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# Jurisdiction and Characterisation of Disputes under UNCLOS in Mixed Disputes in Light of the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait

**Abstract**

This article examines the practice of UNCLOS tribunals in determining their jurisdiction over mixed disputes. It argues that tribunals have developed a substantially uniform approach in deciding on jurisdictional objections related to territorial sovereignty issues. Tribunals have assumed implied powers regarding ancillary territorial sovereignty issues intrinsically connected to maritime law disputes and determined the ancillary nature of the territorial sovereignty issues based on the nature and character of the dispute.

**Keywords:** jurisdiction, characterization of disputes, mixed disputes, territorial sovereignty, prerequisite test, maritime dispute, implied powers, UNCLOS, ITLOS, arbitration

## I. Introduction

On 16 September 2016, Ukraine instituted proceedings against the Russian Federation under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS").[1] Ukraine, among other claims, requested the tribunal to declare that Russia violated UNCLOS by interfering with Ukraine's rights in the maritime zones adjacent to Crimea.[2] The case has arisen with regard to the events that occurred in

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1 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *the Russian Federation)* [hereinafter "Ukraine/Russia"], PCA Case No. 2017–06, Award of 21 February 2020, para 8.

2 Ibid., para 9.

DOI: 10.56749/annales.elteajk.2021.lx.7.101

2014 in Crimea. Ukraine contended that "the Russian Federation invaded and occupied the Crimean Peninsula, and then purported to annex it".[3] The Russian Federation denied these allegations, pointing to the referendum held in Crimea and the fact that the Russian Federation, following Crimea's accession, "assumed all the rights and duties of the coastal State in relation to the waters adjacent to the peninsula" and that "[i]nternationally, Russia unconditionally affirmed its status as a coastal State in relation to waters surrounding Crimea".[4] On 21 May 2018, the Russian Federation submitted preliminary objections to the tribunal, contesting its jurisdiction over Ukraine's claims because "the dispute in the case concerns Ukraine's claim to sovereignty over Crimea",[5] even though Ukraine characterised the dispute as one concerning its "coastal State rights in the Black Sea, Sea of Azov and Kerch Strait".[6]

The *Ukraine/Russia* dispute gave an opportunity to the tribunal to revisit the long-disputed question of to what extent do tribunals constituted under UNCLOS have jurisdiction to decide mixed disputes, *i.e.,* disputes concerning the law of the sea that involve territorial sovereignty disputes as well. UNCLOS tribunals were faced with this question ample times in the past, most recently in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), The South China Sea Arbitration (Philippines v. China)* and now in *Ukraine/Russia*.

In these cases, the tribunals found that UNCLOS tribunals do not have jurisdiction over mixed disputes, except for situations where sovereignty is an "ancillary" issue to the dispute concerning the interpretation of UNCLOS that is necessary to resolve the dispute.[7] Nevertheless, in situations 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).[8]

In *Ukraine/Russia,* the tribunal in this regard stated that "ultimately it is for the Arbitral Tribunal itself to determine on an objective basis the nature of the dispute

[3] *Ukraine/Russia,* Award of 21 February 2020, para 3.
[4] *Ukraine/Russia,* Preliminary Objections of the Russian Federation [hereinafter "Russian Federation's Preliminary Objections"], 19 May 2018, para 10–11.
[5] *Ukraine/Russia,* Russian Federation's Preliminary Objections, para 22.
[6] *Ukraine/Russia,* Russian Federation's Preliminary Objections, para 3.
[7] *Ukraine/Russia,* Award of 21 February 2020, para 157.; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* PCA Case No. 2011-03, [hereinafter "Chagos"], Award of 18 March 2015, para 220; *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China),* PCA Case Repository No. 2013-19, [hereinafter "South China Sea"], Award on Jurisdiction and Admissibility of 29 October 2015, para 153.
[8] *Chagos,* Award of 18 March 2015, para 220.

dividing the Parties [isolating] the real issue in the case and [identifying] the object of the claim".[9] The *Ukraine/Russia* tribunal concluded that, since a significant part of Ukraine's claims rests on the premise that Ukraine is sovereign over Crimea – the validity of which is challenged by the Russian Federation – the tribunal could not decide the claims without first addressing the question of sovereignty over Crimea. Therefore, the question as to which State is sovereign over Crimea, is a "prerequisite" to the decision of the tribunal.[10] The tribunal, similarly to *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* applied the prerequisite test, but also accepted that the tribunal can exercise jurisdiction with regard to ancillary matters.[11]

Therefore, none of the tribunals excluded *per se* their jurisdiction to decide on maritime disputes involving territorial sovereignty elements. In determining whether they had jurisdiction, the tribunals first engaged in the characterisation of the dispute to determine whether the territorial sovereignty element is merely "ancillary" to the dispute, or it is a "prerequisite" to the decision, and, second, the extent to which UNCLOS under Article 288(1) allows the tribunal to decide issues of land sovereignty as a necessary precondition to the determination of the maritime dispute. These two aspects were discussed in all cases that involved jurisdictional questions regarding mixed disputes under UNCLOS. In Section 2 below, I assess the jurisdictional provisions of UNCLOS based on which tribunals can establish their jurisdiction on ancillary territorial sovereignty issues, and in Section 3 the consistent approach applied by the tribunals of *Chagos, South China Sea* and *Ukraine/Russia* to characterise disputes. Finally in Section 4, I summarise the conclusions to be drawn from the jurisprudence of the tribunals.

According to certain scholars the jurisprudence of the tribunals show a lack of a consistent approach to the issue, called the implicated issue problem.[12] Others maintain that parallels can be drawn between the characterisation of mixed disputes with regard to the identification of "indispensable issues" and the "indispensable party" problem.[13] Uncertainties and lack of clarity with regard to extent of jurisdiction of UNCLOS tribunals in maritime disputes involving territorial issues can undermine the effectiveness of dispute settlement and might result in *ultra vires* awards. The present article aims at demonstrating that there is a constant practice by UNCLOS tribunals,

[9] *Ukraine/Russia,* Award of 21 February 2020, para 151.
[10] Ibid., para 154.
[11] Ibid., para 157.
[12] P. Tzeng, The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction, (2018) 50 (7) *NYU J International Law and Politics,* (447–507) 456.
[13] I. Buga, Territorial Sovereignty Issues in Maritime Disputes: A jurisdictional Dilemma for Law of the Sea Tribunals, (2012) 27 (1) *The International Journal of Marine and Coastal Law,* (59–95) 80. https://doi.org/10.1163/157180812X615113

to characterise disputes that might entail issues of territorial sovereignty and determine the extent of their jurisdiction accordingly.

## II. Jurisdiction *ratione materiae* of tribunals constituted under UNCLOS over mixed disputes

### 1. Implied powers

The compulsory jurisdiction of UNCLOS tribunals is stipulated in Article 288(1) of UNCLOS, which provides that tribunals "shall have jurisdiction over any dispute concerning the interpretation or application of th[e] Convention". Limitations and exceptions nevertheless apply to the tribunal's jurisdiction. Article 297 automatically limits the jurisdiction of the tribunal and Article 298 provides for further optional exceptions from compulsory settlement in which the State Parties may, by declaration, restrict the types of disputes under UNCLOS to be brought before tribunals. The optional exception under Article 298(1)(a)(i) has a particular importance regarding the extent of a UNCLOS tribunal's jurisdiction with regard to maritime disputes involving land sovereignty elements.

Article 298(1)(a)(i) allows States to make declarations excluding maritime delimitation disputes and further provides that "any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory" shall furthermore be barred from submission to *conciliation* under UNCLOS Annex V, Section 2. Some argue that, since exceptions under the UNCLOS were intended to be kept to a minimum, Article 298 should be interpreted restrictively,[14] meaning that since territorial sovereignty disputes are not excluded from the compulsory jurisdiction of UNCLOS in the absence of a declaration under Article 298(1)(a)(i), there is nothing to exclude these disputes from the compulsory jurisdiction of Article 288(1) of UNCLOS. On the other hand, UNCLOS does not contain an explicit provision either on whether the tribunals can deal with ancillary territorial issues. Therefore, it is a crucial point to the debate regarding the determination of the jurisdiction of UNCLOS tribunals that it leaves uncertain whether concurrent land sovereignty issues are also excluded in the absence of such a declaration.

This silence provides leeway for tribunals to decide on ancillary land issues, so far as they do not constitute the "very subject matter of the dispute". This assumes that tribunals declare themselves competent to adjudicate ancillary territorial sovereignty

[14] Ibid., 67.

questions in mixed disputes without the express basis under UNCLOS based on implied powers.[15] According to the principle of implied powers, international tribunals may exercise competences not expressly conferred under their constitutive instrument.[16] Nevertheless, the tribunal may only declare implied power if it is necessary for the exercise of the tribunal's jurisdiction, and if it is consistent with the text and object and purpose of the constitutive treaty.[17] Therefore, the interpretation of jurisdiction fixed by the tribunal's constitutive instrument in line with the judicial functions is a matter of implied powers.[18] This is in line with the *non ultra petita* principle recognised by the International Court of Justice, according to which a tribunal "must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its fullest extent".[19]

Assuming that tribunals constituted under UNCLOS have implied powers to decide on ancillary disputes, in these cases whether they have jurisdiction to decide the case depends on "the way the case is presented by the plaintiff party, on which aspects are the prevailing ones, and on whether certain aspects can be separated from the others, on whether the dispute, as a whole, can be seen as being about the interpretation or application of the Convention".[20] The characterisation of disputes will be discussed in the next Section below.

## 2. Interpretation of Article 293(1) of UNCLOS

Another debate concerning the extent of jurisdiction of UNCLOS tribunals revolves around whether Article 293(1) of UNCLOS may expand the jurisdiction of its tribunals. This Article stipulates the applicable law provision which provides that UNCLOS tribunals "shall apply this Convention and other rules of international law not incompatible with this Convention". According to some interpretations, Article 293(1) expands the jurisdiction of UNCLOS tribunals to include claims that would otherwise fall out of the ambit of UNCLOS and declare whether states have violated certain rules of international law.[21] This interpretation was argued by Mauritius

[15] Ibid., 61.
[16] Ibid., 78–79.
[17] Ibid.
[18] Ibid.
[19] *Continental Shelf (Libyan Arab famahiriya / Malta),* Judgment, ICJ Reports1985 13, 23.
[20] T. Treves, What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?, in R. Lagoni and D. Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff, Leiden, 2006) 77.
[21] P. Tzeng, Jurisdiction and Applicable Law under UNCLOS, (2016) 126 (1) *The Yale Law Journal,* (242–260) 246.

in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*[22] and was also applied by the tribunals in *M/V Saiga (No. 2),*[23] *Guyana v. Suriname*[24] and *M/V Virginia G*.[25] Others, on the other hand, argue that it is a well-established principle of international law that applicable law provisions do not expand the jurisdiction of international courts and tribunals.[26]

Those who stand by that Article 293(1) does not expand the jurisdiction of UNCLOS tribunals in fact argue that the wording of the provision reveals a two-step process, in which the UNCLOS tribunal must first determine whether it has jurisdiction and second, if it has jurisdiction, what are the applicable laws.[27] Therefore, the "other rules of international law" applicable in UNCLOS disputes refer to primary rules that help UNCLOS tribunals to exercise their jurisdiction in claims under Article 288(1)[28] as it was applied in the *South China Sea Arbitration (Philippines v China)*[29] or *Arctic Sunrise*.[30] Taking into consideration Article 31 of the Vienna Convention on the Law of Treaties, this interpretation is also supported by the context of the provision and the object and purpose of UNCLOS. First, Article 293(1) refers to applicable law as opposed to jurisdiction as stipulated in Article 288(1). As for the object and purpose of UNCLOS, it can be read from the Preamble that the aim of UNCLOS is to govern "all issues relating to the law of the sea"[31] and therefore does not extend to the resolution of disputes concerning general international law.

On the other hand, Article 293(1) of UNCLOS was invoked in three cases to expand the jurisdiction of UNCLOS tribunals, first in *M/V Saiga (No. 2)* regarding the excessive use of force in the detention of ships. Article 301 of UNCLOS prohibits the threat and use of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations".[32] Therefore, UNCLOS enshrines the

[22] *Chagos Marine Protected Area,* Hearing Day 4, supra, at p. 440, lines 8–23; *Chagos Marine Protected Area* (Mauritius v. U.K.), PCA Case Repository No. 2011-03, Memorial of the Republic of Mauritius of Aug. 1, 2012, para 5.33.

[23] *M/V Saiga (No. 2) (St. Vincent v. Guinea),* ITLOS Case No. 2, Judgment of July 1, 1999 [hereinafter M/V Saiga (No. 2), Judgment], para 155.

[24] *Guyana v. Suriname,* Award of the Arbitral Tribunal of Sept. 17, 2007, 47 I.L.M. 166 [hereinafter Guyana v. Suriname Award], para 413.

[25] *M/V Virginia G (Pan. v. Guinea-Bissau),* ITLOS Case No. 19, Judgment of Apr. 14, 2014 [hereinafter M/V Virginia G, Judgment], para 359.

[26] Tzeng, Jurisdiction and Applicable Law under UNCLOS, 242.

[27] Ibid., 247.

[28] Ibid., 247.

[29] *South China Sea,* Award on Jurisdiction and Admissibility of 20 October 2015, para 274.

[30] *Arctic Sunrise (Netherland v. Russia),* PCA Case Repository No. 2014-02, Award on the Merits of 14 August 2015, para 191.

[31] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397 [hereinafter "UNCLOS"], Preamble.

[32] UNCLOS, Article 301.

well-established principle of customary international law of the prohibition and use of force against States.[33] Nevertheless, it does not specify such an obligation with regard to the detention of ships, even though it exists under customary international law.[34] Despite this background, the International Tribunal for the Law of the Sea ("ITLOS") by applying general international law, established its jurisdiction to decide and in doing so relied on Article 293(1) of UNCLOS.[35] The tribunal in *Guyana v. Suriname* resorted to the same solution in case of Guyana's claim under general international law against Suriname relating to the use of force against foreign vessels.[36] Finally, in 2011 ITLOS was faced with a similar situation in the *M/V Virginia G* case, in which Panama instituted proceedings against Guinea-Bissau for the arrest of a tanker registered in Panama, claiming the violation of the prohibition of excessive use of force in detaining the vessel.[37] In these cases, ITLOS and the tribunal established the international legal responsibility of States based on general international law without reference to a particular provision of UNCLOS. Therefore, there is a convincing basis for arguing that, in these cases, the tribunals acted *ultra vires* and extended their jurisdiction beyond the consent of the Parties to non-UNCLOS claims. Most prominently, it was the *MOX Plant* tribunal which, in Procedural Order no. 3, stated that a distinction has to be drawn between the scope of jurisdiction under Article 288(1) and the applicable law under Article 293(1) of UNCLOS, which does not make non-UNCLOS claims admissible.[38] Even though it seems plausible to argue that Article 293(1) should not be interpreted in a way that allows UNCLOS tribunals to extend their jurisdictions over matters reaching beyond the interpretation and application of UNCLOS, this interpretation leaves a narrow application of Article 293(1).

In *Ukraine/Russia,* Ukraine invoked Article 293 of UNCLOS to argue that there is no debate between the parties concerning sovereignty over the Crimea, as the matter has been settled by UNGA resolutions 68/262, 73/263, 71/205, and 72/190 and 73/194.[39] Ukraine argued that "international tribunals have consistently accorded weight to General Assembly resolutions, particularly those like the Assembly's resolutions on Crimea that expressly state and apply legal principles under the UN Charter

[33] G. Kajtár, Self-Defence Against Non-State Actors – Methodological Challenges, (2013) 54 *Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Section Iuridica,* 307–330., 307. See also G. Kajtár, Az általános erőszaktilalom rendszerének értéktartalma és hatékonysága a posztbipoláris rendszerben, in G. Kajtár and G. Kardos (eds), *Nemzetközi Jog és Európai Jog: Új Metszéspontok: Ünnepi tanulmányok Valki László 70. születésnapjára,* (Saxum and ELTE ÁJK, Budapest, 2011) 60–85.

[34] *M/V Saiga (No. 2),* Judgment, para 156.

[35] Ibid. 155.

[36] *Guyana v. Suriname,* Award, paras 405–406.

[37] *M/V Virginia G,* Judgment, para 54(1)(10).

[38] *MOX Plant (Ireland v. United Kingdom),* PCA Case Repository No. 2002-01, Procedural Order No. 3 of 24 June 2003, para 19.

[39] *Ukraine/Russia,* Award, para 100.

and international law".[40] Ukraine further asserted that UNCLOS, through Article 293, contemplates that the tribunal should account for such rules of international law, similarly as the ICJ has given weight to UNGA resolutions in the *Nuclear Weapons, Jerusalem Wall, South West Africa* and *Chagos Advisory Opinion* proceedings, among others.[41] The tribunal nevertheless rejected this argument. Even though Ukraine could have relied on previous jurisprudence to argue that Article 293(1) of UNCLOS permits the tribunal to establish its jurisdiction to claims that include non-UNCLOS elements applying customary international law, it relied on it restrictively. Arguably, this demonstrates that the interpretation of Article 293 is crystallised and is understood not to extend the jurisdiction of UNCLOS tribunals over mixed disputes.

## 3. Article 300 of UNCLOS as an independent basis for jurisdiction

Some scholars argue that the tribunal's jurisdiction may be extended to mixed disputes based on Article 300 of UNCLOS as well.[42] Article 300 concerns the abuse of rights and any infringement of good faith that is so severe that it may provide a basis for deciding even concurrent sovereignty issues in mixed disputes.[43] UNCLOS tribunals could therefore hypothetically override sovereignty-related jurisdictional objections and use Article 300 as an independent jurisdictional basis for resolving mixed disputes.[44] The original intention of drafters was to include, in the dispute settlement provisions, one to ensure recourse to adjudication in the event of misuse of power by a coastal State but, due to the objection of coastal States, it was finally included in the general provisions.[45] Despite this, the tribunal in *Southern Bluefin Tuna* expressly stated that "[t]he tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS [...] would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction".[46] Based on the above, Ukraine, in *Ukraine/Russia,* could hypothetically have relied on Article 300 as a basis of jurisdiction in forwarding its claims against Russia.

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[40] Ibid., para 102.
[41] Ibid.
[42] Buga, Territorial Sovereignty Issues in Maritime Disputes: A jurisdictional Dilemma for Law of the Sea Tribunals, 88.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] *Southern Bluefin Tuna (Australia and New Zealand v. Japan),* Award on Jurisdiction and Admissibility of 4 August 2000, [hereinafter "SBT Award"] para 64.

## III. Characterisation of disputes

As stated above, it is generally accepted under international law that tribunals have inherent power to interpret submissions and identify the main issues of the dispute to determine whether they have jurisdiction.[47] According to the jurisprudence of *Chagos, South China Sea* and *Ukraine/Russia,* tribunals can establish their jurisdiction over territorial sovereignty matters that are ancillary, but inherently linked to the maritime law issues.[48] To determine whether the territorial sovereignty question in a dispute is predominant or is ancillary, it is necessary for the tribunal to characterise the dispute. Although some scholars argue that the characterisation of disputes lacks consistency regarding the implicated issue problem,[49] it is my assertion that tribunals constituted under UNCLOS apply a uniform approach to the characterisation of disputes.

The tribunals of *Chagos,*[50] *South China Sea*[51] and *Ukraine/Russia,*[52] when characterising disputes, all made explicit reference to a particular passage of the *Fisheries Jurisdiction (Spain v. Canada),* in which the International Court of Justice stated that when determining the dispute of the parties, the tribunal "while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties"[53] it has "to isolate the real issue in the case and to identify the object of the claim".[54] Accordingly, all tribunals analysed the positions of the parties separately, but made an objective assessment with regard to the real issue in the case and the object of the claim. The only difference between the three cases was that the tribunals put the emphasis on different aspects of this assessment.

In *Chagos,* the tribunal took into account that the dispute between the parties existed with respect to sovereignty, but a dispute also existed between the parties with respect to the manner in which the marine protected area was declared and its implications in connection with the detachment of the Archipelago, which constitutes a distinct matter.[55] To characterise it, the tribunal evaluated the "relative weight of the dispute".[56] The tribunal considered that a finding that the United Kingdom is not

[47] Buga, Territorial Sovereignty Issues in Maritime Disputes: A jurisdictional Dilemma for Law of the Sea Tribunals, 89.
[48] *Chagos,* Award, 220.; *Ukraine/Russia,* Award, para 158.
[49] Tzeng, The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction, 456.
[50] *Chagos,* Award, para 208.
[51] *South China Sea,* Award on Jurisdiction and Admission, para 150.
[52] *Ukraine/Russia,* Award, para 151.
[53] *Fisheries Jurisdiction (Spain v. Canada),* Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, para 30.
[54] *Nuclear Tests (New Zealand v. France),* Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para 30.
[55] *Chagos,* Award, para 210.
[56] Ibid.

a coastal State extends well beyond the question of the validity of the marine protected area, putting weight on the sovereignty aspect of the claim. Therefore, the tribunal concluded that the dispute is properly characterised as relating to land sovereignty over the Chagos Archipelago.[57] Consequently, here the tribunal put greater emphasis on the real issue and the true object of the claim and put less on the formulation of the submission by Mauritius.

The tribunal in *South China Sea* put emphasis on the formulation of the claim by the applicant and concluded therefrom that, even though a territorial sovereignty dispute exists between the parties, this does not determine the characterisation of the dispute as one relating predominantly to sovereignty.[58] The tribunal concluded that the Philippines' submissions could be understood to relate to sovereignty if their resolution would require rendering a decision on sovereignty expressly or implicitly, or if the actual objective of the claim was to advance its position in the parties' dispute over sovereignty.[59] Since the submissions could be resolved without implicitly deciding on sovereignty and without realistically advancing the Philippines' right in the sovereignty dispute, the tribunal established that it has jurisdiction. In this case, the formulation of the submissions by the Philippines had predominant significance in the characterisation of the dispute.

In *Ukraine/Russia* the tribunal engaged in the characterisation of the dispute and examined the position of the parties, particularly the formulation of the dispute by the applicant, but also stressed that it had to determine the nature of the dispute on an objective basis by isolating the real issue and by identifying the object of the claim.[60] The tribunal, as the result of the assessment, concluded that many of Ukraine's claims are based on the premise that Ukraine is sovereign over Crimea, and unless the tribunal accepts "at face value" that the Russian Federation's claim of sovereignty over Crimea is inadmissible and implausible, it has to decide on the question of sovereignty as a "prerequisite" to decide on the claims.[61] In this case, the tribunal applied a prerequisite test similarly to the one applied by the International Court of Justice in *Monetary Gold*[62] and *Certain Phosphate Lands in Nauru*.[63]

[57] Ibid., 211.
[58] *South China Sea,* Award on Jurisdiction and Admission, para 152.
[59] Ibid., para 153.
[60] *Ukraine/Russia,* Award, para 151.
[61] Ibid., para 152.
[62] *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America),* Preliminary Question, Judgment of June 15th, 1954: ICJ Reports 1954, p. 19.
[63] *Certain Phosphate Lands in Nauru (Nauru v. Australia),* Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, para 55.

## IV. Conclusion

The first conclusion to be drawn from the above analysis is that UNCLOS tribunals have consistently approached the question of the scope of jurisdiction in mixed disputes involving territorial sovereignty issues. First, they determined the nature and character of the dispute by taking both subjective and objective elements into account; second, they engaged in determining the scope of jurisdiction under Article 288(1) of UNCLOS.

As stated above, tribunals dealing with mixed disputes did not exclude *per se* their lack of jurisdiction over these disputes despite the fact that UNCLOS does not explicitly contain provisions with regard to territorial sovereignty claims. The tribunals assumed implied powers by relying on the jurisprudence of the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran,* where the Court concluded that there are no grounds to "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important".[64] Presumably, this is where the implied powers of UNCLOS tribunals with regard to ancillary issues of territorial sovereignty issues intrinsically connected to maritime law disputes can be retraced. Considering that there are seldom cases that are hermetically sealed from other issues of general international law, this interpretation is plausibly in line with the judicial functions of UNCLOS tribunals.

When determining whether a territorial sovereignty dispute is ancillary to the maritime law dispute, tribunals determine the nature and character of the dispute. In doing so they reach back to the approach applied by the International Court of Justice in the *Fisheries Jurisdiction (Spain v. Canada)* case. The three tribunals in *Chagos*, *South China Sea* and *Ukraine/Russia* all resorted to the same methodology, according to which they assessed the submissions of the parties, but also made an objective assessment of the real issue and the object of the submissions. In doing so, the tribunals reached different outcomes and put the emphasis on different aspects of the same test. While in *Chagos* and *Ukraine/Russia* the tribunal put more emphasis on the real issues and objective of the claims, in *South China Sea* the tribunal considered that the applicant's claim was formulated in a way that, even though there was an underlying sovereignty dispute between the parties, the solution of the submission would not require an implicit determination of sovereignty and therefore would not advance any parties' position in the sovereignty debate.[65]

It can be concluded from the above assessment that tribunals constituted under UNCLOS have a substantially uniform approach to deciding on jurisdictional objections related to territorial sovereignty issues. Nevertheless, it remains to be seen

[64] *South China Sea,* Award on Jurisdiction and Admission, para 152.
[65] Ibid., para 153.

whether tribunals would apply the same approach in mixed disputes involving other general international law issues, such as human rights law, international environmental law and use of force issues. In these cases, a more divergent practice can be expected based on the previous jurisprudence of UNCLOS tribunals. In *M/V Saiga (No. 2), Guyana v. Suriname* and *M/V Virginia G,* the tribunals established their jurisdiction on use of force claims related to the detention of vessels by relying on Article 293(1) of UNCLOS. On the other hand, in *Arctic Sunrise,* jurisdiction over international human rights law related claims was rejected despite Article 293(1) of UNCLOS. In mixed disputes involving international environmental law or international human rights law, the application of Article 300 of UNCLOS could rise with reference to the *obiter dicta* of the tribunal in *Southern Bluefin Tuna* in the event of a serious breach of good faith and other egregious breach of obligations.