “concerning the interpretation or application of the Convention” (Chagos, 2015, para. 215). Land sovereignty issues are not subject to the dispute settlement procedure of Part XV of UNCLOS.

However, existence of sovereignty dispute between disputing Parties does not always become a reason that the arbitral tribunal finds itself without jurisdiction to address such cases. In the Chagos case, the Tribunal observed that in order to determine whether or not an issue is one concerning the interpretation or application of the Convention, two steps are required. The first step is “what is the nature of the dispute” and the second is:

to the extent that the Tribunal finds the Parties’ dispute to be, at its core, a matter of territorial sovereignty, to what extent does Article 288(1) permit a tribunal to determine issues of disputed land sovereignty as a necessary precondition to a determination of rights and duties in the adjacent sea? (Chagos, 2015, para. 206)

The answer of “what is the nature of the dispute” is able to find by “the process to isolate the real issue in the case” and “to identify the object of the claim” (Chagos, 2015, para. 208). In this light, the obligation of the Tribunal is to “evaluate where the relative weight of the dispute lies” to characterize the Parties dispute (Chagos, 2015, para. 211). It cited these terms from ICJ’s decision, *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para. 30. The arbitration tribunal finds that whether the objective of the claim is the interpretation or application of the Convention after careful consideration by isolating the real issue in the case as a first step. Even though, a land sovereign issue is found in a case, there is still a small room to consider jurisdiction from an *a contrario* reading of 298(1)(a)(i) for a court or tribunal under the Part XV, only where it is “genuinely ancillary” to a dispute over a maritime boundary or a claim of historic title (Chagos, 2015, para. 218).

Then, if the objection to the claim is not concerned with land sovereignty at the core, the jurisdiction of a court or tribunal under the mechanism of obligatory

settlement of UNCLOS extends to an examination of such fact or ancillary determination of law that are needed to resolve the dispute. It should be kept in mind that “an incidental connection between the dispute and some matter regulated by the Convention” is not enough to give a court or tribunal jurisdiction pursuant to Article 288 (1) over a dispute as a whole (Chagos, 2015, para. 220). Therefore, where land sovereignty consists of “one aspect of a larger question”, the court or tribunal may have jurisdiction to hear the dispute. However, where the issues “primarily concern sovereignty”, it does not have jurisdiction.

In the South China Sea case, the Tribunal invoked the *Nuclear Tests* case again in order to explain “the nature of the dispute” and adopted the same process with the Chagos case. Moreover, it referred to the ICJ in *the United States Diplomatic and Consular Staff in Tehran* and stated that “there are no grounds to decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important” (South China Sea, 2015, para. 152).

For the reason above, in general, a dispute concerning land sovereignty issues fall outside of the dispute settlement procedures under UNCLOS. However, it might be possible for the court or tribunal to hear such case if a problem of territorial sovereignty is considered as one aspect of the dispute and the nature of the dispute is inherently not related to it.

B. What made the differences between the two cases?

Since it had been anticipated that UNCLOS did not handle disputes concerning territorial sovereignty, both Mauritius and the Philippines insisted that there was no intention to ask the Arbitral Tribunal to make a decision as to which State owns sovereignty over the land features in question. However, the arbitration tribunal made different decisions. As for the first submission in the Chagos case, it held that “[t]he Parties’ dispute regarding sovereignty over the Chagos Archipelago does not concern the interpretation or application of the Convention” (Chagos, 2015, para. 221), namely it concluded that the nature of the dispute was territorial sovereignty. The second submission was also dismissed by the same reason.

On the other hand, in the South China Sea case, the Tribunal observed that “any of the Philippines’ Submissions require an implicit determination of

sovereignty” (South China Sea, 2015, para. 153), despite the fact that it recognised the existence of a dispute concerning land sovereignty.

Considering the reason why the judgements differed, it would be noteworthy that the Tribunal drew attention to the history of the Mauritius’ claims in regard to sovereignty over the Chagos Islands. Paragraph 209 points out that:

In the Tribunal’s view, the record [...] clearly indicates that a dispute between the Parties exists with respect to sovereignty over the Chagos Archipelago. Since at least 1980, Mauritius has asserted its sovereignty over the Chagos Archipelago in a variety of fora, including in bilateral communications with the United Kingdom and in statements to the United Nations. Mauritius has also challenged the circumstances by which the Archipelago was detached; questioned the validity of the Mauritius Council of Ministers’ approval of that decision; enshrined a claim to sovereignty over the Archipelago in its Constitution and legislation; and declared its own exclusive economic zone in the surrounding waters. Finally, the pleadings in these proceedings are replete with assertions of Mauritian sovereignty over the Chagos Archipelago.

In contrast, in respect of the South China Sea case, this was the first international judicial decision as regards China’s activities in the South China Sea, which was challenged by one of the Coastal States surrounding the South Sea against China (Ueno, 2016, pp.1). There is not a paragraph regarding a history that the Philippines appealed the territorial sovereignty matter against China before any international courts. Besides, even in regional conferences, the concerned States have not criticised China by name. The Association of Southeast Asian Nations (ASEAN), some States of which such as Malaysia, the Republic of Indonesia, the Socialist Republic of Viet Nam and the Kingdom of Thailand attended the hearing as observers in South China case (2015, para. 15), have shown anxiety as for the actions taken by China for instance construction of artificial islands through dialogues. However, it has avoided from making a pointed reference to "China". (Suzuki, 2016,

pp.2). Records of litigation at an international court might partly be a contributory factor that had the Tribunal to hand down the judgement.

In addition, the Tribunal concerning the Chagos case found that Mauritius had sought to obtain the consequence “well beyond the question of the validity” of the claim itself from the speech regarding jurisdiction over “coastal state” issue by Professor Philippe Sands QC, who was a member for Mauritius at the hearing (Hearing, Vol.8, pp.1030, para. 13-21). The consequences that an applicant pursues should follow directly from a dispute regarding the interpretation of terms laid down in the Convention for the purposes of certain articles of it (Chagos, 2015, para. 209). An applicant should be required to entirely ask the interpretation or application of UNCLOS.

Finally, it is probably necessary that the Applicant should explain how exactly the provisions that it invokes are linked to its submissions. According to Nguyen, Judge Wolfrum and Judge Cot of the ITLOS stated in *ARA Libertad* case that it is required for the Applicant to “invoke and argue particular provisions of the Convention which plausibly support its claim and to show that the views on the interpretation of these provisions are positively opposed by the Respondent”. In this light, while the Philippines succeeded in constructing its claims by asking the Tribunal to determine characteristic of certain geographical features by virtue of relevant provisions of UNCLOS (South China Sea, 2015, para. 26), Mauritius failed to prove the link because it merely referred to the UK was not a coastal state for the purpose of the provisions, which Mauritius enumerated.

C. Relationship between sovereignty issues and other clauses

1) In Relation to Obligation to Exchange Views

Article 283 in Section 1 requires disputing States to conduct a dialogue. When a dispute occurs as a result of the different opinions in respect of the interpretation or application of the Convention, “the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means”. Yet, it does not indicate any particular means how to take place an exchange of views (Oxman, 2017, pp. 397). With regard to the requirement under Article 283, the Tribunal of the Chagos case observed that what

an exchange of views meant was to discuss a method for resolving the dispute. The Parties do not need to “in fact engage in negotiations or other forms of peaceful dispute resolution. Considering the text of the provision”, the Tribunal concluded that “Article 283 cannot be understood as an obligation to negotiate the substance of the dispute” (Chagos, 2015, para. 378). The South China Sea case took on the same approach (South China Sea, 2015, para. 333).

According to this approach, the Parties are not obliged to specify what the dispute concerning the interpretation or application is in question (Klein, 2016, pp. 407). Therefore, even if land sovereignty issues are not on the table of negotiation to meet the requirement of an exchange of views, it could be dealt with in the compulsory settlement of the dispute.

2) Possibility of Separation of land sovereignty from Entitlement dispute and Maritime Boundary Issue

States that are members of the Convention can opt out of the maritime delimitation dispute by virtue of Article 298. If land sovereignty issues are inseparable from maritime boundary delimitation in deciding it, the existence of the issue seems to prevent an applicant from bringing the case before any court or tribunal under UNCLOS. However, in the South China Sea case, the Tribunal held that it does not mean that “a dispute over an issue that may be considered in the course of a maritime boundary delimitation constitutes a dispute over maritime boundary delimitation itself” (South China Sea, 2015, para. 155). Namely, the Tribunal decided that territorial sovereignty issues do not directly affect maritime delimitation dispute, which means that those two aspects are able to be considered separately. The land sovereignty issues would not immediately be excluded from the deliberation. However, this decision did not mention any more clear reasons why an issue that may be taken into account in conjunction with maritime boundary does not always compose of a dispute concerning maritime boundary delimitation.

D. Consideration of what the Tribunal did not say in the Awards?

As noted above, there are some vague points remained in the process that the Tribunal determined what the nature of the dispute was. The decisions were not all clear. What the Tribunal did not distinctly mention in the Award needs to be further

considered. In the Chagos case, a consequence of earlier colonial intervention and claims exists as a sort of historical scenario. UNCLOS would have had to be attentive not to turn off its member States by being associated with historical disputes concerning sovereignty that an unsolved decolonisation had not classified where such a scenario lies. In the South China Sea case, the territorial sovereignty issue derived from the wholly different standpoint. It can be still disputable to conclude but the political consideration of UNCLOS may be to deter a strong maritime power from attempting to change the current situation around neighbouring territories and areas of the sea in the aggressive manner observed here. Thus, UNCLOS would have had a side with the Philippines to get the endorsement of the international society. Assuming that the presumption is correct in both cases, then a court and tribunal under the Convention acts like a policy and decision-making body in a government on the basis of what a majority of the international society wants. However, given the history that Part XV of UNCLOS was employed as a result of interest adjustment in the members in the first place to convince many nations to join the Convention, taking care of a sensitive incompleting issue under such procedures is incompatible with its original purpose. The UNCLOS dispute settlement regime needs to be careful not to impinge on the sovereign authority of a State more than necessary.

A significant difference is found in both cases in terms of the origin of the disputes. While, in the Chagos case, the dispute traces back to earlier colonial rule by the UK, in the South China case, the conflict apparently arose from neo-colonial ambitions by recourse to using powers. The judicial settlement needs to create decisions to be able to obtain international credibility as a guardian of the rule of law on the sea.

It may be debatable to say that the UNCLOS dispute settlement regime has certain global uniformity when it makes a decision whether it has jurisdiction over a case. Instead, it is probably a better expression that the regime takes a case-by-case approach having its sight on the maintenance of peace, which is one of the purposes of the Convention beyond the reason why Part XV was introduced.

CHAPTER 10

Conclusions

The divergent decisions in the two cases studied show that disputes concerning land sovereignty are not automatically precluded from the compulsory jurisdiction of a court or tribunal pursuant to Part XV of UNCLOS. If land sovereignty does not constitute the nature of the dispute or is a new form of problem, the court may have jurisdiction over the dispute. However, where a dispute concerns a historically contested territory, like in the Chagos case, the Tribunal will seek to avoid taking a clear-cut decision protecting the weaker party's claims and positions in terms of land sovereign issues. Regarding the judgment of whether it is essential or ancillary and maritime boundary delimitation, it seems to be highly concerned with the respective political background which has been appealing to the international society, though the Tribunal had not clearly referred to it.

Where a dispute is submitted to the ICJ pursuant to its statute, all States member to the UN have the right to make use of the Court, the submission must be accepted by the Parties to the dispute in order to commence the proceeding and permit the Court to have jurisdiction. In other words, it means that it is necessary for disputing States to agree on the judicial proceedings of the Court to settle the dispute in question. It can be said that there is no settlement without agreement. The premise of settlement is that both parties agree to initiate judicial proceedings. This is that there is an implicit understanding that accepts adjudication whatever the result is (Tsuru, 2016, pp.6). However, provided that the Parties follow the regime of obligatory settlement of UNCLOS, they do not need to get through a long exhaustive process to get consensus before the commencement of the procedures.

Having said that, since this unilateral reference of a dispute to obligatory settlement is based on the general presumption which the agreement is created automatically at the time States ratify the Convention, it often faces contradiction by the other state that is brought before a stage of adjudication against its will, for example China in the South China Sea Arbitration. In case of the unilateral approach, although an agreement has already created on the assumption, it would be totally

unanticipated for and operate against the other State. This would invite some criticism as even if such a procedure succeeds in allowing the court to admit the jurisdiction, it will not eventually resolve the dispute actually separating the Parties (Qu, 2016, pp. 40). Rather, it may exacerbate the situation (Schoenbaum, 2016, pp. 452).

Nevertheless, making use of the dispute settlement procedures will contribute to the rule of law at sea. States should not enjoy benefits arising from UNCLOS, for instance, EEZ and the continental shelf, if they do not comply with the regime of dispute settlement. Although it might happen that the Tribunal's judgement increases the tension between the disputing Parties, the Parties have to take actions to solve the problem by peaceful means in accordance with international law. It is useful to find out complicated procedures for dispute settlement, which promote awareness of the importance.

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