

New Knowledge and Changing Circumstances

Mixed Disputes under the Dispute Settlement Procedures of UNCLOS

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Mixed Dispute

- Definition of the Mixed Dispute

- ?

- Max Planck Institute of Public International Law,
Encyclopedia of Public International Law

- Dictionary of International Law

Mixed Dispute

- Statement by H.E. Judge Rudiger Wolfrum, President of the International Tribunal for the Law of the Sea to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, New York, 23 October 2006

“Certainly, these conditions are peculiar to the compulsory conciliation procedure; they do not apply to adjudication by the Tribunal, the ICJ or arbitration. This is of particular relevance to the condition regarding **“mixed”** delimitation cases; namely cases in which **a maritime dispute involves the concurrent consideration of any dispute concerning sovereignty or other rights over continental or insular land territory**”

Mixed Dispute

definition

the dispute of application and interpretation of the UNCLOS involves the territorial sovereignty dispute.

Article 281, UCLOS

Article 281

Procedure where no settlement has been reached by the parties

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure .

Article 288, UCLOS

Article 288

Jurisdiction

1. A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.

-> Territorial dispute itself can not be submitted to the court or tribunal.

Chagos Archipelago case, PCA

Factual Grounds

- Mauritius, a colony of the British Empire
- Nov. 1965, the UK detached the Chagos Archipelago from the colony
- After independence, UK removed the Chagossian population from the Archipelago
- Mauritius fishermen has been exempt from the abandonment of fishery according to the UK law
- UK, MPA (2010), abandoned the access of Mauritian fishermen

Chagos Archipelago case, PCA

- Submission (1) of Mauritius
 - the United Kingdom is not entitled to declare an “MPA” or other maritime zones because it is not the “coastal State” within the meaning of *inter alia* Articles 2, 55, 56 and 76 of the Convention;”

Chagos Archipelago case, PCA

- View point of Arbitral Tribunal to the decision of jurisdiction of submission 1 (para. 206)
 - What is the nature of the dispute in Mauritius' First Submission? Territorial dispute or not ? (→ Characterization)
 - To what extent does Article 288(1) permit a arbitral tribunal to determine issues of dispute land sovereignty as a necessary precondition to a determination of rights and duties of the UNCLOS ?

Chagos Archipelago case, PCA

- Arbitral Award 1 – “Territorial Dispute !!”
 - “Mauritius’ First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago.”
(para. 212)
 - “The Parties’ differing views on the “coastal State” for the purposes of the Convention are simply one aspect of this larger dispute of Convention”
(para. 212)

Chagos Archipelago case, PCA

- Arbitral Award 2
 - “where the “real issue in the case” and the “object of the claim” do not relate to the interpretation or application of the Convention, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).”
(para. 220)

Chagos Archipelago case, PCA

- Arbitral Award 3

- "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."
(para. 221)

Chagos Archipelago case, PCA

Evaluation

- 1) 1st mixed dispute
- 2) Legal tool to decide jurisdiction is the Characterization

South China Sea case, PCA

15 submissions

- 1) China's maritime entitlements may not extend beyond the UNCLOS
- 2) 9 dash line is contrary to the UNCLOS
- 3) Scarborough Shoal has no EEZ
- 4) Mischief Reef, Second Thomas Shoal, and Subi Reef are LTEs
- 5) Mischief Reef and Second Thomas Shoal are part of EEZ and CS
- 6) Gaven Reef and McKennan Reef (including Hughes Reef) are LTEs.
- 7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef has no EEZ.
- 8) China has unlawfully interfere with maritime resources of PH's EEZ.
- 9) China has unlawfully failed to prevent its nationals from exploiting the living resources in PH' EEZ.
- 10) China has unlawfully prevented PH fishermen from pursuing their livelihood.
- 11) China has violated its obligations under the UNCLOS to protect and preserve the marine environment at Scarborough Shoal, etc.
- 12) China's occupation of and construction activities on Mischief Reef violates EEZ
- 13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner.
- 14) Since the start of arbitration, China has unlawfully aggravated and extended the dispute.
- 15) China shall respect the rights and freedoms of the Philippines under the Convention.

South China Sea case, PCA

Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (2014/12/07)

- I. 3. *The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in SCS. ...*

South China Sea case, PCA

Position paper

Sub. 1) China's maritime entitlements may not extend beyond the UNCLOS

→ "10. ... However, whatever logic is to be followed, only after the extent of China's territorial sovereignty in the South China Sea is determined can a decision be made on whether China's maritime claims in the South China Sea have exceeded the extent allowed under the Convention."

South China Sea case, PCA

Position paper

Sub. 3) Scarborough Shoal has no EEZ

Sub. 4) Mischief Reef, Second Thomas Shoal, and Subi Reef are LTEs

Sub. 5) Mischief Reef and Second Thomas Shoal are part of EEZ and CS

Sub. 6) Gaven Reef and McKennan Reef (including Hughes Reef) are LTEs.

Sub. 7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef has no EEZ.

→ "19. ... This is in essence an attempt at denying China's sovereignty over the Nansha Islands as a whole"

South China Sea case, PCA

Position paper

Sub. 8) China has unlawfully interfere with maritime resources of PH's EEZ.

Sub. 9) China has unlawfully failed to prevent its nationals from exploiting the living resources in PH' EEZ.

Sub.10) China has unlawfully prevented PH fishermen from pursuing their livelihood.

Sub. 11) China has violated its obligations under the UNCLOS to protect and preserve the marine environment at Scarborough Shoal, etc.

Sub.12) China's occupation of and construction activities on Mischief Reef violates EEZ

Sub.13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner.

→ "27. ... Until and unless the sovereignty over the relevant maritime features is ascertained and maritime delimitation completed, this category of claims of the Philippines cannot be decided upon. ..."

South China Sea case, PCA

Award on Jurisdiction and Admissibility¹ -> Not mixed dispute

"153. The Tribunal might consider that the Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty. ...
The Tribunal likewise does not see that any of the Philippines' Submissions require an implicit determination of sovereignty."

South China Sea case, PCA

Award on Jurisdiction and Admissibility 1

"153. ... The Tribunal does not see that success on these Submissions would have an effect on the Philippines' sovereignty claims and accepts that the Philippines has initiated these proceedings with the entirely proper objective of narrowing the issues in dispute between the two States. In this respect, the present case is distinct from the recent decision in *Chagos Marine Protected Area*. "

South China Sea case, PCA

Award on Jurisdiction and Admissibility 1

"153. ... The Tribunal understands the majority's decision in that case to have been based on the view both that a decision on Mauritius' first and second submissions would have required an implicit decision on over sovereignty and that sovereignty was the true object of Mauritius' claims. **For the reasons set out in this paragraph, the Tribunal does not accept the objection set out in China's Position Paper that the disputes presented by the Philippines concern sovereignty over maritime features.**"

South China Sea case, PCA

Evaluation

- 1) It is **still** the 2nd mixed dispute !!
- 2) The Arbitral Tribunal denies a territorial dispute ?
→ Characterization !!!

Characterization

Characterization is always the option tool for dealing with mixed dispute case ?

Is there any other legal tool for dealing with the mixed dispute case ?

Change a question!

From : After characterizing the submission, is it a territorial dispute ?

TO : How deeply can the Tribunal deal with the mixed dispute ?

Alternative approach

TO : How deeply the Tribunal can deal with the mixed dispute ?

- Can the Tribunal decide title to territory in the operative clause ?
- Can the Tribunal decide title to territory in the legal reasoning ?

Cf : Criteria - Legal Binding Force

Alternative approach

Criteria – Legal Binding Force of the Judgement

Legal Binding Force

- Operative clause (O)
- *Legal reasoning*
 - *obiter dictum* (x) : a passage in a judicial opinion which is not necessary for the decision of the case
 - *ratio decidendi* (O) : rationale for decision

Alternative approach

Criteria – Legal Binding Force of the Judgement

Legal Binding Force

** Res Judicata : The Former Court - The Current Court*

Recent Case

- Genocide Convention case, ICJ (2007)*
- Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 (2016)*

Similarity between two concept

Jurisprudences and Scholarly opinions have not drawn the fine line between legal binding force and res judicata.

Alternative approach

Criteria – Legal Binding Force of the Judgement

Genocide Convention case, ICJ (2007)

“125. it may be necessary to distinguish between, first, the issues which have been decided with the force of *res judicata*, or which are necessarily entailed in the decision of those issues ; secondly any peripheral or subsidiary matters, or *obiter dicta* ; and finally matters which have not been ruled upon at all. Thus an application for interpretation of a judgment under Article 60 of the Statute may well require the Court to settle “[a] difference of opinion [between the parties] as to whether a particular point has or has not been decided with binding force.”

Alternative approach

Criteria – Legal Binding Force of the Judgement

Come back to the question : How deeply the Tribunal can deal with the mixed dispute ?

- Can the Tribunal decide title to territory in the operative clause ? – ***NO***.
- Can the Tribunal decide title to territory in the legal reasoning ? – ***NO (ratio decidendi) / Yes (obiter dictum)***

But in which condition legal reasoning in the judgment about title to territory in UNCLOS case could be obiter dictum ?

- Hard to imagine this kind of situation

Applying the Alternative approach

to the former two cases

Submission of the South China Sea case / Chagos

Archipelago case

- Not requesting a decision on title to territory in operative clause
- And impossible to request it in submissions under the Article 281

So the tribunal can not give any operative clause about title to territory.

Applying the Alternative approach to the former two cases

Legal reasoning

South China Sea case

Chagos Archipelago case

- If the tribunal decide title to territory in the legal reasoning, does it have legal binding force ?
- What if the Tribunal decides whether the UK could establish the MPA under its confirmation that UK is coastal State ?

Conclusion

- 1) *Definition of the mixed dispute*
- 2) *Characterization*
- 3) *Alternative approach*
 - *legal binding force of the judgement*