Revisiting Jurisdiction of UNCLOS Courts and Tribunals Over Ancillary Sovereignty Disputes

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Structured Abstract

Article Type: Research Article

Purpose—The paper concludes an in-depth analysis of the position taken by the tribunal in the Chagos MPA Award by examining its reasoning under the broader international law principles of effectiveness and state consent.

Design, Methodology, Approach—The paper encourages international courts and tribunals to adopt a systematic approach in assessing whether, and to what extent, they can assert their subject-matter jurisdiction over ancillary disputes by interpreting their dispute settlement and other relevant provisions following Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT).

Findings—Pursuant to Article 31(3)(c) of VCLT, it follows that a tribunal should take into consideration the relevant principles of international law which here are effectiveness and state consent. Each tribunal has to examine how effectiveness fits within its particular functions and to what extent it allows the tribunal to assert its jurisdiction over an ancillary issue.

Practical Implications—As international courts and tribunals differ in their functions, it is expected that the extent of any court's jurisdiction over any ancillary issue will vary according to the court and the subject matter. Yet, there is a difference between variations based on a systematic approach that follow a consistent methodology and haphazard applications based on subjective positions. The paper concludes that UNCLOS tribunals have no basis to exercise jurisdiction over a sovereignty dispute.

Keywords: international courts and tribunals, jurisdiction, sovereignty disputes, UNCLOS

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I. Introduction

As of this writing, there are several territorial sovereignty disputes that might possibly be brought before the compulsory dispute settlement procedures under Part XV of the United Nations Convention on the Law of the Sea (UNCLOS), including the disputes over the Falkland Islands, Diaoyu/Senkaku Islands, South Georgia and the South Sandwich Islands, Dokdo/Takeshima, parts of Antarctica, the Spratlys, Paracels or other features in the South China Sea, Sabah, Belize, Tromelin, Western Sahara, Abu Musa, Mbanie Island, Mayotte, and Perejil Island.[1] Although some commentators discussed jurisdiction of Part XV courts and tribunals over sovereignty disputes, no paper has been wholly dedicated to this specific issue encompassing an in depth analysis of the position taken by the tribunal in the *Chagos MPA Award* and examining its reasoning under the international law rules of effectiveness and state consent.[2]

The dilemma considered in this paper is one of the manifestations of the problem of incidental substantive disputes in international adjudication. Incidental substantive disputes are external substantive disputes not regulated by the treaty granting the "primary" jurisdiction of international courts, hence rendering the latter hesitant to exercise jurisdiction over them, despite the necessity of considering these external disputes to settle the primary dispute. Generally, international courts are hesitant and inconsistent in their approach to dealing with this problem from a jurisdictional perspective. This problem exists before various courts and tribunals with respect to different sorts of incidental disputes. For instance, incidental territorial sovereignty disputes were brought before UNCLOS Annex VII tribunals in relation to the *Chagos MPA (Mauritius v. United Kingdom)* and *South China Sea (Philippines v. China)* cases; incidental disputes concerning the use of force and self-determination were brought before the ICJ in relation to *Georgia v. Russia* and *Ukraine v. Russia* cases under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); incidental disputes concerning countering terrorism and countermeasures were brought before the ICJ in the *Qatar v. UAE* case under CERD. All the aforementioned courts or tribunals have limited jurisdiction, because in all these cases they derive their jurisdiction from compromissory clauses in treaties (e.g., UNCLOS, CERD) that limit the task of the concerned court to settling disputes concerning the interpretation and application of its concerned treaty (and not others). Hence, the question that arises is "to what extent may these courts and tribunals assert their jurisdiction *ratione materiae* over the incidental dispute, if deemed necessary?"

Caution is required. Asserting or denying jurisdiction over an incidental substantive dispute can mask a political contest and impose a third-party authority in a world of equal sovereigns. Although the literature and jurisprudence has developed a framework regulating the extent of the powers of a tribunal over the procedures (inherent jurisdiction) and over a non-consenting party (*Monetary Gold* principle), no framework has been developed regulating the extent of the power of a tribunal over the subject-matter. As a result, international practice in terms of the latter is haphazard. This is despite the fact that some rationales and balances behind these frameworks regulating the limits of powers over the procedures and non-consenting parties are inspiring in regulating the limits of powers over the subject matter. Therefore, this paper invites development of a framework for regulating the extent of the power of a tribunal over the subject-matter that is inspired by the

former frameworks, regulating the extent of the powers of a tribunal over the procedures and over a non-consenting party.

The focus of this paper is only on exercising jurisdiction over a sovereignty dispute by UNCLOS Part XV courts and tribunals because territorial sovereignty is the most reflective form of state sovereignty and thus states are not expected to comply with its subjugation to any sort of jurisdiction that is *prima facie* unsubstantiated. Also, because UNCLOS is one of the most advanced dispute settlement systems,[3] examining the incidental substantive dispute dilemma under this system is the most challenging, yet it is also the most rewarding.

This paper generally encourages courts and tribunals to adopt a "systematic approach" in assessing whether and to what extent they can expand their subject-matter jurisdiction. This systematic approach calls for international courts and tribunals to follow a consistent methodology in dealing with ancillary substantive disputes including those concerning sovereignty disputes. For that purpose, a tribunal should interpret its relative provisions following the interpretation maxims in Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT). Meanwhile, pursuant to Article 31(3)(c) of VCLT, a tribunal should take into consideration the relevant rules of international law, which here are effectiveness and state consent. Adhering to this approach would lead to a more consistent framework for exercising jurisdiction over incidental substantive disputes including sovereignty disputes ancillary to maritime disputes.

Therefore, this paper will first present the tactics of bringing sovereignty claims under Part XV. Second, it will assess whether the provisions of the Convention can provide jurisdiction over a sovereignty dispute in light of the reasoning of the *Chagos MPA Award*. Then it will explore whether such a jurisdiction can be asserted under the doctrine of "incidental jurisdiction" and assess that doctrine under the principles of effectiveness and state consent within the context of UNCLOS. The paper then concludes that such systemic methodology renders UNCLOS tribunals with no basis to expand their jurisdiction over a sovereignty dispute even if it was minor, in contrast to the position of the tribunal in the *Chagos MPA Award*.

II. Tactics of Bringing Sovereignty Claims Under Part XV

States lacking effective control over the disputed territory or island ("claimant") could initiate two types of compulsory procedures against states controlling the disputed territory or island ("respondent") as follows.

2.1 Annex VII Arbitration

The claimant could initiate arbitration procedures against the respondent under several possible grounds. First, the claimant could initiate maritime delimitation proceedings like in the *Mauritius v. Maldives* case before ITLOS, which concerns the delimitation of the maritime area between these two states in the Indian Ocean, including the disputed Chagos Archipelago. The claimant could also challenge one or more of the measures taken

by the respondent in the disputed maritime zone under Articles 2(3), 56(2) and 194(4) of the Convention, which the tribunal in the *Chagos* case found that each requires at least the coastal state to "consult" with other states and "balance" its own rights with theirs.[4] The claimant could also argue that it is entitled to a historic title or even historic rights (i.e., mining, fishing, etc.) in the maritime zones of the disputed territory. The tribunal in the *South China Sea* case held it has jurisdiction to decide on China's "historic rights," as they differ from "historic titles" excluded by an Article 298(1) declaration.[5] The claimant could also submit that the respondent's straight baselines on the coast of the disputed territory are in violation of Article 7 on the basis that the respondent is not the "coastal State" entitled to put baselines on these coasts.[6] Generally, the claimant could argue, like Mauritius did against the United Kingdom,[7] that the respondent is not the coastal state competent to take the measures authorized by the Convention or claim, like Ukraine did against the Russian Federation,[8] that the respondent interfered with its maritime rights in the disputed area.

As a result, through these tactics, the claimant may bring a sovereignty dispute before an UNCLOS tribunal. This would not be a problem if the tribunal finds that it can decide on the case without having to necessarily decide on the sovereignty dispute. This was the case in *Mauritius v. Maldives* since ITLOS found a way to avoid deciding on the sovereignty dispute over Chagos by relying on the ICJ advisory opinion on the matter.[9] Also, in the *South China Sea* case, the tribunal decided on the case without having to decide on the sovereignty dispute over the maritime features in the South China Sea by limiting itself to deciding on the question of whether such features are entitled to maritime zones (regardless of to which State such features belong).

2.2 Compulsory Conciliation

The claimant could initiate compulsory conciliation procedures against the respondent concerning disputes mentioned in Article 298 of the Convention. Under the latter, a state party could submit a declaration excluding the disputes specified in Article 298 from compulsory dispute settlement, including disputes concerning maritime delimitation and historic titles. However, those last two disputes could still be subject to compulsory conciliation upon a request by one of the parties when no agreement is reached within a reasonable period of time in negotiations between the parties. Thus, the claimant might initiate compulsory conciliation against the respondent state that submitted an Article 298 declaration with regard to the respondent's *delimitation of its sea boundaries* or the claimant's *historic title* in the disputed maritime zone. Nevertheless, Article 298(1)(a)(i) explicitly excludes sovereignty disputes from its compulsory conciliation procedure.

III. Jurisdiction Over Sovereignty Disputes Under the Provisions of the Convention

Interpreting jurisdictional clauses has been subject to debate. Some argue for a restrictive approach and some argue for a liberal approach.[10] However, Fitzmaurice found no uniform approach by the ICJ in this respect.[11] Therefore, the best point of departure is to

interpret the jurisdictional clauses of UNCLOS according to Articles 31–33 of the VCLT.[12] Article 31(1) states a treaty shall be interpreted in "good faith" in accordance with the "ordinary meaning" to be given to the terms of the treaty in their "context" and in the light of its "object and purpose."

3.1 Direct Provisions of the Convention

This part examines whether a tribunal can exercise jurisdiction over a sovereignty dispute based on a provision in the Convention that might directly provide such jurisdiction.

3.1.1 Article 288 (Jurisdiction)

Article 288 states that a tribunal "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention" and "shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement." Generally, the international agreements over which the parties base their sovereignty claims neither relate to the purposes of the Convention nor provide jurisdiction to its courts or tribunals.

Consequently, for a tribunal to have jurisdiction over a sovereignty dispute, it has to be considered a dispute "concerning the interpretation or application of the Convention." The "ordinary meaning" of Article 288(1) is neutral because the provision neither grants nor prohibits jurisdiction over such disputes.[13] That is in contrast to the newly adopted draft agreement under UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction which explicitly mentions in its Article 55 (Procedures for settlement of disputes) that "[n]othing in this Agreement shall be interpreted as conferring jurisdiction upon a court or tribunal over any dispute that concerns or necessarily involves the concurrent consideration of the legal status of an area as within national jurisdiction, nor over any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto of a Party to this Agreement, provided that nothing in this paragraph shall be interpreted as limiting the jurisdiction of a court or tribunal under Section 2 Part XV of the Convention." It is logical to infer that by such explicit and detailed exclusion, states decided to put an end to the controversies that have arisen on this subject before UNCLOS tribunals and in the literature. It is expected that after this agreement is widely concluded by UNCLOS State parties, it may be considered as a subsequent agreement (VCLT Article 31.3.a) on the application of UNCLOS provisions that enhance the exclusion of ancillary sovereignty disputes from the jurisdiction of UNCLOS tribunals.

Besides, taking into account the "context" in interpreting UNCLOS Article 288 requires taking into account the only explicit reference to sovereignty disputes in the Convention, Article 298(1)(a)(i), which also does not explicitly bring ancillary sovereignty disputes within the jurisdiction of UNCLOS tribunals as will be shown below in section 3.1.3.[14]

With respect to Article 288(1), tribunals have adopted a "re-characterization" test on a party's submission. The tribunal first asks whether the sovereignty dispute is just one aspect of the larger Convention question or whether the dispute primarily concerns the sovereignty dispute?[15] In this test, tribunals have claimed that they adopt an "objective

approach" by re-assessing the submissions of both parties, taking into account external evidence as well (i.e., historical, diplomatic, etc.).[16]

The tribunal in the *Chagos* case found that Mauritius's submission that the United Kingdom was not the "coastal state" was characterized as primarily relating to the sovereignty dispute over the Chagos Archipelago.[17] However, Judges Wolfrum and Kateka, in the minority, relied on the wording of Mauritius's submission and thus found that the term "coastal state" was the main dispute before the tribunal and the issue of sovereignty was merely an element in the reasoning.[18]

A few months later, in the *South China Sea* case, the Philippines legal team (which included members from the Mauritius team) learned the lesson from the *Chagos* MPA case and developed more nuanced arguments. Philippines' team requested that the tribunal declare that China's claims based on its "nine dash line" are inconsistent with UNCLOS and queried if whether, under Article 121 of UNCLOS, certain maritime features claimed by both states are capable of generating entitlement to maritime zones greater than 12M.[19]

The tribunal noted that there is a dispute between the Parties regarding sovereignty over islands, but held that the matters submitted to arbitration by the Philippines do not concern sovereignty.[20] The tribunal did not accept 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."[21] The tribunal emphasized that "[t]he Philippines has not asked the tribunal to rule on sovereignty and, indeed, has expressly and repeatedly requested that the tribunal refrain from so doing."[22] The tribunal thus concluded that it did "not see that any of the Philippines' submissions required an implicit determination of sovereignty."[23] The tribunal added that it was "fully conscious of the limits on the claims submitted to it and, to the extent that it reaches the merits of any of the Philippines' Submissions, intends to ensure that its decision neither advances nor detracts from either Party's claims to land sovereignty in the South China Sea."[24]

A few years later, Ukraine's legal team in the *Coastal State Rights in the Kerch Strait (Ukraine v. Russia)* repeated the same mistake of Mauritius' team and challenged that Russia is the "coastal State" within the meaning of UNCLOS. Consequently, the tribunal found that the status of Crimea "is a prerequisite to the decision of the Arbitral Tribunal on a significant part of the claims of Ukraine" and that sovereignty disputes are generally not within its jurisdiction.[25]

The previous case emphasizes how skillful drafting of submissions is significant in fitting them within a tribunal's jurisdiction and how the "re-characterization" test entails an extent of subjectivity that might produce different results depending on the composition of the tribunals in future cases.[26] Therefore, commentators and tribunals are encouraged to develop specific criteria and apply them consistently in order to adopt an objective approach; otherwise, a judgment will be less persuasive and non-compliance will be more probable.

3.1.2 Article 293(1) (Applicable Law)

Article 293(1) of the Convention states that a tribunal "having jurisdiction under this section shall apply this Convention and *other rules of international law* not incompatible with this Convention."[27] Some tribunals considered these "other rules of international law" as a *renvoi* that could serve as a basis for jurisdiction over non–UNCLOS disputes.

The International Tribunal on the Law of the Sea (ITLOS) in *M/V Saiga* and *M/V Virginia G* and the Annex VII Tribunal in *Guyana v. Suriname* all asserted their jurisdiction over non–UNCLOS claims (illegal use of force) under customary international law on the basis of Article 293(1).[28]

However, the previous assertion is inconsistent with the "ordinary meaning" of Article 293(1). A tribunal cannot apply non–UNCLOS rules without firstly establishing its jurisdiction because Article 293 states a tribunal must be one "having *jurisdiction*…."[29] The ICJ adopted a similar position when it refused to expand its jurisdiction in the *Genocide Convention* case as defined by the compromissory clause of the Genocide Convention over other alleged breaches to the applicable law, even if the alleged breaches were to peremptory norms.[30] The tribunals in the *MOX Plant* and *Chagos* cases took the same position by distinguishing between jurisdiction in Article 288 and applicable law in Article 293(1).[31] Therefore, Article 293(1) *per se* does not provide a basis for jurisdiction over a sovereignty dispute.

3.1.3 Article 298(1)(a)(i) (Optional Exceptions)

Sovereignty disputes are not explicitly mentioned in the Convention except under Article 298(1)(a)(i). This Article, as elaborated in section 2.2, permits any state party to exclude disputes concerning maritime delimitation or historic titles from the compulsory procedures, although these disputes could still be subject to compulsory conciliation. However, in that case, the Article explicitly excludes "any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning *sovereignty or other rights over continental or insular land territory*"[32] from compulsory conciliation.

Mauritius argued in the *Chagos* case that this last clause means *a contrario* that sovereignty disputes shall be within the scope of the Convention in the absence of a declaration.[33] But the tribunal rejected this argument stating that "[t]he negotiating records of the Convention provide no explicit answer regarding jurisdiction over territorial sovereignty."[34] The tribunal added that "had the drafters intended that such [sovereignty] claims could be presented as disputes 'concerning the interpretation or application of the Convention,' the Convention would have included an opt-out facility for States not wishing their sovereignty claims to be adjudicated, just as one sees in Article 298(1)(a)(i) in relation to maritime delimitation disputes."[35] However, the methodology of the tribunal in reaching its conclusion is neither clear nor comprehensive.

Article 298(1)(a)(i) is a treaty provision and thus its interpretation shall be subject to Articles 31–33 of the VCLT. Article 32 of the VCLT permits recourse to the *travaux préparatoires* of the treaty and the circumstances of its conclusion *only* in order to determine the meaning when the interpretation according to Article 31 leaves the meaning *ambiguous, obscure*, *manifestly absurd or unreasonable*. The tribunal, nevertheless, did not attempt to interpret Article 298(1)(a)(i) according to the elements mentioned in Article 31 of the VCLT (i.e., the "ordinary meaning" of the provision) which might have led to a different conclusion, or even provided a convincing and consistent legal basis for the same conclusion. One apt illustration of the weakness of the tribunal's analysis is that the minority, in reaching its opposite conclusion, relied on the same *travaux préparatoires* that the majority relied on. The minority argued that if the negotiating records of the Convention provide no explicit answer regarding jurisdiction over sovereignty disputes, then this should not provide a justification for "reading a limitation into the jurisdiction" of the tribunal.[36]

3.2 The Renvoi Provisions of the Convention

This part examines whether a tribunal can exercise jurisdiction over a sovereignty dispute based on a provision in the Convention that might indirectly provide such a jurisdiction on the basis of a *renvoi* in a provision. UNCLOS includes few provisions which refer in general terms to the observance of "other rules of international law" (Article 2.3) and "rights" of other states (Articles 2.3, 56.2 and 194.4) while applying the Convention. Whether and to what extent such general *renvoi* allow an UNCLOS court or tribunal to assert its jurisdiction over ancillary sovereignty disputes was discussed by the *Chagos MPA* tribunal and literature. This part concludes that the tribunal's methodology in interpreting these *renvoi* is imperfect.

3.2.1 The Renvoi to "Other Rules of International Law" in Article 2(3) of the Convention

Article 2(3) states that "the sovereignty over the territorial sea is exercised subject to this Convention and to *other rules of international law*."[37] Thus, the claimant state might argue that the international law sources (treaty or customary international norm) concerning the sovereignty dispute are within these *other rules of international law*, and hence within the scope of the Convention under Article 288(1).

However, the tribunal in the *Chagos* case found that the *travaux préparatoires* of Article 2(3) show that the International Law Commission (ILC) intended that "the obligation in Article 2(3) is limited to exercising sovereignty subject to the *general* rules of international law."[38] Hence, the tribunal did not find that the Lancaster House Undertakings (LHU), which regulate sovereign rights over land and water of the Chagos Archipelago in which Mauritius had an interest that the tribunal declare those undertakings to be binding, represented part of the "general rules of international law" for which the Convention creates an obligation of compliance. However, the tribunal found that general international law requires the United Kingdom to act in "good faith" with regard to the rights of other states.[39] The minority, on the other hand, although relying on the same *travaux préparatoires*, reached a different conclusion, declaring that "the reference to 'other rules of international law' encompasses obligations arising from commitments by the coastal State *bilaterally* or even *unilaterally*, as well as commitments based upon *customary international law*...."[40]

Here also the tribunal's methodology is unclear, and its conclusion is imprecise. Article 32 of the VCLT permits recourse to the *travaux préparatoires* of the Convention *only* after attempting to interpret the provision according to the elements mentioned in Article 31 of the VCLT. The tribunal did not attempt to evaluate the "ordinary meaning" of the *other rules of international law* in light of the Convention's "object and purpose." Also, adding the qualifier "general" raises questions about its consistency with the "ordinary meaning" given to *other rules of international law* and how this can happen by what should be a *supplementary* means of interpretation (*travaux préparatoires*). Besides, the tribunal did not attempt to interpret the provision in light of the "relevant rules of international law" according to Article 31(3)(c) of VCLT as will be examined in section 5.[41] By adhering to the maxims of treaty interpretation, the tribunal would have laid down a more convincing and consistent legal basis to its conclusion even if it would have eventually been the same

conclusion. Moreover, there is no consensus in literature and case law on the scope of the "general rules of international law" found by the tribunal.[42]

3.2.2 The Renvoi to the "Rights" of Other States Under Articles 2(3), 56(2) and 194(4) of the Convention

3.2.2.1 Identifying the "Rights" of Other States. The tribunal in the *Chagos* case found that the *other rules of international law* in Article 2(3) impose an obligation of good faith regarding the rights of other states. Similarly, Article 56(2) declares that the coastal State shall have due regard to the "rights and duties of other States," and Article 194(4) provides that States shall refrain from unjustifiable interference with activities carried out by other states in the exercise of "their rights and in pursuance of their duties." Hence, the tribunal found that each of these obligations requires the United Kingdom to "consult" with Mauritius and to conduct a "balance" between the United Kingdom's rights and interests and those of Mauritius.[43] As a result, the tribunal held that the United Kingdom violated Articles 2(3), 56(2) and 194(4) because it violated its procedural obligation to "consult" and "balance" with regard to Mauritius' rights and interests and not because it violated these substantive rights *per se*.[44] However, a few remarks can be made.

First, such a finding entails a contradiction in the tribunal's line of reasoning because although the tribunal previously declined jurisdiction over the "coastal state" question, here the tribunal considered the United Kingdom to be a "coastal state" that is obliged by the Convention to "consult" and "balance" with another state which the tribunal considered to be Mauritius.[45]

Second, while the tribunal indicated that it was just deciding on the United Kingdom's mere "procedural" obligation to "consult" with Mauritius regarding the latter's rights instead of deciding on any violation to these rights *per se*, the tribunal in fact went beyond that and identified exactly Mauritius's rights by engaging in a long examination of Mauritius's rights and interests under an outside instrument (Lancaster House Undertakings).[46] Was the latter substantive analysis *necessary* for the tribunal's declared objective to assess the United Kingdom's mere "procedural" obligation to "consult" with Mauritius regarding the latter's rights?

Third, did the tribunal have *jurisdiction* to examine these rights and interests especially if they were derived from a disputed source outside the Convention? Relatedly, was it appropriate for the tribunal to determine these non–UNCLOS rights and interests with a decision in the *dispositif* and thus within the *res judicata* of the judgment? The answer to these questions is in the negative. With respect to its jurisdiction, although the tribunal did not hold that the LHU were "breached," still it made a significant decision that these external undertakings are "binding." Consequently, the tribunal's findings that the 1965 Agreement is a binding international treaty as well as its related undertakings represent a success to Mauritius regarding its sovereignty dispute, which is based on the same Agreement.[47] Thus it is necessary to return back to the basis on which the tribunal relied in exercising its jurisdiction to assess whether it was entitled to assert its jurisdiction over Mauritius's non–UNCLOS rights under the 1965 Agreement.

3.2.2.2 Jurisdiction Over Identifying the "Rights" of Other States. The tribunal in the *Chagos* case based its jurisdiction on Article 288(1) and Article 297(1)(c) which states that a

dispute concerning the interpretation or application of the Convention occurs when "….it is alleged that a coastal State has acted in contravention of specified *international rules and standards* for the protection and preservation of the *marine environment* which are applicable to the coastal State, and which have been *established by this Convention* or through a *competent international organization….*"[48]

Accordingly, based on the previous provisions, the tribunal assumed that its jurisdiction permits it to decide on Mauritius's rights and interests under an outside disputed instrument, the 1965 Agreement.[49] The tribunal stated that "the legal effect of the 1965 Agreement is also a central element of the Parties' submissions on Mauritius' Fourth Submission, insofar as it involves the Lancaster House Undertakings. The tribunal finds that *its jurisdiction* with respect to Mauritius' Fourth Submission […] *permits it to interpret the 1965 Agreement* to the extent necessary to establish the nature and scope of the United Kingdom's undertakings."[50] However, it is unclear on what basis the tribunal expanded its jurisdiction over the 1965 Agreement. Article 297(1)(c) only provides jurisdiction concerning those international rules and standards for the protection of the marine environment which have been established by the *Convention* or through a *competent international organization*. Such an exercise of jurisdiction goes against the "ordinary meaning" of Article 297(1)(c).

IV. Jurisdiction Over Sovereignty Disputes Under the Notion of Incidental Jurisdiction

Although the tribunal in the *Chagos* case eventually found that none of the provisions of the Convention provide jurisdiction over the sovereignty dispute over the Chagos Archipelago, the tribunal indicated that itself could exercise jurisdiction over a sovereignty dispute under the incidental jurisdiction maxim.

4.1 Incidental Jurisdiction in the Chagos MPA Award

The tribunal mentioned that it had incidental jurisdiction over sovereignty disputes in two instances: first, it mentioned in the course of interpreting Article 298(1)(a)(i) of the Convention, second, as a general rule independent of any provision. With regard to Article 298(1)(a)(i), the tribunal, after rejecting Mauritius's *a contrario* reading of the Article, added 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 historic title*."[51]

Then, the tribunal mentioned its incidental jurisdiction as a general rule independent of any provision by declaring that "as a *general matter*, […] where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or *ancillary determinations* of law as are *necessary to resolve the dispute* presented to it"[52] and that "the Tribunal does not categorically exclude that in some instances *a minor issue of territorial sovereignty* could indeed be ancillary to a dispute concerning the interpretation or application of the Convention."[53] However, the previous is not free from ambiguity.

First, with regard to the finding of incidental jurisdiction under Article 298(1)(a)(i), the link between such a jurisdiction and the Article is unclear. Normally, the interpretation of Article 298(1)(a)(i) is expected to lead to a finding that a sovereignty dispute is either within the tribunal's jurisdiction or not. Thus, how could it be inferred from the *a contrario* reading of Article 298(1)(a)(i) that it supports the proposition that a tribunal has incidental jurisdiction? Incidental jurisdiction, if existing on the basis of a provision, shall be considered a "primary," rather than an incidental, jurisdiction.

Second, the relation between the incidental jurisdiction the tribunal found under Article 298(1)(a)(i) and its general rule of incidental jurisdiction is ambiguous. It is unclear whether the tribunal's incidental jurisdiction shall apply only with regard to a "dispute over maritime boundary or a claim of historic title" under Article 298(1)(a)(i) or if it shall apply generally with regard to any "dispute concerning the interpretation or application of the Convention."[54]

Third, and connected to the second point, it is unclear whether a tribunal's incidental jurisdiction can apply in cases where a state submitted an Article 298(1)(a)(i) declaration. If the incidental jurisdiction applies only with regard to a "dispute over maritime boundary or a claim of historic title," then an Article 298(1)(a)(i) declaration would hinder the application of a tribunal's incidental jurisdiction.[55] Nevertheless, if the incidental jurisdiction applies generally with regard to any "dispute concerning the interpretation or application of the Convention," then an Article 298(1)(a)(i) declaration would not necessarily hinder a tribunal's incidental jurisdiction.

Fourth, with regard to the conditions for exercising incidental jurisdiction, the sovereignty dispute has to be "minor," which is a vague condition. Therefore, tribunals are encouraged to set concrete criteria for the application of this condition, otherwise they will decide on it subjectively.[56] Thus, a judgment will be less persuasive, and non-compliance will be more probable.

4.2 Incidental Jurisdiction in Other Case Law

In stating its general incidental jurisdiction over sovereignty disputes, the tribunal in the *Chagos* case cited the *Certain German Interests in Polish Upper Silesia* case.[57] In the latter case, the Permanent Court of International Justice (PCIJ) derived limited jurisdiction from a compromissory clause in the Geneva Convention. The PCIJ, however, found that "the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as *incidental* to a decision on a point in regard to which it has jurisdiction."[58] Hence, although the PCIJ required the ancillary determination to be "incidental," the tribunal in the *Chagos* case stated that it has to be "necessary," though citing the *Certain German Interests in Polish Upper Silesia* case. Thus, it is not clear whether only one or both conditions are required. Also, the PCIJ did not clarify the basis of its finding. But H. Lauterpacht assumed that the Court relied on the principle of effectiveness of treaty obligations.[59] However, effectiveness as a basis cannot exist with respect to ancillary sovereignty disputes particularly, as will be elaborated in section 5.1.

Moreover, the ICJ in the *Croatian Genocide* case derived limited jurisdiction from the compromissory clause of the Genocide Convention. The Court, however, found that

although it had no power to rule on alleged breaches of other obligations under international law, it is not prevented from "considering, in its reasoning, whether a violation of international humanitarian law or international human rights law has occurred to the extent that this is *relevant* for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention"[60] The Court also did not clarify the basis of its finding. It seems though the Court is differentiating here between "ruling" in the *dispositif* on the alleged breaches to the outside rules and "considering [them] in the reasoning." However, this differentiation cannot be applied to ancillary sovereignty disputes particularly, as will be elaborated further in section 5.2.

Furthermore, the tribunal in the *Eritrea/Yemen* case derived limited jurisdiction from a special agreement to determine sovereignty and delimit maritime boundaries. However, the tribunal asserted its jurisdiction to determine a party's basepoints as it deemed it "necessary" for its primary jurisdiction. Here also the tribunal did not clarify the basis of its finding. The tribunal found that it "does however *have to decide* on the basepoints which are to control the course of the international boundary line."[61] A similar approach was adopted by the UNCLOS Annex VII Tribunal in the recent *Enrica Lexie* award. In response to a claim by the claimant (Italy) that the Marines arrested by the respondent (India) are entitled to "immunities" under general international law, the tribunal asserted its incidental jurisdiction over the "immunity" dispute as the tribunal "could not provide a complete answer to the question as to which Party may exercise jurisdiction *without incidentally examining whether the Marines enjoy immunity*" and hence characterizing the immunity dispute as falling within "questions preliminary or incidental to the application."[62]

By contrast, the ICJ in the *Malaysia/Singapore* case had limited jurisdiction to determine sovereignty over South Ledge, but the latter appeared to be a low-tide elevation and accordingly should belong to the state in the territorial waters of which it is located. Thus, instead of declaring that it has an incidental jurisdiction to delimit these territorial waters, the Court declined to exercise its primary jurisdiction in view that it had not been mandated to delimit the territorial waters of the parties.[63]

Therefore, all the previous cases indicate the absence of a precise and consistent framework concerning the application of incidental jurisdiction by international courts and tribunals. Interestingly, the same exists in domestic courts. In the United States, the federal courts, which possess a limited jurisdiction *vis-à-vis* state courts by virtue of the U.S. Constitution, commonly exercise incidental jurisdiction over ancillary determinations. Nevertheless, the methodology used by federal courts to assert their incidental jurisdiction has been described as confused and haphazard.[64] Hence, the discussion will now turn to the relevant principles of international law in search of whether they can mandate or prohibit the exercise of such a jurisdiction over sovereignty disputes by UNCLOS tribunals.

V. Incidental Jurisdiction Over Sovereignty Disputes Under the Principles of International Law

Article 31(3)(c) of VCLT states that in treaty interpretation "any relevant rules of international law" applicable in the relations between the parties shall be taken into account.

As ICJ stated in the *Right of Passage* case: it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it.[65] Consequently, the ECHR held that "it must also take into account any relevant rules of international law when examining questions concerning its jurisdiction."[66]

The "rules" mentioned in Article 31(3)(c) have to be applicable between the parties regardless of whether they are named "rules," "principles," "maxims," etc. The ICJ and ILC do not make a distinction between "rules" and "principles," but they agree that the latter may be regarded as norms with a more general and more fundamental character.[67] In the *Gulf of Maine* case, the Chamber of the ICJ stated that "the association of the term 'rules' and 'principles' [in the Special Agreement] is no more than the use of a dual expression to convey one and the same idea, since in this context 'principles' clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term 'principles' may be justified because of their more general and more fundamental character."[68]

Effectiveness and state consent are widely recognized principles of international law. For example, in the *LaGrand* case, the ICJ was faced with the question of whether it had the power to order provisional measures that were binding. There, the ICJ also adopted an interpretation of Article 41 of the ICJ Statute in accordance with the principle of effectiveness to find that its provisional measures had mandatory force. Besides, the PCIJ stated that the principle of consent is related to "a fundamental principle of international law, namely, the principle of the independence of States."[69] Hence, as effectiveness and state consent are principles of international law applicable in a general manner, they are included within the scope of VCLT Article 31(3)(c).

Accordingly, this part examines whether incidental jurisdiction over sovereignty disputes can be asserted under the principle of effectiveness or prevented under the principle of state consent.

5.1 Asserting Incidental Jurisdiction Over Sovereignty Disputes Under the Principle of Effectiveness

This section will examine a tribunal's incidental jurisdiction over sovereignty disputes in light of the principle of *ut res magis valeat quam pereat* or effectiveness. According to Fitzmaurice, effectiveness provides that "treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them their fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text."[70] The doctrine of "inherent jurisdiction" is the progeny of the doctrine of effectiveness regulating the extent of the powers of a court regarding its procedures.

Fitzmaurice defined inherent jurisdiction as jurisdiction that is necessary of any court of law to be able to function.[71] However, inherent jurisdiction is still controversial within the realm of international adjudication. Briggs, on one hand, sees inherent powers as powers that a court may use to support the exercise of its primary jurisdiction and may be compulsorily exercised independently of the respondent's consent.[72] Thirlway, on the other hand, takes a restrictive view by arguing that jurisdiction is not a general property vested in a court

or tribunal, but it is the power to make a determination on specified disputed issues that will be binding on the parties because that is what they have consented to.[73] Nevertheless, international courts commonly claim that they possess inherent jurisdiction, independent from their constituent instruments, to assume procedural powers like *compétence de la compétence*, ordering provisional measures, conducting site visits and ordering expert reports.[74]

In addition, "inherent jurisdiction" is the conceptual source for "incidental jurisdiction." As Fitzmaurice argues, "[a]lthough much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court—or any court of law—being able to function at all."[75]

Yet, incidental jurisdiction over the subject matter has not been commonly treated under the progeny of inherent jurisdiction yet. So far, no effort has been made to develop a progeny of the principle of effectiveness with respect to the expansion of the powers of a court regarding its subject matter, although expansions in procedures and the subject matter are common in that in both a court expands its power without a basis in its constituent instrument and thus implicates the principles of effectiveness and consent. This explains why the practice of incidental jurisdiction is haphazard, as has been noted in section 4.2 above.

Therefore, as the inherent jurisdiction concept has been used as a progeny for regulating the extent of a court's powers over the procedures, it could be also used as a progeny for regulating the extent of a court's powers over the subject-matter. Accordingly, exploring the rationales behind inherent jurisdiction should be useful in conceptualizing incidental jurisdiction over the subject-matter.

The ICJ found in the *Nuclear Tests* case (1974) that it "possesses an *inherent jurisdiction* enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute."[76]

However, it is not clear from what source of law the Court derived its inherent jurisdiction. Identifying the exact source of inherent jurisdiction is essential in identifying its scope and limitations. The ICJ added in the *Nuclear Tests* case that "such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the *mere existence of the Court* as a judicial organ established by the consent of states, and is *conferred upon it* in order that its basic *judicial functions* may be safeguarded."[77]

Thus, it is clear, first, that the purpose of inherent jurisdiction is to safeguard the judicial functions of the Court. Hence, the scope of inherent jurisdiction differs depending on the court or tribunal applying it as international courts and tribunals differ in their functions.[78] The Iran–United States Claims Tribunal affirmed this position by stating that "in order to determine which powers international courts and tribunals may exercise as inherent powers one must take into account *the particular features* of each specific court or tribunal, including the *circumstances surrounding its establishment*."[79] Therefore, by transplanting the same rationale to incidental jurisdiction, the application of incidental jurisdiction by the tribunal in the *Chagos* case shall not be necessarily the same as that applied by the PCIJ in the *Certain German Interests in Polish Upper Silesia* case, which was cited by

the tribunal, because the PCIJ and an UNCLOS tribunal differ in their establishment, features and functions.

As a result, the principle of effectiveness requires, before asserting incidental jurisdiction over sovereignty disputes by an UNCLOS tribunal, first determining how such a jurisdiction fits within the particular functions and features of UNCLOS tribunals and the circumstances of their establishment. For instance, unlike the general function of the PCIJ and ICJ which possess general jurisdiction, UNCLOS tribunals' function is limited to settling law of the sea disputes. Besides, UNCLOS tribunals differ in their establishment and features from other international courts and tribunals. For example, the Convention does not even require, in the establishment of its tribunals, an Annex VII arbitrator to have any legal background or an ITLOS member to have any public international law background.[80] Therefore, it is hard to argue that an UNCLOS tribunal should have incidental jurisdiction over any minor or major sovereignty dispute.

Second, it is not clear from the *Nuclear Tests* case whether the source of inherent jurisdiction is the "mere existence of the Court as a judicial organ" or because it is "conferred upon it." On one hand, if the source is the former, then conferral is not needed.[81] Also, this would indicate that inherent jurisdiction is based on a general principle of law. As a result, by importing the same rationale to incidental jurisdiction, the principle of effectiveness would require first determining whether there is a general principle of law that allows the assertion of incidental jurisdiction over a sovereignty dispute. However, the general principles of law known in all domestic legal systems and eligible to be transferred to the realm of public international law are very limited.[82] Moreover, it is doubtful whether the procedural powers asserted by international courts are based on general principles of law as legal systems differ with respect to these procedural powers.[83] Thus, it is hard to contend that incidental jurisdiction over an outside matter is based on a general principle of law, especially since domestic courts enjoy compulsory jurisdiction and some are vested with the power to refer ancillary issues to be decided by other competent courts.

On the other hand, if the source is the "conferral," this would indicate that inherent jurisdiction is based on consent and thus should be defined within the boundaries of treaty interpretation.[84] As a result, the principle of effectiveness would require first determining whether incidental jurisdiction is possible, based on the object and purpose of the Convention and its provisions. Nevertheless, the tribunal in the *Chagos* case did not find that any of the provisions of the Convention provide a basis for exercising jurisdiction over a sovereignty dispute.

Regarding UNCLOS Article 288 (Jurisdiction), the *Chagos MPA* tribunal adopted (as mentioned in part 2.1.1) the "re-characterization test" and found that Mauritius's submission that the United Kingdom was not the "coastal state" was characterized as primarily relating to the sovereignty dispute over the Chagos Archipelago and thus does not fall under Article 288.[85] Regarding UNCLOS Article 298(1)(a)(i), the *Chagos MPA* tribunal found that it does not provide jurisdiction over the sovereignty dispute at the present case and at most, *a contrario* reading of that Article might provide incidental jurisdiction over a minor sovereignty dispute that is genuinely ancillary to a dispute under UNCLOS. However, even the rationale behind this last finding is questionable as shown in section 4.1. Consequently, it is hard to argue that the inherent jurisdiction concept may allow UNLCOS tribunals to exercise incidental jurisdiction over ancillary sovereignty disputes.

Therefore, the notion that incidental jurisdiction over sovereignty dispute could be asserted under the principle of effectiveness is superficial. Hence, assessment will turn now to whether the exercise of such a jurisdiction shall be prevented under the principle of state consent.

5.2 Preventing Incidental Jurisdiction Over Sovereignty Disputes Under the Principle of State Consent

International adjudication is based on the principle of consent. The PCIJ in the *Eastern Carelia* opinion described the principle of consent as related to "a fundamental principle of international law, namely, the principle of the independence of States."[86] The *Monetary Gold* principle is the progeny of the principle of state consent with respect to a court's jurisdiction over a non-consenting state. Thus, this part explores the balances behind the *Monetary Gold* principle and considers them in the practice of incidental jurisdiction.

The ICJ in the *Monetary Gold* case held that it cannot proceed in a matter when a decision on the "legal interests" of a non-consenting state over which the Court has no jurisdiction would not only be "affected" by a decision, but form "the very subject matter" of the decision.[87] The Court stated that this is an application of a "well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."[88] This means that the Court could exercise its jurisdiction if the implicated "legal interests" of a non-consenting state would only be "affected" by the decision. However, in this situation, the non-consenting state will be protected by Article 59 of the Statute which provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case."

Then, what test exactly does the Court adopt in identifying whether the legal interest of the non-consenting state would only be "affected" or would form "the very subject matter" of the decision? The ICJ elaborated in the *Nauru* case that the test of the latter is "not purely temporal but also logical," so that deciding on the implicated legal interest is needed as "a prerequisite" or "a basis" for the Court's decision on its mainline jurisdiction.[89] The "prerequisite" decision in the *Monetary Gold* case precisely concerned the "international responsibility" of a third state. Moreover, the Court in the *El Salvador/Honduras* case considered Nicaragua's legal interests to be "affected" but not to constitute the "very subject matter" of the judgment because the Court will not need to declare on Nicaragua's "rights" under the disputed condominium in the waters of the Gulf of Fonseca, but merely on the disputed condominium as between El Salvador and Honduras only.[90]

Therefore, the case law makes it clear that, at least, a need to directly decide on an "international responsibility" or "rights" of a non-consenting state would constitute a bar to exercise jurisdiction. An advantage of the *Monetary Gold* formula is that it strikes a balance between the principles of effectiveness and state consent. It does not preclude the Court from exercising its mainline jurisdiction due to a mere "effect" on the legal interest of a state over which it lacks jurisdiction *ratione personae*. But at the same time, it does not bind that state with the findings of the Court. A disadvantage is that it opens the floor for contradictions between the findings of different international courts and tribunals on the same issue.

What was observed with respect to the principle of effectiveness is also observed with respect to the principle of state consent. Although the *Monetary Gold* principle is the progeny of the principle of state consent with respect to the expansion of jurisdiction *ratione personae*, there is no similar progeny with respect to the expansion of jurisdiction *ratione materiae*, although the two fields implicate the general principle of state consent. While in the former, a court assesses to what extent its decision would implicate a party over which it lacks jurisdiction *ratione personae*, in the latter a court assesses to what extent its decision would implicate an outside issue over which it lacks jurisdiction *ratione materiae*.

In addition, H. Lauterpacht observed that "numerous judgments show the Court 'bearing in mind the fact that its jurisdiction is limited, that it is invariably *based on the consent of the respondent* and only exists *in so far as this consent has been given*.'"[91] Thus, no reason appears to differentiate between the criteria that regulates when there is no consent *in toto* (*Monetary Gold* principle) and when there is only a limited, partial or incomplete consent (implicated issue). Therefore, exploring the balances behind the *Monetary Gold* principle would be useful in assessing incidental jurisdiction over sovereignty disputes.[92]

This first depends on whether the *Monetary Gold* principle is confined to the ICJ. The answer is in the negative.[93] As mentioned, the ICJ stated with respect to the *Monetary Gold* principle that this is an application of a "well-established *principle of international law* embodied in the Court's Statute."[94] This means that the principle is applicable to any court or tribunal operating within the corpus of public international law, including UNCLOS tribunals. Moreover, the tribunal in *Larsen v. Hawaiian Kingdom* rejected the argument that the principle was applicable only to the ICJ.[95] Second, the terms the framers of UNCLOS used in Article 298(1)(a)(i) to exclude ancillary sovereignty disputes from compulsory conciliation resembles those used in the *Monetary Gold* principle. Article 298(1)(a)(i) excluded any dispute that "*necessarily* involves the *concurrent* consideration" of any dispute concerning sovereignty.[96] Third, the test used by the tribunal in the *Chagos* case with regard to the tribunal's incidental jurisdiction over minor sovereignty disputes resembles that used in the *Monetary Gold* principle. In the former, the tribunal stated it cannot exercise jurisdiction when the "real issue in the case" and the "object of the claim" do not relate to its mainline jurisdiction. In the latter, the ICJ stated it cannot exercise jurisdiction when "the very subject matter" of its judgment is the legal interests of a non-consenting party.

Therefore, by adopting the same balances of the *Monetary Gold* principle in assessing incidental jurisdiction over sovereignty disputes, an UNCLOS tribunal has to decide whether deciding on such a dispute would entail a direct decision on the "international legal responsibility" or "rights" of a party. It might be argued that a tribunal incidentally deciding on a sovereignty dispute can just decide which party is the sovereign under international law, without necessarily deciding on its "international responsibility." However, a response to this is that even in such a case the judgment is directly deciding on the "rights" of a party and thus these rights constitute the "very subject matter" of a part of the judgment as noted in *El Salvador/Honduras* case. Therefore, incidental jurisdiction should be declined.

Also, it might be argued that a tribunal can identify who is the sovereign party in its *reasoning* rather than in its *dispositif*, thus no binding effect would entail the determination on sovereignty *per se*, and thus, technically, no judicial decision on "rights" would occur. Instead, what might occur would not exceed an "effect" on the legal interests of a party, hence it is a situation under the *Monetary Gold* principle considered not to prevent the exercise of full

jurisdiction. Nevertheless, a response to the previous is that even identifying who is the sovereign party in the *reasoning* of a judgment would be binding in this case and thus a judicial decision on "rights" would occur. This is because the *res judicata* of a judgment extends to its essential reasons.[97] Thus, here also incidental jurisdiction should be declined.

As a result, whether the ancillary sovereignty dispute is minor or major should be immaterial. Therefore, the tribunal's finding in the *Chagos* case that it might exercise jurisdiction over a *minor* issue of territorial sovereignty ancillary to its primary jurisdiction departs from the balances of the principle of consent as reflected in the *Monetary Gold* principle.[98] Therefore, the principle of state consent should prevent an UNCLOS tribunal from exercising incidental jurisdiction over any ancillary sovereignty dispute.

VI. Conclusion

Incidental substantive disputes exist before various courts and tribunals with respect to different sorts of disputes. It becomes more sensitive when the ancillary dispute is a sovereignty dispute because territorial sovereignty is the most reflective form of state sovereignty, and thus states are not expected to comply with its subjugation to any sort of jurisdiction that is *prima facie* unsubstantiated. Regrettably, the international practice of exercising jurisdiction over an external ancillary dispute is haphazard due to the absence of a framework. Therefore, this paper argues that courts and tribunals are encouraged to adopt a "systematic approach" in assessing whether they can expand their jurisdiction over the subject-matter. That approach would require a tribunal to first interpret its relative provisions following the interpretation maxims in Articles 31–33 of the VCLT. Meanwhile, pursuant to Article 31(3)(c) of VCLT, a tribunal should take into consideration the relative principles of international law which here are the principles of effectiveness and state consent.

By applying this systematic approach to the problem of sovereignty disputes before UNCLOS tribunals, it appears that neither of the relevant provisions of UNCLOS provides its Part XV tribunals jurisdiction over a sovereignty dispute. In addition, the exercise of such a jurisdiction cannot be asserted by the principle of effectiveness and is inconsistent with the principle of state consent. Hence, UNCLOS tribunals have no basis to exercise jurisdiction over a sovereignty dispute even if it was minor, in contrast to the position of the tribunal in the *Chagos* case. As a result, any future claimant state should not be able to have a finding by an UNCLOS tribunal concerning an ancillary sovereignty dispute.

Other international courts and tribunals facing incidental substantive disputes should adopt the same systematic approach based on Articles 31–33 of the VCLT. Each tribunal also has to examine how the principle of effectiveness fits within its *particular features* and to what extent it allows exercising jurisdiction over an incidental substantive dispute without disturbing the balance of the principle of state consent. Therefore, it is expected that the extent of a tribunal's jurisdiction over an incidental substantive dispute will vary according to the tribunal and the subject matter. However, there is a difference between variations based on a systematic approach and haphazard applications based on subjective positions.

Notes

1. See Arbitration under Annex VII of the United Nations Convention on the Law of the Sea, Counter-Memorial Submitted by the United Kingdom, 15 July 2013, para. 4.61

2. There are papers on the subject albeit using different analytical approaches. See for example Alexander Proelss, "The Limits of Jurisdiction *Ratione Materiae* of UNCLOS Tribunals," *Hitotsubashi Journal of Law and Politics* 46 (2018), pp. 47–60; Joshua Benn, "ITLOS & Mixed Disputes: Untapped Jurisdiction," *Indian Journal of Projects, Infrastructure and Energy Law*, January 26, 2022, https://ijpiel.com/index.php/2022/01/26/itlos-mixed-disputes-untapped-jurisdiction/, accessed May 11, 2023; Viktoriia Hamaiunova, "Jurisdiction of Law of the Sea Courts and Tribunals in Mixed Boundary Disputes Over Land and Maritime Territory," Master Thesis *University of tarty-School of Law* (2019) https://dspace.ut.ee/handle/10062/66757 , accessed May 11, 2023

3. Alan E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction," *The International and Comparative Law Quarterly* 46(1) (1997), p. 37, https://doi.org/10.1017/S0020589300060103.

4. *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)* (2015), paras. 520, 540.

5. *The South China Sea Arbitration Award (The Republic of Philippines v. The People's Republic of China) (2016),* para. 229. See also *Sovereignty and Maritime Delimitation in the Red Sea, Award of the Arbitral Tribunal in the Second Stage (Eritrea/Yemen) (1999),* para. 103 [hereinafter Eritrea/Yemen]; *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain, Merits, Judgment, 1.C.J. Reports 2001, p. 40 (2001)*, paras. 235–236.

6. See W. Michael Reisman, "Eritrea-Yemen Arbitration (Award, Phase II: Maritime Delimitation)," *American Journal of International Law* 94(4) (2000), p. 732, https://doi.org/10.2307/2589799.

7. *Chagos Marine Protected Area Arbitration* (n 4), paras. 71–90.

8. Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration against the Russian Federation under the United Nations Convention on the Law of the Sea, September 14, 2016, https://mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provadzhennya-proti-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsykogo-prava, accessed August 3, 2018.

9. *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives),* Preliminary Objections, Judgment, ITLOS Special Chamber, 28 January 2021, para. 246.

10. See Elihu Lauterpacht, *Aspects of the Administration of International Justice Aspects of the Administration of International Justice* (Cambridge University Press, 1991), p. 23.

11. Jonathan I. Charney, "Compromissory Clauses and the Jurisdiction of the International Court of Justice," *The American Journal of International Law* 81(4) (1987), pp. 855–887, footnote 48, https://doi.org/10.2307/2203414.

12. See *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 13, para. 19.

13. Peter Tzeng, "Supplemental Jurisdiction Under UNCLOS," *Houston Journal of International Law* 38(2) (2016), pp. 561–562.

14. *Ibid*.

15. Stefan Talmon, "The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCOLS Part XV Courts and Tribunals," *International and Comparative Law Quarterly* 65 (2016), p. 933, https://doi.org/10.1017/S0020589316000403.

16. *South China Sea Arbitration Award* (n 5), para. 150; *Chagos* (n 4), para. 208.

17. *Chagos* (n 4) paras. 207–212.

18. Talmon, 2016, p. 934.

19. *South China Sea Arbitration Award (Philippines v. China)* PCA Case No. 2013–19, Award on Jurisdiction, para. 26.

20. *Ibid*., paras. 152–154.

21. *Ibid*., para. 152.

22. *Ibid*., para. 153.

23. *Ibid*.

24. *Ibid*.

25. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation)*, Award on Preliminary Objections, PCA, 21 February 2020, p. 154.

26. Talmon 2016, pp. 933–934; Callista Harris, "Claims with an Ulterior Purpose: Characterising

Disputes Concerning the 'Interpretation or Application' of a Treaty," *The Law & Practice of International Courts and Tribunals* 18 (2020), pp. 279–299, p. 298, https://doi.org/10.1163/15718034-12341405.

27. Emphasis added.

28. *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, ITLOS Case No. 2, Judgment (1999), para. 155; *M/V Virginia G (Pan. v. Guinea-Bissau*), ITLOS Case No. 19, Judgment (2014), para. 359; *Guyana v Suriname, Award,* ICGJ 370 (PCA 2007), 17th September 2007, Permanent Court of Arbitration, para. 406; Tzeng 2016, pp. 519–535.

29. Emphasis added.

30. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, I.C.J. Reports 2007, p. 43, para. 147.

31. *MOX Plant (Ireland. v. U.K.), Procedural Order No. 3 (Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures)* (2003) para. 19; *Chagos MPA Award* (n 4) para. 181; Tzeng 2016, pp. 523–524.

32. Emphasis added.

33. *Chagos MPA Award* (n 4), para. 218.

34. *Ibid*., para. 215 (emphasis added).

35. *Ibid*., para. 217.

36. *Ibid*.; *Dissenting and Concurring Opinion of Judges Kateka and Wolfrum*, para. 27.

37. Emphasis added.

38. *Chagos MPA Award* (n 4), para. 516 (emphasis added); Tzeng 2016, pp. 555.

39. *Chagos MPA Award* (n 4), para. 517.

40. *Chagos MPA Award* (n 4), *Dissenting and Concurring Opinion of Judges Kateka and Wolfrum*, paras. 92-94 (emphasis added); Talmon 2016, pp. 938.

41. See *Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgment, I.C.J. Reports 2003, p. 161, para. 41.

42. Tzeng 2016, 557.

43. *Chagos MPA Award* (n 4), paras. 520, 540; Talmon 2015, p. 939.

44. *Chagos MPA Award* (n 4), para. 547.

45. Wensheng Qu, "The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond," *Ocean Development & International Law* 47(1) (2016), p. 49, https://doi.org/10.1080/00908320.2016.1124484.

46. *Chagos MPA Award* (n 4), paras. 417–456.

47. David A. Colson and Brian J. Vohrer, "International Decisions; In Re Chagos Marine Protected Area (Mauritius v. United Kingdom)," *The American Journal of International Law* 109(4) (2015), pp. 845–851, p. 850, https://doi.org/10.5305/amerjintelaw.109.4.0845.

48. Emphasis added; *Chagos MPA Award* (n 4), para. 323.

49. *Ibid*.; Talmon 2016, p. 940.

50. *Chagos MPA Award* (n 4), para. 419 (emphasis added).

51. *Ibid*., para. 218 (emphasis added).

52. *Ibid*., para. 220 (emphasis added).

53. *Ibid*., para. 221 (emphasis added).

54. See Lan Ngoc Nguyen, "The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?," *The International Journal of Marine and Coastal Law* 31(1) (2016), p. 132, https://doi.org/10.1163/15718085-12341393.

55. Speech of the ITLOS President to the Meeting of Legal Advisers of Ministries of Foreign Affairs on 23 October 2006, p. 6, https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf, accessed August 6, 2018; Irina Buga, "Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals," *The International Journal of Marine and Coastal Law* 27 (2012), pp. 59–95, p. 91.

56. Alfredo Crosato Neumann, "Sovereignty Disputes Under UNCLOS: Some Thoughts and Remarks on the Chagos Marine Protected Area Dispute," *Cambridge Journal of International and Comparative Law Online,* (2015), p. 7.

57. *Chagos MPA Award* (n 4), para. 220.

58. *Certain German Interests in Polish Upper Silesia, Preliminary Objections*, Judgment of 25 August 1925, P.C.I.J. Series A, No. 6, para. 47 (emphasis added).

59. Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press, 1982), p. 92.

60. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia*), Judgment, I.C.J. Reports 2015, p. 3, para. 85 (emphasis added).

61. *Eritrea/Yemen*, 1999, para. 142 (emphasis added).

62. *Enrica Lexie Incident (Italy v. India)*, Award (PCA, 2020), para 808.

63. *Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, paras. 297–299.

64. "A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction," *Harvard Law Review* 95(8) (1982), p. 1935, https://doi.org/10.2307/1340656.

65. *Case Concerning the Right of Passage Over Indian Territory (Preliminary Objections) (Portugal v. India)* I.C.J. Reports 1957, p. 142.

66. *Banković and ors v Belgium and ors*, Admissibility, App no. 52207/99, ECHR 2001-XII, para. 57.

67. ILC, First report by the Special Rapporteur on general principles of law, A/CN.4/732, 5 April 2019, para 151.

68. *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, I.C.J. Reports 1984, p. 246, pp. 288–290, para. 79.

69. *Status of Eastern Carelia*, Advisory Opinion, PCIJ (ser B) No. 5 (1923 July 23), para 33.

70. Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points," *British Yearbook of International Law* 203 (1957), p. 211.

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