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# How should international judicial bodies constituted under UNCLOS determine if they have jurisdiction over disputes involving territorial sovereignty?

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For the international judicial bodies constituted under the United Nations Convention on the Law of the Sea (UNCLOS), there are mainly three conditions which limit their jurisdiction to extend to disputes pertaining to the interpretation and application of UNCLOS which involve sovereignty issue: firstly, if the nature of the dispute is deemed as a sovereignty dispute; secondly, if the prerequisite to adjudicate/arbitrate the dispute is to resolve the sovereignty dispute; and thirdly, if the adjudication/arbitration of the dispute will advance or detract a state's sovereignty claim. However, not all disputes involving territorial sovereignty are out of their jurisdiction. Provided that the court judgment or arbitral award will not affect the settlement of the sovereignty dispute between the disputed states or the claim to sovereignty of any state, they may, to a certain extent, have jurisdiction over a dispute of the interpretation and application of UNCLOS with sovereignty dispute ancillary to it.

## KEYWORDS

jurisdiction, UNCLOS court or tribunal, territorial sovereignty, UNCLOS, court or tribunal

## Introduction

According to Articles 287 and 288 of Section 2 “Compulsory Procedures Entailing Binding Decisions” of the United Nations Convention on the Law of the Sea (UNCLOS), a state is free to choose, through declarations, the courts or tribunals constituted according to UNCLOS to resolve disputes related to the interpretation or application of UNCLOS. UNCLOS is a convention that regulates maritime rights extended from the land based on the principle of “land dominates the sea”; then, the interpretation or application of UNCLOS is fundamentally related to maritime rights of UNCLOS but not sovereignty matters (Vanaik, 2020), and therefore the courts’ or tribunals’ jurisdiction is limited to disputes related to maritime rights contained in UNCLOS, not of sovereignty issues (McMahon, 2013).

However, in international judicial practice, the consideration of such disputes of maritime rights of UNCLOS, for example, maritime boundary delimitation, is frequently accompanied with unsettled sovereignty disputes. Having no jurisdiction over the sovereignty disputes, the courts or tribunals usually took an evasive approach in resolving the jurisdiction issue, until the time when the Chagos Marine Protected Area Arbitration Award (hereinafter “Chagos Arbitral Award”) took place. In this case, it was the first time that the tribunal explicitly and directly interpreted the sovereignty issue by ascertaining if the nature of the dispute was essentially a sovereignty dispute and to what extent the tribunal has jurisdiction to sovereignty disputes (The tribunal, 2019). Actually, this is only one of the approaches provided for by the courts or tribunals since they have the discretion in deciding the existence of jurisdiction; there are still other ways shown in several other cases, which need to be summarized and analyzed. Based on the jurisdiction authorized by Article 288 of UNCLOS, this paper analyzes the different approaches of the courts or tribunals constituted under UNCLOS (hereinafter “the international judicial bodies”) involved in different cases in order to (1) summarize how the international judicial bodies decide their jurisdiction under different circumstances and (2) analyze the specific legal issues involved therein, particularly those involving sovereignty issues.

## To ascertain if the nature of the dispute is sovereignty dispute

When one of the parties doubts if the essence of the dispute is mainly focusing on territorial sovereignty or if the dispute itself is suspected of constituting a territorial sovereignty dispute by the international judicial bodies, then the international judicial bodies should ascertain the nature of the dispute from the outset. This procedure is relatively fully explained in the Chagos Arbitral Award. In this case, the tribunal not only used a

large space to ascertain if the core of the dispute is territorial sovereignty but also answered the extent of its jurisdiction to sovereignty disputes in a supplementary way.

## How to determine the nature of the claims

Mauritius was a colony of the United Kingdom. In September 1965, Mauritius achieved its independence from the British Government with the condition that the Chagos Archipelago remained to be a colony of the UK. In 2010, the UK proposed to build a marine protected area near Chagos. Mauritius objected and initiated arbitration against the UK in accordance with the provisions of UNCLOS. Among the submissions of Mauritius, the first submission, of which the tribunal was requested to declare that the UK was not the coastal state of Chagos and thus had no right to delimit a marine protected area near it, was chosen to be further explored as follows because it was deemed as the most relevant submission (The tribunal, 2019).

In light of the first submission, the UK believed that it was a packaged submission for the settlement of territorial sovereignty disputes, and the term “coastal state” was actually an allusion to “sovereignty state”. However, Mauritius stated that it only requested the tribunal to explain the term “coastal state” in UNCLOS. If the United Kingdom’s claim was supported, the tribunal would not have the power to arbitrate Mauritius’ first submission since the real dispute of the first submission is sovereignty dispute; on the contrary, if this submission was recognized as to interpret the connotation of the term “coastal state” in UNCLOS, then it would be within the tribunal’s jurisdiction. As such, the tribunal had to decide what is the real dispute contained in Mauritius’ first submission, and since it is well known that there exists the sovereignty dispute between Mauritius and the UK, the specific question to be answered by the tribunal is whether the focus of the dispute between the two states is on the interpretation of UNCLOS, and the issue of territorial sovereignty is only one aspect of the dispute or the essence of the dispute between the two states is a territorial sovereignty dispute and the interpretation of the term “coastal state” of UNCLOS may constitute an aspect of the territorial sovereignty dispute.

Finally, the tribunal holds that if it claimed that the coastal state of Chagos is not the UK’s but Mauritius’, it actually recognized that the Chagos is part of the territory of Mauritius and that Mauritius is the sovereignty state of Chagos. Therefore, the tribunal concluded that Mauritius’ first submission could not be characterized as the interpretation of “coastal state”; rather, it aimed at the sovereignty dispute related to the Chagos, which is out of the tribunal’s jurisdiction (The tribunal, 2019).

In UNCLOS, only states, which is a member to the United Nations, are allowed to submit their disputes in international

judicial bodies, including the UNCLOS tribunals. Therefore, the term “coastal state” not only signifies that only states can submit their disputes to the UNCLOS tribunal but also means “sovereign state over coastal land”. The essence of Mauritius’ first submissions is actually a sovereignty dispute. The tribunal’s conclusion of its lack of jurisdiction over the first submission was convincing; otherwise, its award would interfere with the settlement of sovereignty.

## To what extent does the court’s or tribunal’s jurisdiction extend to sovereignty disputes?

After examining the essence of the dispute, the tribunal further explained the extent to which UNCLOS accords the tribunal to arbitrate the dispute which contained a territorial sovereignty issue. In UNCLOS, only Article 298(1)(a)(i) refers to land sovereignty, in which it provides that a state has the right to make a writing declaration to reject the “Compulsory Procedures Entailing Binding Decisions” of UNCLOS, which is tantamount to rejecting the jurisdiction of international judicial bodies of UNCLOS, to resolve the dispute related to sea boundary delimitation or historic bays or titles. This article also states that, if the disputed states cannot reach an agreement to resolve the abovementioned disputes, the state which has made such a declaration should accept submitting the dispute to the compulsory conciliation regulated in UNCLOS, except that, in the application of the compulsory conciliation, it is necessary to concurrently consider the issue of land territorial sovereignty dispute.

It can be construed from the abovementioned regulations that, firstly, a state is authorized to declare to exclude the application of compulsory dispute settlement procedures, which also means the international judicial bodies’ jurisdiction to resolve part of the issues regulated in UNCLOS, but the state is obliged to apply the compulsory conciliation procedure to settle the dispute even if it has made the optional exceptions declaration. However, there is a further exception to this obligation, such that the compulsory conciliation procedure should be excluded in the settlement of the disputes over the maritime rights of UNCLOS, if the consideration of territorial sovereignty dispute is inevitable.

Since the territorial sovereignty issue is extremely sensitive in the application of compulsory dispute settlement procedures, the tribunal of the Chagos Archipelago Award holds that Article 298 (1)(a)(i) was the evidence of the distrust of the participants at the conference of the negotiation of UNCLOS to the compulsory settlement, and it was reasonable to exclude territorial sovereignty from compulsory settlement. Then, the tribunal answered a question on what if the state does not make the optional exceptions declaration. After denying Mauritius’ absolute conclusion that if the state does not make such a declaration, the sovereignty dispute should be within the international judicial bodies’ jurisdiction, the tribunal holds

that, if the sovereignty issue is genuinely ancillary to the dispute of maritime boundary or historic title, it might be within the abovementioned jurisdiction ([The tribunal, 2019](#)).

The tribunal further interpreted the implication of “ancillary” in the abovementioned conclusion. When considering and settling dispute over the maritime rights of UNCLOS, if it is necessary to confirm or verify some facts of the territorial sovereignty issue contained therein at the same time, such dispute can be considered as maritime rights dispute with territorial sovereignty dispute ancillary to it; however, if the main issue of the dispute is territorial sovereignty, and the interpretation and the application of UNCLOS have a connection with it only because it is related to one factor or aspect of territorial sovereignty, then such dispute cannot be recognized as dispute maritime rights of UNCLOS with territorial sovereignty disputes ancillary to it. In this regard, the author is of the view that, when confirming or verifying the facts of a territorial sovereignty issue, the extent and limitation set for the tribunal should be confined clearly ([Nguyen, 2016](#)). Since Article 298(1)(a)(i) regulates that the dispute which necessarily involves the concurrent consideration of the settlement of sovereignty should be excluded from the compulsory conciliation procedures, it can be inferred that, when the facts contained in the sovereignty issue are considered by the international judicial bodies, it should not at least effect any state’s claims on territorial sovereignty. As such, the conclusion should be that, for a dispute over the maritime rights of UNCLOS with territorial sovereignty dispute ancillary to it, if it is available for the tribunal to consider the dispute itself but not necessary to determine the ownership of territorial sovereignty at the same time, then the tribunal’s jurisdiction could be recognized. The case between Guyana and Suriname to be discussed in Part 4 of this paper can further buttress the abovementioned conclusion.

Overall, in the Chagos Archipelago Arbitration, the tribunal made a great progress in judicial practice to interpret the relationship between its jurisdiction with the territorial sovereignty dispute, but there is still some space for further explanation on this issue.

## To determine if the prerequisite to adjudicate/arbitrate the dispute is the settlement of the sovereignty dispute

There is another view that, even though the disputes between the parties are about maritime rights arising from land territory, the international judicial bodies have no jurisdiction to determine the entitlement of the maritime rights in the first place because of the existence of the dispute of this territory sovereignty. This view was interpreted in the maritime boundary

delimitation case between Mauritius and Maldives (hereinafter “the Chagos Preliminary Objections”), but the conclusions on the existence of the sovereignty dispute were controversial since it involved the legal effect of the advisory opinions of international judicial bodies (ICJ) about the separation of the Chagos Archipelago (hereinafter “the Chagos Advisory Opinion”).

## The adjudication of the Chagos Preliminary Objections

In the Chagos Preliminary Objections, Mauritius instituted arbitral proceedings to the special chamber of the International Tribunal for the Law of the Sea (hereinafter “the Special Chamber”) against Maldives in the dispute concerning their maritime boundary delimitation. Maldives proposed an objection to the Special Chamber’s jurisdiction that, in order to resolve the maritime boundary delimitation between the two states, the Special Chamber has no choice but to determine who has territorial sovereignty over the Chagos between the UK and Mauritius first; however, the Special Chamber lacks jurisdiction over the territorial sovereignty issue, and the UK, as an indispensable third party in this case, has not participated in the proceedings (ITLOS, 2019).

It should be noted that the ICJ’s conclusions in the Chagos Advisory Opinion is inseparable with the abovementioned two states’ arguments in the Chagos Preliminary Objections. In the Chagos Advisory Opinion, ICJ held that the process in which Mauritius obtained independence on the condition that the Chagos would subsequently separate from Mauritius was inconsistent with international law, and the UK was obliged to end its colonial rule over the Chagos as soon as possible.

The Maldives and Mauritius hold opposite opinions on the implications of the Chagos Advisory Opinion, namely, that for Mauritius the territorial sovereignty dispute over the Chagos had been settled by the Advisory Opinion in its favor and that for Maldives this dispute still existed. Therefore, in the Special Chamber’s opinion, the identification of the existence of the territorial sovereignty dispute of the Chagos Archipelago was crucial to the preliminary objections of Maldives and the confirmation of the Special Chamber’s jurisdiction.

Even though the issue discussed in the Chagos Advisory Opinion was decolonization, which is different from sovereignty, the Special Chamber held that, given the close relationship between decolonization and sovereignty, ICJ has actually denied the UK’s claim of territorial sovereignty over the Chagos, and Mauritius’ same claim was implicitly supported. After confirming Mauritius’ sovereignty claim, the Special Chamber began to prove the legal effect of ICJ’s advisory opinion. In this regard, the Special Chamber holds that, although the organs requesting an advisory opinion from ICJ do not have the same obligation to strictly implement the advisory opinion as the state requesting a judgment from ICJ,

the legal authority of the advisory opinions are no less than that of the judgments because they were made with the same rigor and scrutiny by the judicial organ of the United Nations with a significant ability to deal with international law issues. Therefore, the Special Chamber recognized that the main legal effect of this Advisory Opinion was that Mauritius had been admitted as a territorial sovereign state of the Chagos Archipelago, and its territorial sovereignty dispute with the UK has been settled by the Advisory Opinion.

Since Maldives held that the Chagos Archipelago’s sovereignty was in dispute and the establishment of this claim will limit the Special Chamber from reviewing the dispute of ocean boundary delimitation between Maldives and Mauritius, it was supported that the Special Chamber had to determine whether the sovereignty dispute had been settled in the Advisory Opinion first. However, the Special Chamber’s conclusion was questioned and will be discussed below.

## A limit should be set for the international judicial bodies to distinguish the existence of sovereignty disputes

From the abovementioned analysis, the ruling of the first submission of Mauritius in the Chagos Arbitral Award and the maritime delimitation in the Chagos Preliminary Objections are all based on the settlement of the sovereignty dispute of the Chagos. Since the conclusions of the existence of sovereignty dispute were quite on the contrary, the Chagos Preliminary Objections had used ICJ’s Advisory Opinion to overrule the Chagos Arbitral Award—that is to say, the conclusion of the disappearance of sovereignty dispute before the Special Chamber mainly derived from its interpretation to ICJ’s Advisory Opinion—and this practice has been questioned as excessive.

Before starting the abovementioned analysis, the legal effect and function of ICJ’s advisory opinion should be defined first. According to the Charter of the United Nations, certain organs are authorized to request ICJ to give an advisory opinion on debated legal issues. Although advisory opinion is not as legally binding as judgment rendered by ICJ, it has internationally acknowledged legal authority, such as guidelines for diplomacy and maintaining the stability and peace of the world order. In this respect, advisory opinion has made outstanding contributions to the development and improvement of international law and the peace and stability of international relations (ICJ, 2022).

With respect to this, an obvious difference of the functions between the legal effect of advisory opinion and the legal binding of the judgment is that the judgment could alter the rights and obligations of legal subjects (Thin, 2021), and the advisory opinion, as a soft law, only interprets the legal issues involved in the dispute rather than directly intervening in the settlement of the dispute (Guzman, 2010). As for the sovereignty dispute

over the Chagos Archipelago, it can be concluded that only the ICJ's judgment could recognize Mauritius as a sovereign state, and the Chagos Advisory Opinion only provides the United Nations General Assembly, which was the requesting entity in the Advisory Opinion, some legal guidance for the settlement of the dispute.

Moreover, since the Chagos Advisory Opinion only explained one of the complicated elements of the sovereignty dispute over Chagos, it could not have achieved the effect of completely resolving the dispute. Other than the decolonization issue, there are still many complicated factors such as the legal effect of the UK's administration to Chagos over a long period of time since 1814 ([The Guardian, 2019](#)) and Mauritius' silence on UK's administration especially from 1968 to 1980 ([The tribunal, 2013a](#)). For this fact, the UK holds that Mauritius' silence indicated that the government of Mauritius, at that time, did not oppose the issue that the Chagos was a part of the territory of the UK until 1980, and this long-time silence should be regarded as convincing evidence that the UK is the sovereign state of Chagos ([The tribunal, 2014](#)). Since the Chagos Advisory Opinion only inferred with the decolonization issue, it is far from reaching the effect of settling the sovereignty dispute over the Chagos Archipelago; thus, the conclusion that the Chagos territorial sovereignty dispute has been settled in a way favorable to Mauritius is actually mainly made by the Special Chamber rather than ICJ.

It is widely accepted that the main limit for international judicial bodies to find out whether there is sovereignty dispute between states is to prove whether they hold diametrically opposed views on the ownership of territorial sovereignty based on their respective facts and evidence rather than to ascertain whether the states' claims are right or not ([Gao, 2021](#)), and this has been proven and admitted in the dispute related to coastal state rights between Ukraine and Russia. In this case, there is a very similar situation in which the precondition of the submission of Ukraine is that Crimea is part of its territory, but Russia recalled that it had put forward its position on sovereignty in Crimea and continued to exercise sovereignty over the territory since 2014 and well before the present proceedings. The tribunal held that since it had neither the ability nor the right to participate in assessing the two state's territorial sovereignty claims, its sole function and purpose in this regard was to verify whether Russia has objections to Ukraine's claim of territorial sovereignty over Crimea and to prove that if Russia and Ukraine had disputes in this territorial sovereignty issue. After verifying if there was a sovereignty dispute between the two states, the tribunal concluded that without the settlement of the sovereignty dispute over Crimea, it could not make any decisions on Ukraine's claim on maritime rights in the Black Sea, Sea of Azov, and Kerch Strait as it is beyond the tribunal's jurisdiction ([The tribunal, 2020](#)).

In the Chagos Preliminary Objections, the conclusion that the Chagos sovereignty dispute had been already resolved was

from the Special Chamber, but not ICJ, which means that the Special Chamber has assigned rights and obligations to the two states, and in this respect, the Special Chamber was trumping its jurisdictional limits to determine the sovereignty dispute.

## To estimate if the adjudication/ arbitration of the dispute will advance or detract a state's claim to territorial sovereignty

In some cases, the claims over maritime rights seem to be the dispute on maritime rights of UNCLOS and not based on the settlement of sovereignty dispute, but if they are supported by international judicial bodies, they will effect a state's territorial sovereignty claims. This situation will also prevent the court from exercising its jurisdiction.

In the South China Sea Arbitration, among the 15 claims submitted by Philippines, one is to request the tribunal to determine whether the maritime features whose sovereignty are disputed can be recognized as islands or rocks according to UNCLOS. In the process of determining if the submissions were concerning the territorial sovereignty over the maritime features, the tribunal actually followed the reasoning in the abovementioned two approaches which the author has discussed in Parts 2 and 3. The tribunal holds that (a) before considering the Philippines' submissions, the tribunal did not need to make a decision on the sovereignty of these disputed maritime features and (b) the real disputes of the Philippines' claims did not expressly or implicitly point to sovereignty disputes; thus, the tribunal decided that the Philippines' submissions were not concerned with territorial sovereignty ([The tribunal, 2013b](#)).

The tribunal affirmed its jurisdiction without a detailed analysis on the abovementioned two conditions or approaches that it proposed. This may involve many complicated factors such as to realize the political purpose by packaging a territorial sovereignty issue into disputes of maritime rights, which is not the focus of this paper. As to the legal analysis under the approaches that the tribunal adopted, not only the scholars opposed it by arguing that it is difficult to determine the legal status of the maritime features without the prior decision of which state has sovereignty ([Proelss, 2018](#)) but also the author proposed that even though the ruling of the Philippines' submissions will not be based on the settlement of territorial sovereignty disputes between China and the Philippines, it will at least affect one of the states' sovereignty claims—for example, the Philippines' fourth submission was to ask the tribunal to declare that Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations since the maritime zones such as territorial sea and exclusive economic zone cannot generate from them; they are not islands available for occupation. It is known that China has always been claiming the territorial sovereignty over these



maritime features, but with the fourth submission supported by the tribunal, these maritime features could not be occupied. In the author's view, the final award actually limited China's sovereignty claims in the South China Sea. If China initiates a dispute over sovereignty to other international bodies such as ICJ and its claims are supported, the judgment of ICJ will be in conflict with the abovementioned award, leading to the inconsistency of different judicial dispute settlement conclusions, and this may aggravate international disputes between the disputed states.

Here it may be necessary to recall the conclusion similar to that of Part 2 in this paper: if there is an unsettled territorial sovereignty issue between the disputed states, the jurisdiction of the court or tribunal over their disputes of maritime rights which concern that sovereignty issue should not affect the settlement of the sovereignty dispute or advance or detract the sovereignty claim of either state—for example, in the arbitration between Guyana and Suriname, the tribunal was asked by Guyana to delimit their maritime boundary, and in its first submission, Guyana proposed the specific starting point and the maritime boundary line between the two states for territorial sea, exclusive economic zone, and other jurisdictional waters. Suriname argued that, before considering Guyana's first submission, the tribunal needed to identify the end point of the land boundary line between the two states since it had no jurisdiction on land sovereignty issues, and thus it could not arbitrate Guyana's first submission. By evaluating the unsettled sovereignty fact, the tribunal found that it could independently ascertain the starting point of the two states' maritime delimitation without further considering their sovereignty disputes; the tribunal subsequently confirmed its jurisdiction over Guyana's claims. ([The tribunal, 2007](#)) In this case, the tribunal's jurisdiction will not affect the final settlement of the states' sovereignty issue to delimit the state boundary, and this kind of sovereignty disputes which are ancillary to the disputes of maritime rights of UNCLOS will fall within the ambit of the tribunal's jurisdiction.

## Conclusion

From the view of sovereignty issue, the author actually explained the limitation of the jurisdiction of international judicial bodies regulated in Article 288 of UNCLOS based on different approaches. By analyzing the nature of the dispute, if the real dispute is to resolve a sovereignty issue, the international

judicial bodies' jurisdiction will be excluded. However, a dispute of maritime rights of UNCLOS is allowed to be ancillary with the issue of territorial sovereignty, provided that the "ancillary" shall not lead the sovereignty dispute into consideration in the adjudication/arbitration. There is another view that, even though the dispute between the parties is about the maritime rights of UNCLOS, because the prerequisite of settlement of the dispute is to resolve the sovereignty dispute involved, the international judicial bodies cannot exercise jurisdiction. In ascertaining the existence of sovereignty disputes, the main limit set for international judicial bodies is to prove whether the disputed states hold diametrically opposed views on the ownership of territorial sovereignty based on their respective facts and evidence rather than to ascertain whether the states' claims are right or not. Moreover, in some cases, the dispute may manifestly focus on the maritime rights of UNCLOS without a sovereignty dispute involved, but it will advance or detract a state's claim to land sovereignty if the claims are supported. In this respect, the international judicial bodies should exercise its jurisdiction prudently.

## Author contributions

The author confirms being the sole contributor of this work and has approved it for publication.

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