Claims with an Ulterior Purpose: Characterising Disputes Concerning the “Interpretation or Application” of a Treaty

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Abstract

This article considers the approach for determining whether a dispute concerns the “interpretation or application” of a particular treaty, such that it is within the subject-matter jurisdiction of an international court or tribunal. Specifically, the article considers what approach should be taken when claims are presented as concerning the “interpretation or application” of a particular treaty, but involve central issues under rules of international law found outside the treaty in question. The specific argument made in this article is that the approach used in some recent decisions, involving characterising where the “relative weight” of a dispute lies and the “true object” of claims, should not be followed.

Keywords

subject-matter jurisdiction – compromissory clauses – characterisation of disputes – UNCLOS – International Court of Justice

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1 Introduction

International dispute settlement is consensual: no State can, without its consent, be compelled to submit disputes to any kind of dispute settlement. Nonetheless, many States do consent to dispute settlement or, at least, to the settlement of disputes relating to certain treaties. Parties to the United Nations Convention on the Law of the Sea (“UNCLOS”), for example, consent to third-party settlement of disputes concerning the “interpretation or application” of UNCLOS.

Courts and tribunals convened to hear disputes under treaties such as UNCLOS have a correspondingly limited subject-matter jurisdiction. UNCLOS tribunals are only empowered to adjudicate disputes concerning the interpretation or application of UNCLOS. In many proceedings, the International Court of Justice (“ICJ” or “Court”) also only has jurisdiction over disputes concerning the interpretation or application of a particular treaty.

To this extent, the design of the international dispute settlement system does not reflect reality. The disputes that arise between States do not fit neatly into one treaty or another. Disputes concerning UNCLOS will not only concern the law of the sea, to the exclusion of all other rules of international law. Consequently, the disputes referred to international courts and tribunals often involve issues relating to rules of international law found outside the treaty conferring jurisdiction in the particular case. Such “external” issues may be relatively peripheral, and there are various examples of courts and tribunals deciding such peripheral external issues.

In other cases, however, an external issue may be central to, or even the crux of, a particular dispute. Indeed, an applicant State might intentionally raise an external issue before a court or tribunal because it is the only forum in which the issue can be aired. Proceedings could even be commenced under a treaty with an external issue in mind. Claims brought under a treaty in such circumstances could be considered to have been brought improperly or for an ulterior

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1 Status of Eastern Carelia, P.C.I.J., Series B, No. 5, 27.
2 UNCLOS, Article 286. See also Articles 297 and 298.
3 Ibid, Article 288(1). See also Article 288(2). “UNCLOS tribunals” is used to refer to all the bodies mentioned in Article 287(1) of UNCLOS.
purpose. Some consider the well-known Chagos arbitration\(^5\) to involve such claims.\(^6\) But the Chagos arbitration is not the first case in which claims could be perceived as having been brought for an ulterior purpose.\(^7\)

Such proceedings present difficult questions for international courts and tribunals. Where a State brings a claim under a treaty, but an issue central to the claim involves rules of international law found outside the treaty, is there a dispute concerning the “interpretation or application” of the relevant treaty? And on what legal basis?

The solution to this problem adopted by the Chagos tribunal was to engage in a process of characterising the claims brought before it, to determine whether they could properly be characterised as presenting disputes concerning the interpretation or application of UNCLOS, which the tribunal held they could not. This process of characterising disputes for the purpose of determining whether they concern the interpretation or application of a treaty has only been used by one other UNCLOS tribunal to date (the South China Sea tribunal).\(^8\) But the approach has been endorsed by commentators\(^9\) and has

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\(^5\) Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), PCA Case No. 2011-03, Award, 18 March 2015.

\(^6\) See, e.g., S. Talmon, “The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals”, 65(4) ICLQ (2016), 927, 950 (“[Chagos] is an excellent example of the creative or strategic use of the UNCLOS compulsory dispute settlement mechanism in order to gain a ruling on issues that have nothing to do with the law of the sea”).

\(^7\) See, e.g., Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255, Dissenting Opinion of Judge Crawford, 521 (para. 18) (“in Georgia v. Russian Federation ... the doubt was whether that dispute really concerned racial discrimination ... or whether Article 22 was being used as a device to bring a wider set of issues before the Court”); Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2003, p. 161, Separate Opinion of Judge Higgins, 229 (para. 19), 239 (para. 53) (“[the applicant’s] real and only interest lay in the use of force.... The Applicant in 1996 sought a jurisdictional basis to bring a case against the Respondent regarding the use of force”); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident in Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 9, Dissenting Opinion of Judge Sir Robert Jennings, 105 (“arguments deployed in the attempt to bring this essentially Security Council matter somehow, indeed anyhow, within the scope of Article 14, paragraph 1, of the Convention”).

\(^8\) South China Sea Arbitration (Philippines v. China), PCA Case No. 2013-09, Award on Jurisdiction and Admissibility, 29 October 2015.

also been invoked in other proceedings. It is thus timely to reflect on whether this characterisation approach should be endorsed more broadly.

Section 2 of this article provides an overview of the characterisation approach. Section 3 then shows that the approach is a fundamental departure from the established approach for determining whether a dispute concerning the interpretation or application of a particular treaty exists. Section 4 considers whether, notwithstanding this, the characterisation approach should be used and suggests that it should not be. In particular, the approach does not seem to be supported by authority and the development of the approach appears to have been influenced by concerns regarding the nature of the external issue raised in the Chagos and South China Sea arbitrations – that is, sovereignty over territory – rather than by reasons of principle. Section 5 offers some concluding observations.

2 The Characterisation Approach

2.1 The Emergence of the Characterisation Approach: the Chagos Arbitration

The Chagos arbitration concerned a dispute between Mauritius and the United Kingdom relating to a Marine Protected Area ("MPA") established by the United Kingdom around the Chagos Archipelago. The dispute relating to the MPA arose in the context of a longer-running dispute between the two States, relating to which State has sovereignty over the Archipelago. Prior to initiating the arbitration, Mauritius had sought to have the sovereignty dispute submitted to the ICJ by agreement, but the United Kingdom refused, as it is entitled to do.

In the arbitration, Mauritius’ first submission sought a declaration that the United Kingdom was not entitled to declare the MPA, because it is not the “coastal State” within the meaning of various articles of UNCLOS. According to the United Kingdom, however, Mauritius’ claim was simply an artificial re-characterisation of their long-standing sovereignty dispute and the question of sovereignty was the “real issue” in the case (using the terms of the ICJ’s decision in the Nuclear Tests cases). The United Kingdom argued that Mauritius’ ...
claim was predicated on the tribunal resolving the sovereignty dispute, which would require the application of rules of international law external to UNCLOS (including rules of international law relating to self-determination).\textsuperscript{14}

The tribunal ultimately held that it did not have jurisdiction over Mauritius’ first submission and, for the purposes of this article, it is the tribunal’s reasoning in support of that conclusion that is important. To determine whether there was a dispute concerning the “interpretation or application” of UNCLOS within the tribunal’s jurisdiction, the tribunal said it first needed to determine the “nature” of the dispute between the parties.\textsuperscript{15} The tribunal engaged in a process of “characterizing” the dispute and stated that it “must evaluate where the relative weight of the dispute lies”.\textsuperscript{16} The tribunal asked if the dispute was “primarily a matter of the interpretation and application of the term ‘coastal State’” or “primarily concern[ed] sovereignty”.\textsuperscript{17} After setting up this enquiry, the tribunal held that the dispute was “properly characterized” as relating to sovereignty\textsuperscript{18} and concluded that this “dispute regarding sovereignty” was not a dispute concerning the interpretation or application of UNCLOS.\textsuperscript{19} The tribunal also employed the same reasoning in relation to a second, related submission by Mauritius.\textsuperscript{20}

Two members of the five-member tribunal dissented, expressing the view that the disputes with respect to Mauritius’ first two submissions were not properly characterised as disputes relating to sovereignty. The two dissenting arbitrators, Judges Kateka and Wolfrum, agreed with the majority that the disputes brought before the tribunal needed to be characterised. They simply disagreed on what the outcome of that characterisation process should have been.\textsuperscript{21}

2.2 \textit{The South China Sea Arbitration}

Shortly after the \textit{Chagos} tribunal rendered its award in March 2015, another tribunal took a similar approach to determine whether a dispute concerning the interpretation or application of UNCLOS existed. In its October 2015 award

\begin{thebibliography}{9}
\bibitem{14} Ibid., paras. 172, 174.
\bibitem{15} Ibid., para. 206.
\bibitem{16} Ibid., para. 211 (emphasis added).
\bibitem{17} Ibid.
\bibitem{18} Ibid., para. 212.
\bibitem{19} Ibid., para. 221.
\bibitem{20} Ibid., paras. 222, 229–230.
\bibitem{21} Ibid., Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, paras. 4, 5–6, 9, 15, 17, 19, 45.
\end{thebibliography}
on jurisdiction and admissibility, the *South China Sea* tribunal similarly took the position that it had to “characterise” the dispute before it.\textsuperscript{22}

In the *South China Sea* arbitration, the Philippines brought claims against China relating to (among other things) the status under *UNCLOS* of certain maritime features in the *South China Sea*.\textsuperscript{23} China claimed, however, that the “essence of the subject-matter of the arbitration” was territorial sovereignty over those maritime features.\textsuperscript{24}

In its award, the tribunal observed that the “nature” of a dispute can have significant implications, including whether the dispute can “fairly” be said to concern the interpretation or application of *UNCLOS*.\textsuperscript{25} The tribunal stated that it might have considered the Philippines’ claims to relate to sovereignty if resolving the claims would have required it to “first render a decision on sovereignty, either expressly or implicitly” or if the “actual objective” of the Philippines’ claims was “to advance its position in the Parties’ dispute over sovereignty.”\textsuperscript{26}

In the opinion of the tribunal, the *Chagos* tribunal had decided that Mauritius’ claims fell into those two categories: Mauritius’ claims would have required an implicit decision on sovereignty and sovereignty was the “true object” of Mauritius’ claims.\textsuperscript{27} In contrast to the *Chagos* arbitration, however, the *South China Sea* tribunal held that neither of those situations was present in the case before it, and so it rejected China’s objection.\textsuperscript{28}

There are perhaps differences of emphasis between the analysis of the *Chagos* tribunal and the analysis of the *South China Sea* tribunal.\textsuperscript{29} The *Chagos* tribunal focused on whether the relative weight of the dispute lay with *UNCLOS*, on the one hand, or with a subject or rules of international law external to *UNCLOS*, on the other hand.\textsuperscript{30} The *South China Sea* tribunal instead focused on the object of the applicant’s claims: on whether the “actual objective” or “true object” of the applicant’s claims was to advance the applicant’s position
in respect of a dispute under rules external to UNCLOS. Notwithstanding this difference of emphasis, there is a common core to the approaches of the two tribunals. Both tribunals consider it necessary to “characterise” a dispute when determining whether there is a dispute concerning the interpretation or application of UNCLOS and, for both tribunals, the characterisation process turns on the relationship that the dispute has to rules external to UNCLOS. This approach to determining whether a dispute concerning the “interpretation or application” of a particular treaty exists based on the dispute's relationship to rules of international law external to the treaty in question – based on whether the relative weight of the dispute lies with rules external to the treaty or whether the true object of the claim is to advance the applicant’s position in a dispute relating to rules external to the treaty – is referred to in this article as the “characterisation approach”.

2.3 The Potential for Broader Endorsement of the Characterisation Approach

The characterisation approach has been invoked by, for example, Russia in the pending Coastal State Rights UNCLOS arbitration commenced by Ukraine. By way of preliminary objection, Russia has argued that the tribunal must “characterise” the dispute before it and has submitted that the real dispute is sovereignty over Crimea. Russia has argued that the relative weight of the dispute lies with the sovereignty dispute and that Ukraine’s actual objective is to advance its position in the sovereignty dispute. Ukraine has contested those submissions. But, of note for the purposes of this article, Ukraine has not argued that the characterisation approach is incorrect.

With the characterisation approach being invoked in other proceedings, it is timely to reflect on whether the approach should be endorsed more broadly.

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31 Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russia), PCA Case No. 2017-06. A hearing on preliminary objections was held in June 2019 and a decision was still pending as at 5 January 2020. See also the pending Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation proceedings, including CR 2019/16, 29 (para. 5), 34–35 (paras. 21–23); CR 2019/17, 14 (para. 3), 19–20 (paras. 4–5).
32 Preliminary Objections of Russia, 19 May 2019, paras. 5–7, 24, 64.
33 Ibid., paras. 25, 42, 45.
34 Rejoinder on Jurisdiction of Ukraine, 28 March 2019, paras. 4, 9, 11.
35 Ukraine has argued that the characterisation approach should not be used because the sovereignty dispute is not long-standing and acknowledged. See, e.g., Written Observations of Ukraine, 27 November 2018, para. 51.
The Conventional Approach to Determining Whether There Is a Dispute Concerning the Interpretation or Application of a Treaty

When reflecting on whether the characterisation approach should be used in future, a key point to consider – and a point that is not evident from the Chagos and South China Sea awards – is that the characterisation approach is a fundamental departure from the approach conventionally used to determine whether there is a dispute concerning the interpretation or application of a particular treaty.

In the jurisprudence of the ICJ, there is an established approach for determining whether a dispute concerning the interpretation or application of a treaty exists. Consistently, the Court has not characterised disputes brought before it: the Court has not enquired into the true object of a claim or assessed whether the relative weight of a dispute lies with the treaty invoked or with rules of international law external to that treaty. The Court has simply asked whether the acts complained of fall within the provisions of the relevant treaty (the “conventional approach”). A claim will fall within the provisions of a treaty when, for example, it could amount to a violation of the treaty.

One case which clearly demonstrates the conventional approach is the Oil Platforms case. In that case, Iran brought claims under Article XXI(2) of the 1955 Treaty of Amity, Economic Relations and Consular Rights (“1955 Treaty”), which gave the Court jurisdiction over any dispute as to the “interpretation or application” of the Treaty. The United States objected to the jurisdiction of the Court, arguing that there was no dispute as to the interpretation or application of the Treaty but, rather, a dispute regarding the use of force.

As the Court itself observed, the original dispute between the two States had related to whether the United States had violated the prohibition on the use of force. The United States argued that Iran was seeking to “recast” and

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37 See, e.g., Oil Platforms, Preliminary Objection, supra note 36, 820 (para. 51). See also M/V “Louisa” (Saint Vincent and the Grenadines v. Spain), ITLOS Case No. 18, Judgment, 28 May 2013, para. 99.

38 Oil Platforms, Preliminary Objection, supra note 36, 809 (para. 15).

39 Ibid., 810–811 (paras. 16–18).

40 Oil Platforms, Merits, supra note 7, 180–181 (para. 37). See also Preliminary Objection of the United States, 16 December 1993, paras. 3.03–3.07.
“characterize” its complaints regarding compliance with the UN Charter and customary international law, as violations of the 1955 Treaty. According to the United States, Iran's assertions that the United States had violated those rules external to the Treaty reflected the “true character” of the dispute.\textsuperscript{41}

The \textit{Oil Platforms} case is arguably a clear instance of proceedings brought with an ulterior purpose.\textsuperscript{42} Nonetheless, the Court did not characterise the dispute before it. The Court did not assess whether the relative weight of the dispute lay with the 1955 Treaty or with the use of force. Nor did the Court enquire into the true object of Iran's claims. To determine the United States' objection, the Court asked “whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty".\textsuperscript{43} In respect of Iran's claim regarding Article X(1) of the Treaty, the Court upheld its jurisdiction, finding that the “lawfulness [of the United States' conduct] can be evaluated in relation to that paragraph".\textsuperscript{44}

The way in which the Court dealt with issues relating to the use of force in the merits phase of \textit{Oil Platforms} has been criticised.\textsuperscript{45} But the Court's approach at the jurisdictional stage to determining whether there was a dispute concerning the interpretation or application of the 1955 Treaty is not controversial.\textsuperscript{46} Indeed, the Court followed that approach in two recent decisions, which post-date the \textit{Chagos} and \textit{South China Sea} arbitrations:

(a) In \textit{Alleged Violations}, Iran sought to base the Court's jurisdiction on the same 1955 Treaty at issue in \textit{Oil Platforms}.\textsuperscript{47} In the context of a request for provisional measures made by Iran, the United States argued that the parties' dispute exclusively related to a different instrument – the Joint Comprehensive Plan of Action (“JCPOA”) – which contains no compromissory

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\item \textsuperscript{41} Preliminary Objection of the Unites States, 16 December 1993, paras. 5, 3.01, 3.12.
\item \textsuperscript{42} See \textit{Oil Platforms, Merits}, supra note 7, Separate Opinion of Judge Higgins, 229 (para. 19), 239–240 (paras. 52–53), Separate Opinion of Judge Kooijmans, 250 (paras. 14–16).
\item \textsuperscript{43} \textit{Oil Platforms, Preliminary Objection}, supra note 36, 810 (para. 16).
\item \textsuperscript{44} \textit{Ibid.}, 820 (para. 51).
\item \textsuperscript{46} Cf., \textit{Oil Platforms, Preliminary Objection}, supra note 36, Dissenting Opinion of Judge Oda, 898–899 (paras. 21–22); \textit{Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia), Preliminary Objections, Judgment, I.C.J. Reports 2011}, p. 70, Separate Opinion of Judge Koroma, 185 (para. 7).
\item \textsuperscript{47} \textit{Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order}, 3 October 2018, para. 3.
\end{itemize}
Nonetheless, in its October 2018 order on provisional measures, the Court did not characterise the dispute, but followed the conventional approach.

(b) In Certain Iranian Assets, Iran again invoked Article XXI(2) of the 1955 Treaty. The United States objected to the Court’s jurisdiction, including on the basis that the dispute between the parties was not one as to the interpretation or application of the 1955 Treaty. The United States argued that the core of Iran’s case concerned violations of customary international law rules relating to sovereign immunity, not violations of the 1955 Treaty. Nonetheless, in its February 2019 judgment on preliminary objections, the Court again did not characterise the dispute before it. Rather, it followed the conventional approach.

The conventional approach is not something of recent origin or something specific to the 1955 Treaty. The approach is evident in very early decisions of the Court, including in the 1924 decision of the Permanent Court of International Justice (“PCIJ” or “Court”) in Mavrommatis.

In Mavrommatis, Greece commenced proceedings against Great Britain as Mandatory for Palestine, in relation to the Government of Palestine’s refusal to recognise certain concessions granted to Mr. Mavrommatis by the previous Ottoman authorities. Greece brought proceedings under Article 26 of the Mandate for Palestine, which provided jurisdiction over any dispute relating to “the interpretation or the application” of the provisions of the Mandate. Great Britain objected to the Court’s jurisdiction and contended that, if there was any dispute between the two States, it was a dispute relating to the interpretation and application of a different instrument, Protocol XII of the Treaty of Lausanne. Protocol XII related specifically to concessions granted in the Ottoman Empire (unlike the Mandate), but it contained no compromissory clause. Like in Oil Platforms, the Court asked whether Greece’s suit “falls to be decided by application of the clauses of the Mandate” and held that it did.

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48 Ibid., paras. 34–35. See also CR 2018/17, 13 (para. 14), 25 (para. 11).
49 Alleged Violations, supra note 47, para. 30.
51 Preliminary Objections of the United States, 1 May 2017, paras. 1.5, 8.1. See also CR 2018/33, 27 (para. 6).
52 Certain Iranian Assets, supra note 50, para. 36.
54 Ibid., 11.
56 See Mavrommatis, supra note 53, 30.
even though resolution of the dispute would require the Court to determine if there had been a breach of the Protocol.\textsuperscript{57}

A parallel can be drawn between \textit{Mavrommatis} and the \textit{Chagos} arbitration. In \textit{Mavrommatis}, the “real issue” between Greece and Great Britain related to compliance with rules of international law external to the Mandate. The real issue concerned the rules in Protocol XI to the Treaty of Lausanne. In the \textit{Chagos} arbitration, the “real issue” concerned the rules of international law relevant to determining which State has sovereignty over the Archipelago, rules which are external to UNCLOS. In both cases, there was no forum with jurisdiction to adjudicate on compliance with the relevant external rules. Also in both cases, resolution of the claims presented to the Court or tribunal required prior application of the relevant external rules. Notwithstanding this, the Court in \textit{Mavrommatis} – as is the Court’s practice\textsuperscript{58} – did not characterise the dispute before it when determining whether there was a dispute concerning the interpretation or application of the relevant treaty.

In two other recent decisions post-dating the \textit{Chagos} and \textit{South China Sea} arbitrations, the Court has taken a slightly different approach to the approach outlined above. In the Court’s June 2018 judgment on preliminary objections in \textit{Immunities and Criminal Proceedings} and in its November 2019 judgment on preliminary objections in the \textit{Ukraine v. Russia} ICJ proceedings, the Court determined the “subject-matter” of the dispute brought before it.\textsuperscript{59}

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\textsuperscript{57} Ibid., 16, 26. See also \textit{Mavrommatis Jerusalem Concessions}, P.C.I.J., Series A, No. 5, 26, 40.

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Notwithstanding that the Court did determine the subject matter of the dispute in these two cases, neither should be seen as an endorsement of the characterisation approach. In both cases, the Court clearly did not engage in the characterisation process used by the Chagos and South China Sea tribunals. Indeed, in Immunities and Criminal Proceedings, to determine the “subject-matter” of the dispute, the Court simply identified the various claims on which the parties disagreed. In Ukraine v. Russia, although the Court did determine the subject matter of the dispute, it nonetheless clearly applied the conventional approach when determining whether there was a dispute concerning the interpretation or application of the relevant treaties. The Court asked whether the “acts of which the applicant complains” (not the “subject-matter” of the dispute as identified by the Court) “fall within the provisions” of the relevant treaties.

Regardless of whether Immunities and Criminal Proceedings and Ukraine v. Russia are seen as endorsing the characterisation approach, the characterisation approach is nonetheless a fundamental departure from the approach conventionally used to determine whether a dispute concerning the interpretation or application of a particular treaty exists.

4 What Approach Should Be Taken to Determine Whether There Is a Dispute Concerning the Interpretation or Application of a Treaty?

Even though the characterisation approach marks a clear departure from the conventional approach, it could still be asked whether the characterisation

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60 See Immunities and Criminal Proceedings, supra note 59, paras. 67–68, 70. See also Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge ad hoc Kateka, paras. 8–10 (“instead of ascertaining precisely the subject-matter of the dispute, the majority have referred to a series of claims on which the Parties hold differing views”).

61 Ukraine v. Russia, supra note 59, paras. 57, 95. The Court only referred to the subject matter of the dispute as defined by it when considering whether the requirement of negotiations under Article 22 of CERD had been satisfied. See para. 119. In determining the subject matter of the dispute, the Court focused on what obligations Ukraine had asked it to pronounce violations of. See paras. 29–30.
approach should nonetheless be used going forward, by UNCLOS tribunals, the Court and other international courts and tribunals. For the various reasons outlined below, it is suggested that the characterisation approach should not be used in future.

4.1 Is the Characterisation Approach Supported by Authority?

One important point bearing on whether the characterisation approach should be followed in future is whether the approach can be said to be supported by any relevant authority, notwithstanding that it does depart from the conventional approach.

In setting out the characterisation approach, the Chagos tribunal relied on jurisprudence of the ICJ – on the Nuclear Tests cases and on Fisheries Jurisdiction (Spain v. Canada) (“Fisheries Jurisdiction”). The same cases were also cited by the South China Sea tribunal. Notwithstanding that both the Chagos and South China Sea tribunals relied on these decisions, neither decision is authority for the proposition that a dispute should be characterised for the purpose of determining whether it concerns the interpretation or application of a particular treaty. In both the Nuclear Tests cases and Fisheries Jurisdiction, the Court did characterise the dispute before it. However, in both instances, the Court did so for a different purpose.

62 The characterisation approach could be used as an alternative to the conventional approach or in addition to the conventional approach, serving as an additional step to be gone through before turning to the conventional approach. See Chagos, supra note 5, Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, paras. 4, 22. See also Immunities and Criminal Proceedings, supra note 59, paras. 46–47 (discussed supra); Southern Bluefin Tuna (New Zealand/Japan, Australia/Japan), Decision, 4 August 2000, XXIII RIAA 1, 38–39 (para. 48) (discussed at infra note 92).

63 Chagos, supra note 5, paras. 208, 220, 230. These two cases had been cited in argument before the tribunal. See Preliminary Objections of the United Kingdom, 31 October 2012, para. 3.1. The respondent States in Southern Bluefin Tuna (see infra note 92) and Georgia v. Russia also relied on these cases when arguing that there was no dispute concerning the interpretation or application of the relevant treaty. In the provisional measures phase of Georgia v. Russia, the Court implicitly rejected Russia’s argument that the dispute should be characterised, as the Court applied the conventional approach. See CR 2008/23, 28 (para. 8); Georgia v. Russia, Provisional Measures, supra note 36, 386–387 (paras. 110–112). The Court also implicitly rejected Russia’s argument at the preliminary objections stage, finding that a dispute with respect to the interpretation or application of CERD had arisen even though Georgia’s claims were “primarily claims about the allegedly unlawful use of force”. See Preliminary Objections of Russia, 1 December 2009, para. 2.1; Georgia v. Russia, Preliminary Objections, supra note 46, 120 (para. 113).

64 South China Sea, supra note 8, para. 150. See also Coastal State Rights, Preliminary Objections of Russia, 19 May 2018, para. 5; Coastal State Rights, Rejoinder on Jurisdiction of Ukraine, 28 March 2019, para. 45.
In relation to the *Nuclear Tests* cases, the *Chagos* and *South China Sea* tribunals relied on the ICJ’s statement that it is for a court or tribunal, as opposed to the parties, “to isolate the real issue in the case and to identify the object of the claim”.\(^{65}\) When the Court stated this in the *Nuclear Tests* cases, it was not considering its jurisdiction.\(^{66}\) The Court engaged in the above enquiry for the purpose of determining whether any dispute still existed between the parties.\(^{67}\) The Court found that the dispute had disappeared and did not proceed to consider its jurisdiction.\(^{68}\)

Regarding *Fisheries Jurisdiction*, the two UNCLOS tribunals quoted the Court’s statement that it is for a court or tribunal “to determine on an objective basis the dispute dividing the parties”.\(^{69}\) Again, it is necessary to look at the context in which the ICJ made this statement. In *Fisheries Jurisdiction*, the Court was not considering whether a dispute concerning the interpretation or application of a treaty existed. Rather, the Court was considering whether the dispute fell within a reservation to Canada’s optional clause declaration.\(^{70}\) The Court was considering a question relating to subject-matter jurisdiction, but it was considering a different question relating to subject-matter jurisdiction.

Thus, neither the *Nuclear Tests* cases nor *Fisheries Jurisdiction* is authority that a court or tribunal should characterise a dispute when determining whether it concerns the interpretation or application of a particular treaty. The ICJ was not concerned with that question in either context.

The statements made by the Court in the *Nuclear Tests* cases and *Fisheries Jurisdiction* also cannot be taken from the context in which they were said and transposed into the approach for determining whether a dispute concerning the interpretation or application of a treaty exists. The natures of the enquiries are different.

In the *Nuclear Tests* cases, the Court was considering whether the dispute between the parties had disappeared, on the basis that certain unilateral declarations made by France could be said to “meet the object” of Australia and New Zealand’s claims.\(^{71}\) To determine whether the unilateral declarations did meet the object of Australia and New Zealand’s claims, the Court necessarily first had to identify what the object of Australia and New Zealand’s claims was.

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\(^{66}\) Ibid., 463 (para. 22).

\(^{67}\) Ibid., 476 (para. 58).

\(^{68}\) Ibid., 476 (para. 59).


\(^{70}\) Ibid., 467 (para. 87).

\(^{71}\) *Nuclear Tests*, supra note 65, 472 (para. 45).
In *Fisheries Jurisdiction*, Canada’s optional clause declaration granted the Court jurisdiction over “all disputes” excluding “disputes arising out of or concerning conservation and management measures” taken by Canada and “the enforcement of such measures”⁷² Due to the wording of the reservation, whether Spain’s claims fell within the reservation did not depend on the rules of international law that Spain claimed had been violated (which included, for example, the rule of exclusive flag-State jurisdiction on the high seas).⁷³ Rather, what was excluded from the Court’s jurisdiction were disputes arising out of or concerning a particular subject – “conservation and management measures ... and the enforcement of such measures”.⁷⁴ To determine whether the dispute between the parties fell within the reservation, the Court had to consider the dispute’s connection to the excluded subject.

In both the *Nuclear Tests* cases and *Fisheries Jurisdiction* it was necessary for the Court to characterise the dispute brought before it due to the specific questions that it was dealing with in those cases. The *Chagos* and *South China Sea* tribunals did not set out any reason why it is similarly necessary to characterise a dispute when considering the different question of whether a dispute concerning the interpretation or application of a treaty exists.⁷⁵ Indeed, no such characterisation is considered necessary under the conventional approach, which can be satisfied by a claim that could amount to a violation of the relevant treaty.⁷⁶

Even if (contrary to what was suggested above) *Immunities and Criminal Proceedings* and *Ukraine v. Russia* were seen as endorsing the characterisation approach, this same problem underlies the Court’s reasoning in those cases. In support of its decision to determine the “subject-matter” of the dispute in those cases, the Court did not cite the *Nuclear Tests* cases or *Fisheries Jurisdiction*, but rather two other decisions of the Court: *Bolivia v. Chile* and *Territorial and Maritime Dispute*.⁷⁷ However, like in *Fisheries Jurisdiction*, in *Bolivia v. Chile* and *Territorial and Maritime Dispute* the Court had to characterise the dispute

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⁷² *Fisheries Jurisdiction*, supra note 69, 438–439 (para. 14).
⁷³ Application of Spain, 28 March 1995, 3. A reservation could be worded so as to exclude claims based on the rules of international law alleged to have been violated. See, e.g., *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility*, supra note 58, 424–425 (para. 73).
⁷⁴ *Fisheries Jurisdiction*, supra note 69, 458 (paras. 61, 63), 467 (para. 87). See also Separate Opinion of Judge Koroma, 487 (para. 4).
⁷⁵ See also *Chagos*, supra note 5, Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, para. 6.
⁷⁶ See supra footnote 37.
before it, because disputes relating to certain subjects had been excluded from its jurisdiction.\textsuperscript{78}

\subsection*{4.2 Is the Characterisation Approach a Principled Departure from Existing Jurisprudence?}

Notwithstanding that the characterisation approach is a clear departure from the conventional approach, and notwithstanding that it is not otherwise grounded in jurisprudence of the ICJ, the characterisation approach could nonetheless still be a principled development in the law. However, it is not clear that the characterisation approach is in fact a principled development.

The *Chagos* tribunal was clearly mindful of the nature of the external issue that it was being asked to determine: sovereignty over territory. The tribunal made reference to the “inherent” and “manifest” sensitivity of States to questions of territorial sovereignty.\textsuperscript{79} The tribunal may also have been mindful that the position it took on the matter could have implications for other States, UNCLOS being a treaty with 168 Parties, a number of which have unresolved territorial disputes,\textsuperscript{80} and a treaty that does not permit States to make reservations to jurisdiction beyond those expressly permitted under the treaty.\textsuperscript{81} It can at least be queried whether the characterisation approach was adopted in the *Chagos* arbitration in response to a concern the tribunal had about the specific external issue it was being asked to determine in an UNCLOS arbitration.

That the *Chagos* tribunal may have been influenced by the nature of the external issue that it was being asked to determine is suggested by the fact that the tribunal did not apply the characterisation approach in relation to a different submission made by Mauritius. One of Mauritius’ other submissions before the tribunal included claims that the MPA was incompatible with the United Kingdom’s obligations under Articles 2(3) and 56(2) of UNCLOS.\textsuperscript{82} Article 56(2), for example, required the United Kingdom to have “due regard”

\textsuperscript{78} Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015, p. 592, 602 (para. 24), 606 (para. 39); Territorial and Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 832, 849 (para. 42), 860 (para. 83).


\textsuperscript{80} See Chagos, supra note 5, para. 198; Counter-Memorial of the United Kingdom, 15 July 2013, para. 4.61.

\textsuperscript{81} UNCLOS, Article 309.

\textsuperscript{82} Chagos, supra note 5, paras. 158, 261.
for Mauritius’ “rights”.\textsuperscript{83} As the tribunal noted, these “provisions require the Tribunal to consider Mauritius’ legal rights as they otherwise arise as a matter of international law”.\textsuperscript{84} Specifically, the tribunal had to determine the nature and scope of certain undertakings made by the United Kingdom in 1965.\textsuperscript{85} Notwithstanding this, the tribunal did not consider whether it was faced with a dispute concerning the interpretation or application of UNCLOS or a dispute concerning the interpretation or application of the undertakings.\textsuperscript{86} Instead, the tribunal applied the conventional approach. The tribunal simply stated that “a dispute over the MPA’s alleged violation of specific articles of the Convention is a dispute concerning the interpretation or application of the Convention”.\textsuperscript{87}

It seems that the South China Sea tribunal may also have been influenced by the nature of the external issue before it. In that award, the tribunal also seems to have adopted different approaches when dealing with different kinds of external issues. As described above, the tribunal used the characterisation approach when considering whether the claims of the Philippines were appropriately characterised as a dispute over sovereignty.\textsuperscript{88} Two of the Philippines’ claims raised a different external issue, relating to the Convention on Biological Diversity (“CBD”).\textsuperscript{89} In relation to those two claims, the tribunal still asserted that it had given consideration to whether the Philippines’ claims constituted disputes concerning the interpretation and application of UNCLOS or disputes concerning the interpretation or application of the CBD.\textsuperscript{90} That is, the tribunal stated that it had considered the characterisation approach. However, notwithstanding that assertion, the tribunal did not proceed to characterise the claims one way or the other. Instead, the tribunal upheld its jurisdiction.

\textsuperscript{83} Ibid., paras. 518–519. In respect of this submission, the tribunal seems to have proceeded on the assumption that the United Kingdom is the “coastal State” within the meaning of Articles 2 and 56. See also W. Qu, “The Issue of Jurisdiction Over Mixed Disputes in the Chagos Marine Protection Area Arbitration and Beyond”, 47(1) Ocean Dev. & Int’l L. (2016), 40, 47. In respect of this submission, the United Kingdom also argued that the “real issue” was sovereignty, but the tribunal summarily rejected that argument. See Rejoinder of the United Kingdom, 17 March 2014, para. 4.15; Chagos, supra note 5, para. 210.

\textsuperscript{84} Chagos, supra note 5, para. 293 (emphasis added).

\textsuperscript{85} Ibid., paras. 391, 417.

\textsuperscript{86} See also Qu, supra note 83, 44.

\textsuperscript{87} Chagos, supra note 5, para. 318. The tribunal partially upheld its jurisdiction over this submission, found that the United Kingdom was estopped from denying the binding effect of the undertakings and proceeded to make rulings in Mauritius’ favour. See paras. 323, 448, 547(B).

\textsuperscript{88} South China Sea, supra note 8, para. 152.

\textsuperscript{89} Ibid., para. 174.

\textsuperscript{90} Ibid., para. 174.
over the claims by simply stating that the claims “could involve violations of obligations” under UNCLOS. That is precisely the enquiry required by the conventional approach.

If the characterisation approach is being used by States and tribunals only in certain situations, influenced by the nature of the external issue in question, then the approach is not a principled one. There is no reason of principle why the characterisation approach should be used where it is alleged that the “real issue” in a case is sovereignty over territory, but not where it is alleged that the “real issue” is some other external issue.

There is also no reason of principle why a different approach (the characterisation approach) should apply in relation to disputes concerning the interpretation or application of UNCLOS than applies in relation to disputes concerning the interpretation or application of other treaties. Indeed, prior to the Chagos arbitration, the same approach – the conventional approach – was used in relation to disputes under UNCLOS. It is of course possible that the characterisation approach could be appropriate for a specific treaty, in light of the particular wording or negotiating history of the treaty’s compromissory clause. But the Chagos and South China Sea tribunals did not base the characterisation approach on something specific to UNCLOS. Rather, they purported to base the characterisation approach on jurisprudence of the ICJ.

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91 Ibid., para. 175.
92 See, e.g., M/V “Louisa”, supra note 37, para. 99. See also M/V “Norstar” (Panama v. Italy), ITLOS Case No. 25, Preliminary Objections, Judgment, 4 November 2016, para. 110. In Southern Bluefin Tuna, Japan relied on Fisheries Jurisdiction when arguing that there was no dispute concerning the interpretation or application of UNCLOS, but rather a dispute concerning the Convention for the Conservation of Southern Bluefin Tuna (“CCSBT”), which only provided for arbitration with the consent of all parties to the dispute. Although the tribunal did consider the “real dispute” between the parties, it did not engage in the characterisation approach used by the Chagos and South China Sea tribunals. The tribunal did not, for example, consider whether the relative weight of the dispute lay with the CCSBT or with UNCLOS. Indeed, the tribunal found that there was a dispute concerning both treaties. See Memorial on Jurisdiction of Japan, 11 February 2000, paras. 4–8, 99–100; Southern Bluefin Tuna, supra note 62, 11–12 (para. 23), 39–41 (paras. 48–52).
93 Chagos, supra note 5, para. 208; South China Sea, supra note 8, para. 150. There is a well-known debate about whether the text and travaux préparatoires of UNCLOS indicate that mixed disputes are within or outside of the jurisdiction of UNCLOS tribunals. Whatever the correct answer to that debate, it has no bearing on whether the characterisation approach is an appropriate approach. Indeed, the Chagos tribunal only considered that debate after it had decided to characterise, and had characterised, the dispute before it. See Chagos, supra note 5, paras. 214–218.
4.3 Other Potential Concerns

A response to the above could be to say that the characterisation approach should indeed be applied in relation to all treaties, in all cases where there is an allegation that the real issue in dispute is some external issue. If so, that would then mean that the characterisation approach would be being applied in a principled manner. But it still would not mean that the approach itself is necessarily a principled one. As discussed above, the approach is not supported by the authorities that it purports to be grounded in. This subsection briefly outlines other potential concerns with using the characterisation approach in all cases.

First, the characterisation approach arguably conflicts with the plain terms of the UNCLOS compromissory clause and other compromissory clauses. UNCLOS, like other treaties, confers jurisdiction over “any dispute” concerning the interpretation or application of the treaty. The words “any dispute” are evidently broad. It does not seem that those broad words can be reconciled with an approach which only upholds jurisdiction over disputes which are primarily concerned with the interpretation or application of UNCLOS or disputes the true object of which concerns the interpretation or application of UNCLOS.

Second, it is uncontroversial that acts of a State can give rise to disputes under more than one treaty. The ICJ recently affirmed this in its order on provisional measures in Alleged Violations. As noted above, the United States had argued that the dispute between the parties was exclusively related to the JCPOA, not the 1955 Treaty. The Court stated that acts “may fall within the ambit of more than one legal instrument and a dispute relating to those acts may relate to the ‘interpretation or application’ of more than one treaty or other instrument.”

In the characterisation approach, the Chagos tribunal set up a dichotomy between, on the one hand, disputes concerning the interpretation or application of UNCLOS and, on the other hand, disputes concerning sovereignty. That is antithetical to the well-established position that there can simultaneously be

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96 Alleged Violations, supra note 47, para. 38. See also United States Diplomatic and Consular Staff in Tehran, Judgment, supra note 58, 26 (para. 50); Georgia v. Russia, Provisional Measures, supra note 36, 387 (para. 112); Southern Bluefin Tuna, supra note 62, 40 (para. 52); South China Sea, supra note 8, para. 284.
disputes concerning the interpretation or application of more than one treaty or “area” of international law. The characterisation approach implies that the legality of any particular acts of a State can only be assessed against the norms in one treaty or area of international law: the treaty or area where the weight of the dispute, or the perceived “true object” of the claim, lies.

Third, the characterisation approach is, at least to some extent, a subjective enquiry. In *Fisheries Jurisdiction*, the Court did state that it would determine “on an objective basis” the dispute dividing the parties. Nonetheless, determining where the “relative weight” of a dispute lies, or the “true object” of a claim, does involve at least some subjective judgment and certainly more subjective judgment than the conventional approach.

5 Conclusion

This article has focused on one particular issue that arises when courts and tribunals with jurisdiction over disputes concerning the interpretation or application of a particular treaty are faced with claims perceived to have been brought for an ulterior purpose; that is, when a dispute is brought under a treaty but is alleged by a respondent State to really concern rules of international law external to that treaty. The article has focused on one particular technique that has been used by two UNCLOS tribunals to deal with such claims and, in the case of one of those tribunals, a technique that has been used to decline jurisdiction over claims. For the reasons outlined in the article, it is suggested that this “characterisation approach” should not be followed in future.

States have expressed concerns about claims perceived to have been brought for ulterior purposes. In the *Chagos* arbitration, for example, the United Kingdom argued that Mauritius’ position “risk[ed] undermining the system of Part XV” of UNCLOS and that, if it was accepted, “States would be dissuaded from acceding to the Convention or accepting the jurisdiction of other courts and tribunals”. These concerns may be valid. But even if such concerns are valid, the argument advanced in this article is that the characterisation approach is not the appropriate way to address those concerns.

There are other means that can limit the ability of States to bring external issues before international courts and tribunals. The requirement that claims “fall within” the provisions of the relevant treaty does limit the ability of States

97  *Fisheries Jurisdiction*, supra note 69, 448 (para. 30).
98  *Chagos*, supra note 5, para. 198.
to raise external issues.99 Moreover, when a court or tribunal finds that there is a dispute concerning the interpretation or application of a treaty, at the merits phase it has jurisdiction to rule on that dispute, not any other dispute between the parties.100 Although beyond the scope of this article, there are also various other reasons why a court or tribunal might not be able to decide a particular external issue raised in a given case (such as due to an exclusion from jurisdiction,101 due to the limits on the use to which rules forming part of the applicable law can be put,102 and due to abuse of process103).

The argument made in this article is that, even if a claim is brought with an “ulterior purpose”, when determining whether or not the claim involves a dispute concerning the interpretation or application of a particular treaty, the relevant court or tribunal should not characterise the dispute. It should not evaluate where the “relative weight” of the dispute lies or the “true object” of the claim.

99 See, e.g., Certain Iranian Assets, supra note 50, paras. 52–79; Immunities and Criminal Proceedings, supra note 59, paras. 74–138.
100 Oil Platforms, Merits, supra note 7, Separate Opinion of Judge Higgins, 230 (para. 20), Separate Opinion of Judge Kooijmans, 251 (para. 17), 256 (para. 32), Separate Opinion of Judge Owada, 310 (para. 13), 318 (para. 37).
101 Jurisdictional reservations can be drafted so as to preclude consideration of matters such as sovereignty. See, e.g., UNCLOS, Article 298(1)(a)(i), which excludes delimitation disputes involving concurrent consideration of unsettled sovereignty disputes from the competence of conciliation commissions.
102 Cf., e.g., Guyana v. Suriname, PCA Case No. 2004-04, Award, 17 September 2007, para. 488(2).
103 Concerns about proceedings brought under a treaty for an ulterior purpose, in an attempt to circumvent a lack of consent to settle disputes relating to other rules of international law, could be considered within the framework of abuse of process. See, e.g., R. Kolb, “General Principles of Procedural Law”, in A. Zimmermann et al. (eds.), The Statute of the International Court of Justice (3rd edition, 2019), 963, 998 (para. 49) (“Abuse of procedure ... consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established, especially ... for the purpose of ... obtaining an illegitimate advantage”); Lowe, supra note 95, 204 (“abuse of process ... might, for instance, be deployed to defeat attempts by states to manufacture entirely artificial disputes in order to avail themselves of the jurisdiction of a convenient tribunal, to which the respondent happens to have submitted”).