CHAPTER 9

Recognition of the Existence of Territorial Sovereignty Disputes in International Courts and Tribunals

The Use of the Coastal State Litigation before the Annex VII Arbitration of the UN Convention on the Law of the Sea

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1 Introduction

This chapter clarifies the method for obtaining recognition of the existence of territorial sovereignty disputes (territorial disputes)[1] in international courts and tribunals. For example, in the case of Takeshima (known as Dokdo in the Republic of Korea (ROK)), there is a method for *forcibly* (i.e., even if the ROK protests) obtaining *objective recognition* (i.e., by international courts and tribunals) of the existence of a territorial sovereignty dispute between Japan and the ROK. Why is it necessary to obtain *recognition* even though (it appears that) a territorial sovereignty dispute regarding Takeshima exists? The answer is that the first and most significant hurdle to settle territorial sovereignty disputes is a conflict of views on *whether a territorial sovereignty dispute exists*. For Takeshima, the Japanese Government asserts that the existence of a territorial sovereignty dispute is an "objective fact"[2] (though this is Japan's subjective opinion). The ROK, meanwhile, asserts that "Dokdo *is not subject to territorial dispute*, and there is no reason for the Republic of Korea to prove its sovereignty

1 This chapter refers to disputes regarding the existence of territorial sovereignty as "territorial sovereignty disputes" or "sovereignty disputes."

2 In response to a question by Diet Member Asano Takahiro about whether there is agreement between the Japanese and ROK Governments that there exists a territorial issue regarding Takeshima, the Japanese Government explained that "The Government thinks the existence of a *territorial issue* regarding Takeshima that needs to be settled with the ROK is an *objective fact*" (emphasis added). This can be found in the written answer to a resubmitted question by Diet Member Asano Takahiro requesting the Ministry of Foreign Affairs' opinion on Japanese citizens visiting Takeshima while adhering to ROK legal procedures. (August 23, 2011: Prime Minister Kan Naoto) at http://www.shugiin.go.jp/internet/itdb_shitsumon_pdf_t.nsf/html/shitsumon/pdfT/b177395.pdf/$File/b177395.pdf.

over Dokdo before international courts" (emphasis added).[3] (This is also a subjective opinion.) The key point here is the two-tiered structure of the ROK Government's assertion that (1) since there is no territorial sovereignty "dispute" over Dokdo, (2) there is no reason to use "dispute" settlement procedures (including diplomatic negotiations and the International Court of Justice (ICJ) referral). In fact, the Japanese Government has proposed the joint referral of the matter to the ICJ three times,[4] but the ROK Government has rejected these proposals *on the basis of the non-existence of* a territorial sovereignty *dispute*.[5] As this shows, when exploring the use of "dispute" settlement procedures (including negotiations), the first issue to be overcome is the assertion denying the existence of a territorial sovereignty dispute ((1) above). As long as the other State does not recognize the existence of a "dispute," there is no chance of utilizing a "dispute" settlement procedure.[6] Conversely, if, hypothetically,

3 "Position of the Government of Korea on Dokdo" at http://overseas.mofa.go.kr/jp-sendai-ja/brd/m_623/view.do?seq=683039&srchFr=&srchTo=&srchWord=&srchTp=&multi_itm_seq=0&itm_seq_1=0&itm_seq_2=0&company_cd=&company_nm=&page=24. The ROK Government also makes the following assertion. "Dokdo is an integral part of Korean territory, historically, geographically and under international law. *No territorial dispute exists* regarding Dokdo, and therefore Dokdo is not a matter to be dealt with through diplomatic negotiations or judicial settlement" (emphasis added). "The Korean Government's Basic Position on Dokdo" at http://dokdo.mofa.go.kr/jp/dokdo/government_position.jsp.

4 Ministry of Foreign Affairs "Proposal of Referral to the International Court of Justice" at https://www.mofa.go.jp/mofaj/area/takeshima/g_teiso.html. In past proposals, Japan has proposed joint referral of the matter through the conclusion of a special agreement.

5 When Japan proposed referral to the ICJ in a note verbale dated September 12, 1954, the ROK rejected the proposal and provided the following explanation in a memorandum on October 28, 1954. "The proposal of the Japanese Government to have the matter be taken to the International Court of Justice is nothing but another attempt at the false claim in judicial disguise. The ROK has the territorial rights *ab initio* over Dokdo and sees no reason why she should seek the verification of her rights before the International Court of Justice. It is Japan who conjures up a quasi territorial dispute where *none should exist*" (emphasis added). Serita Kentaro 芹田健太郎, *Shima no Ryōyū to Keizai Suiiki no Kyōkai Kakutei* 島の領有と経済水域の境界画定 [Island Possession and Economic Zone Delimitation] (Tokyo: Yushindo Kobunsha, 1999), 237–238.

6 Sakamoto Shigeki offers the following explanation. "It has to be said that there is almost no possibility of the ROK, which has taken the position that there is no dispute regarding Takeshima, concluding a special agreement to entrust the dispute to the ICJ." Sakamoto Shigeki 坂元茂樹, "Kaiyō Kyōkai Kakutei to Ryōdo Funsō –Takeshima to Senkakushotō no Kage–" 海洋境界画定と領土紛争―竹島と尖閣諸島の影― [Maritime Boundary Delimitation and Territorial Disputes: Shadow of Takeshima and the Senkaku Islands], *Kokusai Mondai* 国際問題, no. 565 (2007), 25. While there is the option of unilateral referral relying on *forum prorogatum*, there is almost no possibility of the ROK actually appearing before the ICJ. Tamada Dai 玉田大, "Takeshima Funsō wa Kokusai Shihō Saibansho ni

the existence of a territorial sovereignty dispute over Takeshima is *objectively* and *forcibly* recognized, this would eliminate the basis for the ROK's assertion that "there is no territorial sovereignty dispute over Takeshima (Dokdo)" ((1) above) and therefore also the basis for rejecting use of a "dispute" settlement procedure (negotiations or ICJ proceedings; (2) above). The contribution of this chapter concerns this point. It will ultimately conclude that it is indeed possible to obtain recognition of the existence of a territorial sovereignty dispute through the "coastal State litigation" before the Annex VII Arbitration of the United Nations Convention on the Law of the Sea (UNCLOS).

2 Criteria for the Existence of Disputes under International Law

2.1 *Definition of "Dispute"*

The ROK asserts that "there is no territorial sovereignty dispute over Takeshima," but is such an assertion actually even accepted? Since the establishment of the Permanent Court of International Justice (PCIJ), there have been many international precedents regarding the concept of "dispute" in international law and today, "case law" on the subject has been established.[7] The foundation is the formula presented by the PCIJ in the Mavrommatis Palestine Concession case (1924): "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests."[8] This formula uses an extremely broad definition of the "dispute" concept and has been subjected to substantial criticism. Nevertheless, it continues to be applied in ICJ judgments today.[9] The threshold

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Mochikomenai?" 竹島紛争は国際司法裁判所に持ち込めない？ [Is It Possible to Bring the Takeshima Dispute to the International Court of Justice?], in Morikawa Koichi 森川幸一, et al. (eds.), *Kokusaihō de Sekai ga Wakaru* 国際法で世界がわかる (Tokyo: Iwanami Publishing, 2016), 245–253.

7 The ICJ used the expression "the established case law of the Court" in the case on obligations in nuclear disarmament negotiations (2016). *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. United Kingdom*), *Preliminary Objections*, Judgement of 5 October 2016, *I.C.J. Reports 2016*, 849, para. 37.

8 *Mavrommatis Palestine Concessions* (*Greece v. the United Kingdom*), Judgment of 30 August 1924, *P.C.I.J., Series A, no. 2*, 11.

9 Refer to the following sources on the definition of "dispute" in case law. Tamada Dai 玉田大, "'Funsō' no Sonzai – Kakugunshuku Kōshō Gimu Jiken (Māsharu Shotō Tai Igirisu)"『紛争』の存在―核軍縮交渉義務事件（マーシャル諸島対イギリス） [Existence of "Dispute": Case on Obligations concerning Nuclear Disarmament Negotiations (Marshall Islands vs. the United Kingdom)], in Morikawa Koichi 森川幸一, et al. (eds.), *Kokusaihō Hanrei Hyakusen* 国際法判例百選, 3rd Edition (Tokyo: Yuhikaku Publishing, 2021), 188–189.

for the existence of a "dispute" is thus set quite low. If there is a conflict of views between two States regarding where territorial sovereignty lies, a territorial sovereignty "dispute" exists.

2.2 *Standard for the Denial of a Dispute*

On the other hand, when the broad definition of "dispute" cited above is used, it risks generating a "dispute" even in cases in which State A makes an assertion against State B without any basis and State B refutes that assertion. For example (as an imaginary case), if the Japanese Government claimed territorial sovereignty over all of the United States (US) and the US rejected this claim, a territorial sovereignty "dispute" would exist between the two countries. To eliminate this type of extreme assertion, it has been generally thought that "mere assertions" are not enough to give rise to a dispute.[10] While details of the ROK Government's position on Takeshima are still unclear, it can be understood as taking a position that the Japanese Government's opinion (assertion of territorial sovereignty over Takeshima) is just a "mere assertion" and hence a "dispute" does not exist between the two countries. The following section considers the "mere assertion" concept in international judicial precedents.

2.2.1 The South West Africa Cases (1962)

The ICJ offers the following explanation in the South West Africa cases (Preliminary Objections Judgment, 1962). "[For the existence of a dispute] it is not sufficient for one State to a contentious case to assert that a dispute exists with the other State. *A mere assertion is not sufficient* to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence" (emphasis added).[11] In this way, for a "dispute" to exist, the claim by one State must, to some extent, be convincing and have an actual basis, and not be a "mere assertion." The next question, hence, is the standard for deciding whether a certain assertion is a "mere assertion" or not.

10 Kotera Akira 小寺彰, "Ryōdo Mondai no Shori Isoguna" 領土問題の処理急ぐな [Avoid Rushing Handling of Territorial Issues], *Nihon Keizai Shimbun* 日本経済新聞 (available on the Research Institute of Economy, Trade and Industry website) at https://www.rieti.go.jp/jp/papers/contribution/kotera/09.html.

11 *South West Africa Cases* (*Ethiopia v. South Africa; Liberia v. South Africa*), *Preliminary Objections*, Judgment, *I.C.J. Reports 1962*, 319, 328.

2.2.2 The Coastal State Rights Case (2020)

The backdrop to the Coastal State Rights case (Annex VII Arbitration of UNCLOS, 2020)[12] is a territorial sovereignty dispute over the Crimean Peninsula, but deserving of attention is the content of the assertions by the parties in the case. The applicant, Ukraine, asserted that Crimea was clearly part of its territory and therefore that a sovereignty "dispute" could not exist between the two countries.[13] This stance means that there is absolutely no basis for Russia's assertion on the territorial sovereignty over Crimea and hence a "dispute" has not occurred. Meanwhile, the respondent, Russia, asserted that the Tribunal had no jurisdiction because of the existence of a sovereignty "dispute" over Crimea, which went beyond the jurisdiction of the Tribunal. The Tribunal rejected Ukraine's assertion that Russia's sovereignty assertion was implausible,[14] but issued the following comment on the standard for recognition of a sovereign dispute. "Jurisprudence of international courts or tribunals also shows that the threshold for establishing the existence of a dispute is rather low. Certainly a mere assertion would be insufficient in proving the existence of a dispute. However, it does not follow that the validity or strength of the assertion should be put to a plausibility or other test in order to verify the existence of a dispute."[15] As this indicates, the Tribunal confirms that a "dispute" does not exist just from a "mere assertion" by one State but makes it clear that plausibility should not be the standard for the existence of a dispute. Furthermore, as shown below, the Tribunal concluded that a sovereignty "dispute" existed between the two countries regarding Crimea.

> The Arbitral Tribunal does not consider that the Russian Federation's claim of sovereignty is a mere assertion or one which was fabricated solely to defeat its jurisdiction. The Arbitral Tribunal notes that since March 2014, both States have held opposite views on the status of Crimea, and this situation persists today. The States have engaged in the controversy regarding sovereignty before and outside these proceedings, including in various international fora such as in debates at the UNGA. Even if the

12 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (*Ukraine v. The Russian Federation*), PCA Case no. 2017–06, in the matter of an Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea, Award concerning the Preliminary Objections of the Russian Federation, 21 February 2020, at https://pca-cpa.org/en/cases/149/.

13 In this case, Ukraine asserted that Russia's sovereignty argument was implausible. *Ibid.*, para. 183.

14 *Ibid.*, para. 187.

15 *Ibid.*, para. 188.

> Arbitral Tribunal applied an additional element of [the awareness of the respondent],[16] the Arbitral Tribunal's finding on the existence of a sovereignty dispute over Crimea would not change.[17]

Hence, regarding Crimea's territorial attribution, even though the United Nations General Assembly (UNGA) resolution confirmed Ukraine's sovereignty over Crimea, the Tribunal recognized the existence of a "dispute" based on the opposite views between the two States on Crimea's territorial sovereignty.

2.2.3 The Indian Ocean Maritime Boundary Delimitation Case (2021)

In the Indian Ocean Maritime Boundary Delimitation case (ITLOS Special Chamber, 2021),[18] in contrast to the Coastal State Rights case described above, the ITLOS Chamber denied the existence of a territorial sovereignty "dispute." While the case involved the delimitation of the boundary between Mauritius and the Maldives, the hidden point of contention at the preliminary objections stage was the location of the base line used for the boundary delimitation (in other words, whether territorial sovereignty over the Chagos Archipelago should be attributed to Mauritius or the United Kingdom). The following two decisions are important in this case. First, the Annex VII Arbitral Tribunal had recognized the existence of a territorial sovereignty dispute between Mauritius and the United Kingdom in the Chagos Marine Protected Area (MPA) case (Annex VII Arbitration of UNCLOS, 2015 Judgment)[19] and concluded that it did not have jurisdiction to decide which State is the "coastal State" (explained

16 In the Nuclear Arms and Disarmament case, the ICJ required the respondent to be "aware" of the conflict of views as a requirement for the existence of a dispute. ICJ Precedent Study Group 国際司法裁判所判例研究会, "Kakugunbi Kyōsō no Teishi to Kakugunbi no Shukushō ni Kansuru Kōshōgimu Jiken (Māsharu Shotō Tai Eikoku) (Senketsuteki Koben Hanketsu 2016 Nen 10 Gatsu 5 Ka)" 核軍備競争の停止と核軍備の縮小に関する交渉義務事件(マーシャル諸島対英国)(先決的抗弁判決・2016年 10月 5日) [*Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands v. United Kingdom*) (Preliminary Objections Judgment, October 5, 2016)], *Kokusaihō Gaikō Zasshi* 国際法外交雑誌, vol. 116, no. 2 (2017), 97–114.

17 Award of 21 February 2020, para. 189.

18 *Delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean* (*Mauritius/Maldives*), Preliminary Objections, Judgment of 28 January 2021, at https://www.itlos.org/en/main/cases/list-of-cases/dispute-concerning-delimitation-of-the-maritime-boundary-between-mauritius-and-maldives-in-the-indian-ocean-mauritius/maldives-2/.

19 In the Matter of the Chagos Marine Protected Area Arbitration before an Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea between the Republic of Mauritius and the United Kingdom of Great Britain and

below). Second, in the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius case (Advisory Opinion, 2019), the ICJ decided that separation of the Chagos Archipelago from Mauritius infringed Mauritius' right to self-determination and concluded that the United Kingdom had an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible.[20]

In this case (the Indian Ocean Maritime Boundary Delimitation case), the Maldives submitted preliminary objections to assert that the ITLOS Special Chamber lacked jurisdiction because of the existence of a territorial sovereignty dispute over the Chagos Archipelago between the United Kingdom and Mauritius (i.e., application of the Monetary Gold Principle). Meanwhile, Mauritius countered that the "dispute" between the United Kingdom and Mauritius no longer existed following the ICJ's Advisory Opinion in 2019. Regarding this point, the Special Chamber confirmed that the ICJ Advisory Opinion was not legally binding but did have considerable implications for the sovereignty claim of Mauritius and "could be interpreted as suggesting" Mauritius' sovereignty over the Chagos Archipelago.[21] Furthermore, the Chamber referred to the "dispute" between the United Kingdom and Mauritius in the following manner. "If, indeed, the ICJ has determined that the Chagos Archipelago is a part of the territory of Mauritius, as Mauritius asserts, the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago cannot be considered anything more than 'a mere assertion'. However, such assertion *does not prove the existence of a dispute*" (emphasis added).[22] As explained above, because the ICJ rendered an opinion (Advisory Opinion) suggesting the attribution of the Chagos Archipelago's sovereignty, the United Kingdom's claim of territorial sovereignty over the Chagos Archipelago became a "mere assertion." Since this means that there is not a territorial sovereignty "dispute" between the two countries, the Special Chamber concluded that "Mauritius can be regarded as the coastal State in respect of the Chagos Archipelago."[23]

The judicial and arbitral precedents mentioned above clarify the following points. First, according to the definition of "dispute" in precedents, a conflict

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Northern Ireland, PCA Case no. 2011–03, Award of 18 March 2015, at https://pca-cpa.org/en/cases/11/.

20 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, *I.C.J. Reports 2019*, 140, para. 183.

21 Judgment of 28 January 2021, *supra* note 18, para. 174.

22 *Ibid.*, para. 243.

23 *Ibid.*, para. 249.

of views between two countries immediately generates a "dispute." However, for the existence of a "dispute," there needs to be a certain degree of validity or strength on a claim (without requiring the plausibility of the content of the claim). Second, when a claim of a State is a "mere assertion," there can be no "dispute." Two standards apply in deciding whether a claim is a "mere assertion." (1) Even when an UNGA resolution rejects a claim of territorial sovereignty of a State, if there has been controversy regarding sovereignty inside and outside the proceedings, including in various international fora, and the States have participated in this, then the claim of one of the States does not constitute a "mere assertion." Hence, a "dispute" exists (the Coastal State Rights case).[24] Conversely, (2) if an ICJ decision (even if it is an Advisory Opinion and not a Judgment) rejects a claim of territorial sovereignty by a State, the claim is treated as a "mere assertion" and the existence of a "dispute" cannot be recognized (the Indian Ocean Maritime Boundary Delimitation case). As this shows, the "mere assertion" concept is handled quite restrictively, and denial of the existence of a "dispute" is limited to exceptional circumstances. Taking Takeshima as an example, the Japanese Government's assertion of territorial sovereignty over Takeshima has not been rejected by an "authoritative determination" from a judicial body such as the ICJ, and there is no possibility of it being treated as a "mere assertion." Hence, the ROK Government's assertion that Dokdo "is not subject to dispute" cannot be accepted. The next question is how to obtain an objective recognition of the existence of a dispute by a judicial or arbitral body, when a State denies the existence of a dispute.

3 The Coastal State Litigation under UNCLOS

3.1 *Characteristics of the Annex VII Arbitration*

The method of obtaining recognition of the existence of a territorial sovereignty dispute in international courts and tribunals is to use the coastal State

24 The ITLOS Special Chamber gave the following explanation for why a claim that has been rejected by UNGA would still not be treated as a "mere assertion." "The Annex VII Arbitral Tribunal did not have the benefit of prior authoritative determination of the main issues relating to sovereignty claims to Crimea by any judicial body." *Ibid.*, para. 244. In other words, since an UNGA resolution is not an "authoritative determination" by a "judicial body," a claim rejected by such a resolution is not treated as a "mere assertion."

litigation within the Annex VII Arbitration of UNCLOS. The procedural characteristics of this Arbitration can be summarized as follows.[25]

Firstly, the jurisdiction of the Annex VII Arbitration can be compulsorily established (in cases between UNCLOS States Parties). According to UNCLOS, a State Party shall be free to choose the means for the settlement of disputes (Article 287), and if the disputing Parties have accepted the same procedure, the dispute may be submitted only to that procedure (Article 287, Paragraph 4). However, if the disputing States have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII (Article 287, Paragraph 5). This means that Annex VII Arbitration has de facto compulsory jurisdiction. For example, since neither Japan nor the ROK have selected a procedure (Article 287),[26] jurisdiction is automatically assigned to Annex VII Arbitration. Secondly, similar to ICJ judgements, awards by Annex VII Arbitration are also legally binding.[27] While there have been some cases of non-compliance with arbitral awards in recent years (for example, Russia in the Arctic Sunrise case and China in the South China Sea case), such non-compliance is not legally permissible.[28]

3.2 *Structure of the Coastal State Litigation*

The jurisdiction *ratione materiae* of Annex VII Arbitration is limited to "any dispute concerning the interpretation or application of this Convention [UNCLOS]" (Article 288, Paragraph 1). Regarding territorial sovereignty itself, UNCLOS does not provide any specific provisions[29] or define any

25 Tamada Dai 玉田大, "UNCLOS Dispute Settlement Mechanism: Contribution to the Integrity of UNCLOS," *Japanese Yearbook of International Law*, vol. 61 (2018) [March 2019], 132–166.

26 Refer to the ITLOS website regarding individual States Parties' choices of procedure (Article 287); https://www.itlos.org/en/main/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-287/.

27 UNCLOS Article 296 Paragraph 1 stipulates, "Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute," and Paragraph 2 stipulates, "Any such decision shall have no binding force except between the parties and in respect of that particular dispute." While there is a procedure for enforcement in the case of non-compliance with an ICJ judgment (United Nations Charter, Article 94, Paragraph 2), there is no such procedure under UNCLOS.

28 Regarding China's refusal to comply with the arbitral award in the South China Sea case, see Tamada Dai, *supra* note 25, 163–164.

29 Robert W. Smith and Bradford L. Thomas, "Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes," *Maritime Briefing*, vol. 2, no. 4 (1998), 16; Géraldine Giraudeau, "A Slight Revenge and a Growing Hope for Mauritius and the Chagossians: The UNCLOS Arbitral Tribunal's Award of 18 March 2015 on Chagos

terminology.[30] Hence, Annex VII Arbitration does not have jurisdiction *ratione materiae* over a territorial sovereignty dispute *itself*. Nevertheless, scholars argue that UNCLOS dispute settlement procedures (ITLOS and Annex VII Arbitration) do have jurisdiction *ratione materiae* over territorial sovereignty disputes. The reasons given for this are a contrario implication of UNCLOS Article 298 Paragraph 1(a)(i) or implied power of the UNCLOS Tribunal.[31] However, these theories do not recognize jurisdiction *ratione materiae* for a territorial sovereignty dispute *itself* but recognize jurisdiction *ratione materiae* in regard to a mixed dispute[32] only.[33] The coastal State litigation is a type of litigation related to mixed disputes.

UNCLOS uses the term "coastal State" as a concept similar to territorial sovereignty and defines sea areas that occur from coastal baselines (territorial sea,

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Marine Protected Area (Mauritius v. United Kingdom)," *Brazilian Journal of International Law*, vol. 12, no. 2 (2015), 717. While UNCLOS applies to the sovereignty of a coastal State over its land territory, internal waters, and territorial sea (Article 2), it does not provide definitions for any of them.

30 UNCLOS Article 298, Paragraph 1(a)(i) excludes unsettled disputes concerning "sovereignty or other rights over continental or insular land territory" from compulsory conciliation under Annex V, indirectly mentioning territorial sovereignty. However, UNCLOS does not offer any definitions or decision-making methods regarding territorial sovereignty.

31 Irina Buga, "Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunal," *The International Journal of Marine and Coastal Law*, vol. 27 (2012), 77–79. Refer to the following for a broad discussion of supplemental jurisdiction towards non-UNCLOS disputes, including other reasons. Peter Tzeng, "Supplemental Jurisdiction under UNCLOS," *Houston Journal of International Law*, vol. 38, no. 2 (2016), 499–576.

32 "Mixed dispute" refers to disputes that simultaneously have elements of both territorial sovereignty disputes (non-UNCLOS disputes) and UNCLOS disputes. In particular, it envisions the former as ancillary to the latter. For a view that criticizes the structuring of points of dispute that deviate from the actual substance of the dispute in mixed disputes, refer to Kanehara Atsuko 兼原敦子, "Saiban Kankatsuken to Tekiyōhō no Kankei: Kokuren Kaiyōhō Jyoyaku ni Okeru Shihō Saiban to Chūsai Saiban" 裁判管轄権と適用法の関係：国連海洋法条約における司法裁判と仲裁裁判 [Relation between Judicial Jurisdiction Rights and Applicable Laws: Judicial Decisions and Arbitral Decisions in UNCLOS], Serita Kentaro 芹田健太郎, et al. (eds.), *Jisshō no Kokusaihō Gaku no Keishō* 実証の国際法学の継承 (Tokyo: Shinzansha, 2019), 544 and 578.

33 President Wolfrum offered the following comments. "Issues of sovereignty or other rights over continental or insular land territory, which are *closely linked or ancillary to maritime delimitation*, concern the interpretation or application of the Convention and therefore fall within its scope" (emphasis added). ITLOS, Statement by H. E. Judge Rüdiger 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, 6, at https://www.itlos.org/en/main/press-media/statements-of-the-president/statements-of-president-wolfrum/.

contiguous zone, exclusive economic zone (EEZ), and continental shelf) as falling under coastal State rights. The coastal State litigation, aimed at presenting disputes related to coastal States as UNCLOS disputes, have therefore been attempted. Specific examples are (1) requesting determination of a coastal State itself, (2) requesting confirmation of the rights of a State as a coastal State, and (3) claiming infringement of coastal State rights by another State. The coastal State litigation cases are mixed dispute cases involving an aspect of determining coastal States under UNCLOS (i.e., UNCLOS disputes) and an aspect of deciding where the territorial sovereignty of designated maritime features and land lies (non-UNCLOS disputes).

3.3 *Examples of the Coastal State Litigation*

3.3.1 The Chagos Archipelago Marine Protected Area (MPA) Case (2015)

Mauritius and the United Kingdom were in opposition over many years regarding the territorial sovereignty of the Chagos Archipelago in the Indian Ocean. Mauritius brought litigation before the Annex VII Arbitration of UNCLOS with the assertion that the Maritime Protected Area (MPA) established by the United Kingdom around the Chagos Archipelago violated its obligations under UNCLOS. Mauritius contended that the United Kingdom was not entitled to declare an MPA because it was not the "coastal State" of the Chagos Archipelago.[34] Meanwhile, the United Kingdom treated the Mauritius assertion as a "sovereignty claim" and argued that sovereignty was "the real issue in the case" and that this type of dispute fell outside the dispute settlement provisions of UNCLOS.[35] In the United Kingdom's view, "Mauritius is requesting the Tribunal to permit 'an artificial re-characterization of the long-standing sovereignty dispute as a "who is the coastal State" dispute'."[36] The Annex VII Arbitral Tribunal confirmed the existence of a sovereignty dispute between the two countries and then rejected its jurisdiction related to the First and Second Submissions by Mauritius. The following describes the reason for this conclusion.

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34 According to Mauritius' argument, "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" (First Submission) and "having regard to the commitments that it has made to Mauritius in relation to the Chagos Archipelago, the United Kingdom is not entitled unilaterally to declare an 'MPA' or other maritime zones because Mauritius has rights as a coastal State' within the meaning of *inter alia* Articles 56(1)(b)(iii) and 76(8) of the Convention" (Second Submission). Award of 18 March 2015, *supra* note 19, para. 158.

35 *Ibid.*, paras. 164 and 170.

36 *Ibid.*, para. 172.

First, according to the Tribunal, while the First Submission requests interpretation and application of the term "coastal State," it is not defined in UNCLOS, and UNCLOS does not have guidelines to designate a "coastal State" in the cases where sovereignty over a land territory is disputed.[37] Second, in the Tribunal's view, "the record (see paragraphs 101–107 above)[38] clearly indicates that *a dispute between the Parties exists with respect to sovereignty* over the Chagos Archipelago" (emphasis added).[39] Third, distinct from the dispute over territorial sovereignty, a dispute also exists between the Parties with respect to the manner in which the MPA was declared and the implications of the MPA for the Lancaster House Undertakings.[40] Fourth, the Parties clearly differ regarding the identity of the "coastal State" and the Tribunal must evaluate where the relative weight of the dispute lies.[41] The Tribunal continues, "[a]ccordingly, the Tribunal concludes that the Parties' dispute with respect to Mauritius' First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago. The Parties' differing views on the "coastal State" for the purposes of the Convention are *simply one aspect* of this larger dispute [i.e., sovereignty dispute]" (emphasis added).[42] Fifth, the Tribunal similarly evaluated the relative weight of the disputes for the Second Submission and found that the Parties' underlying dispute regarding sovereignty over the Archipelago was predominant and the question of the "coastal State" remained merely an aspect of this larger dispute.[43]

As explained above, the Tribunal finally rejected Mauritius' assertion ("coastal State" designation). The following points are worth noting from the decision. First, the Tribunal confirmed the existence of a territorial sovereignty dispute between the two States quite easily. This seems to have been the result of there being no disagreement between the two States regarding the existence of a "dispute" about the territorial sovereignty of the Chagos Archipelago. Second, regarding Mauritius' assertion (First Submission), despite the existence of a sovereignty dispute and an UNCLOS dispute, the Tribunal found that the former was "predominant" and the latter was simply one aspect of the larger dispute (hereinafter, called the "Chagos Formula A"). According to

37 *Ibid*., para. 203.

38 The record cited by the Tribunal (paras. 101–107) summarizes the differences of opinion of the Parties regarding sovereignty over the Chagos Archipelago and past objections.

39 Award of 18 March 2015, *supra* note 19, para. 209.

40 *Ibid*., para. 210.

41 *Ibid*., para. 211.

42 *Ibid*., para. 212.

43 *Ibid*., para. 229.

this interpretation, it is necessary to review which aspect (sovereignty dispute or UNCLOS dispute) should be given more weight.[44] Third, in contrast to the Chagos Formula A, described above, the Tribunal indicated that the sovereignty dispute accords the Tribunal jurisdiction when that dispute touched in some ancillary manner on an UNCLOS dispute.[45] The Tribunal offered the following explanation of this point.

> The jurisdiction of [the Tribunal] pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it. … 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. That, however, is not this case.[46]

Hence, in cases in which a minor issue of territorial sovereignty (non-UNCLOS dispute) *is ancillary* to an UNCLOS dispute, it might sometimes be possible to exercise jurisdiction (hereinafter, called the "Chagos Formula B").

Because the Tribunal did not cite any precedent, it is difficult to envision a scenario to which the Chagos Formula B applies.[47] However, looking at the United Kingdom's assertion in this case,[48] it seems that the Tribunal was considering the ICJ's decision regarding South Ledge in the Pedra Branca case.[49] In that case, Malaysia and Singapore had a territorial dispute regarding South Ledge. The ICJ deemed South Ledge to be a low-tide elevation,[50] but since international law is silent on the question of whether low-tide elevations can be considered to be "territory,"[51] it was difficult to make an independent assessment of territorial sovereignty. (If it were located in the territorial sea, attribution would be to the coastal State of the territorial sea.) In sea areas

44 *Ibid*., para. 229.
45 *Ibid*., para. 213.
46 *Ibid*., paras. 220–221.
47 Typically, since coastal State rights follow the confirmation of the sovereignty of maritime features ("the land dominates the sea"), there can be considered to be no rule that prescribes sovereignty on the basis of making a maritime claim ("the sea dominates the land"). Robert W. Smith and Bradford L. Thomas, *supra* note 29, 16.
48 Award of 18 March 2015, paras. 194–196.
49 *Sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge* (*Malaysia/Singapore*), Judgment of 23 May 2008, *I.C.J. Reports 2008*, 2.
50 *Ibid.*, para. 291.
51 *Ibid*., para. 296.

where the territorial seas have yet to be delimited, since low-tide elevations could potentially be located in the territorial seas of either State,[52] attribution becomes an issue. In the Pedra Branca case, however, since the ICJ was not empowered to draw the line of delimitation with respect to territorial seas,[53] it concluded that "South Ledge, as a low-tide elevation, belongs to the State in the territorial sea of which it is located."[54] In this way, the delimitation of the territorial seas, excluding the low-tide elevation, took place first, and the outcome thereof decided which State's territorial seas included South Ledge and hence the attribution (State with territorial sovereignty). In exceptional cases, there can exist a sovereignty dispute (territorial sovereignty dispute related to a low-tide elevation) ancillary to a dispute on the delimitation of a maritime boundary (territorial sea delimitation dispute, i.e., UNCLOS dispute). This is an exceptional case where the Chagos Formula B is supposed to be applied.

3.3.2 The Coastal State Rights Case (2020)

After Russia annexed the Ukrainian territory of Crimea in 2014, Ukraine brought a case to the Annex VII Arbitration of UNCLOS (2016) and asserted that Russia violated UNCLOS. A key point is that Ukraine did not assert that "Ukraine is Crimea's coastal State" but stated that *there is no* dispute regarding sovereignty between the two States. It asserted that Ukraine's sovereignty over Crimea was simply "a matter of background and context."[55] The respondent, Russia, submitted preliminary objections against Ukraine's submission and asserted that "this Arbitral Tribunal lacks jurisdiction" due to the existence of a territorial sovereignty dispute over Crimea.[56] In other words, a territorial sovereignty dispute exists between the two countries (rather than an UNCLOS dispute)[57] and the territorial sovereignty issue was "the front and centre" of the matter before the Tribunal.[58] A point-by-point analysis of the Tribunal's decision is set out below.

First is the matter of whether there is a territorial sovereignty dispute regarding Crimea. On this point, the Tribunal recognized the existence of the dispute in the following way, (1) "[T]he Parties therefore hold clearly opposite views[.] … [I]t is clear that the Parties are in disagreement on various points of law and

52 *Ibid.*, para. 297.
53 *Ibid.*, para. 298.
54 *Ibid.*, para. 299.
55 Award of 21 February 2020, *supra* note 12, paras. 85 and 161.
56 *Ibid.*, paras. 78–79.
57 *Ibid.*, paras. 132 and 161.
58 *Ibid.*, para. 192.

facts relating to the question as to which State is sovereign over Crimea[.]"[59] As this shows, the Tribunal recognized the existence of a territorial sovereignty dispute between the two States. (2) Next is the issue of Ukraine's assertion. Ukraine asserted that there is not a territorial sovereignty dispute between the two States and that Russia's claim of territorial sovereignty was inadmissible and lacked plausibility. The Tribunal rejected these Ukrainian assertions.[60] Based on (1) and (2), the Tribunal reached a conclusion that a dispute regarding the territorial sovereignty of Crimea exists between the two States. In making this decision, the Tribunal (as explained above), determined that it did not consider that Russia's claim of sovereignty was a "mere assertion."[61]

The second issue is the relative weight of the territorial sovereignty dispute and the UNCLOS dispute. Regarding this point, the Tribunal noted the Award in the Chagos Archipelago MPA case that "implied a possibility that its jurisdiction could be extended to ruling upon an ancillary issue of territorial sovereignty."[62] It hence recognized that the Chagos Formula B could be valid. Nevertheless, the Tribunal rejected the notion that the sovereignty dispute was an ancillary issue in the case and provided the following explanation.

> In the view of the Arbitral Tribunal, the key question it should address, therefore, is whether a sovereignty dispute over Crimea in the present case is an issue ancillary to a dispute concerning the interpretation or application of the Convention. The [former dispute] is not a minor issue ancillary to the [latter dispute]. On the contrary, the question of sovereignty is a *prerequisite* to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine under the Convention [UNCLOS]. Those claims simply cannot be addressed without deciding which State is sovereign over Crimea and thus the 'coastal State' within the meaning of provisions of the Convention invoked by Ukraine. (emphasis added)[63]

59 *Ibid.*, para. 165.

60 Key points of the Tribunal's award are presented below. (1) Regarding the admissibility of Russia's claims, the Tribunal was unable to accept Ukraine's argument because the UNGA resolutions were framed in hortatory language (Award, para. 175) and estoppel did not operate in the case (Award, para. 181). (2) Regarding the plausibility of Russia's claim, while a unilateral assertion would be insufficient in proving the existence of a dispute, "it does not follow that the validity or strength of the assertion should be put to a plausibility or other test" (Award, para. 188).

61 *Ibid.*, para. 189.

62 *Ibid.*, para. 193.

63 *Ibid.*, paras. 194–195.

As explained above, the Annex VII Arbitration recognized the existence of a territorial sovereignty dispute between the two States over Crimea and decided that settlement of this dispute was "prerequisite" to settling the UNCLOS dispute. The Tribunal hence could not rule on any claims of Ukraine which were dependent on the premise of Ukraine being sovereign over Crimea.[64]

3.4 *Types of Formulas*

The above explanation identifies three types of formulas to address the relation between UNCLOS and non-UNCLOS disputes in a mixed dispute – the Chagos Formula A (i.e., "predominant"), the Chagos Formula B (i.e., "ancillary"), and the Crimea Formula (i.e., "prerequisite"). This section will review the content of each formula and then clarify their relationships.

First, the Chagos Formula B is an approach that envisions an exceptional situation, and it is doubtful that it can be generally applied. The Tribunal initially considered the Chagos Formula B in the Coastal State Rights case, but this was only done because the assertions of both States were in agreement on this point. Second, whereas the Chagos Formula A involves a *quantitative* comparison of the territorial sovereignty dispute and UNCLOS dispute ("predominant" or an "aspect"), the Crimea Formula seems to address the *qualitative* relationship ("prerequisite"). In the latter case, even if the sovereignty dispute is relatively modest and the UNCLOS dispute is relatively large, the Tribunal does not have jurisdiction when the former is a "prerequisite" of the latter. As a result, reliance on the Crimea Formula makes it difficult to establish jurisdiction in many coastal State disputes (UNCLOS disputes). Third, the scope of the dispute (fixed by the submission), which is subject to review, differs between the Chagos Formula A and the Crimea Formula. In the Chagos Formula A, the scope of the dispute is extremely narrow, and in fact, regarding a limited submission such as "whether the United Kingdom is the coastal Sate or not." In such a circumstance, since the "territorial sovereignty dispute is predominant," the submission is characterized as a territorial sovereignty dispute. In contrast, under the Crimea Formula, it was difficult for the Tribunal to uniformly characterize the multiple UNCLOS submissions by Ukraine as "either a sovereignty dispute or an UNCLOS dispute," and it therefore positioned the territorial sovereignty dispute as a "prerequisite" of the UNCLOS disputes.

Based on the above analysis, the formulas follow two patterns. (1) If the claimant State independently makes a submission requesting the Tribunal to confirm that it is the "coastal State" under UNCLOS, the jurisdiction of the

64 *Ibid.*, paras. 197–198.

Tribunal over the dispute, involved in the submission, is rejected in accordance with the Chagos Formula A on the basis that the territorial sovereignty dispute is "predominant." On the other hand, (2) if the applicant State *avoids* a request for designation along the lines of (1) and submits multiple claims of UNCLOS violations, the jurisdiction of the Tribunal over the submission, which positions the settlement of the sovereignty dispute as a "prerequisite," is rejected in accordance with the Crimea Formula.

3.5 *Logical Structure of the Recognition of a Territorial Sovereignty Dispute*

As explained above, despite the difference in formulas for determining jurisdiction depending on the case, the Tribunals recognized the existence of a sovereignty dispute in all cases. In terms of the logical structure by which this recognition is reached, the following points can be made. First, the threshold for the occurrence of a "dispute," including a territorial sovereignty dispute, is extremely low. As indicated earlier (Section 2 of this chapter), other than in exceptional cases in which one State's claim is a "mere assertion," if there is a conflict of views between two States, the Tribunal readily recognizes the existence of a territorial sovereignty dispute. Second, in the Chagos Archipelago MPA case, there was no difficulty to find a difference of views between the two States regarding the existence of a territorial sovereignty dispute. The situation in the Coastal State Rights case, however, was different. That is because there was a difference of views between Ukraine (that no territorial sovereignty dispute exists) and Russia (that a territorial sovereignty dispute exists). In this case, Russia's submission of preliminary objections can be said to be the reason for the Tribunal's recognition of the existence of a territorial sovereignty dispute. The respondent, Russia, submitted preliminary objections against Ukraine's submission and asserted that "this Arbitral Tribunal lacks jurisdiction" due to the existence of a territorial sovereignty dispute over Crimea.[65] Since the relative weight of the territorial sovereignty dispute and UNCLOS dispute is subject to review as part of the hearing of the preliminary objections as explained above, recognition of the existence of a territorial sovereignty dispute was inevitably required.[66] Third, in both cases, the respondents (the

65 *Ibid*., paras. 78–79.

66 It is of course possible that, when rejecting jurisdiction, the Tribunal under UNCLOS might have a different basis than the existence of a territorial sovereignty dispute (for example, the obligation to exchange views (UNCLOS Article 283), etc.). It must be noted that the review in this chapter assumes that these other jurisdictional requirements have been met.

United Kingdom and Russia) recognized the existence of a territorial sovereignty dispute and submitted objections over the Tribunal's jurisdiction based on this point. However, in the Coastal State Rights case, since the applicant, Ukraine, denied the existence of a territorial sovereignty dispute, the Tribunal carefully reviewed whether or not such a dispute existed and concluded that it in fact did. That being said, it is worth noting that even though Ukraine and Russia had a difference of views on whether or not a territorial sovereignty dispute existed, the existence of such a dispute was nevertheless recognized by the Tribunal.

Considering the points covered above, recognition of the existence of a territorial sovereignty dispute relating to Takeshima requires the following special considerations. Since the claimant (Japan) *asserts the existence of* a territorial sovereignty dispute while the respondent (ROK) *denies the existence* of a territorial sovereignty dispute, there is unlikely to be an objection to jurisdiction along the lines that "the Annex VII Tribunal does not have jurisdiction due to the existence of a territorial sovereignty dispute." Nevertheless, even in a case such as this in which the respondent State does not submit any preliminary objection, as the Tribunal cannot ignore the existence of a territorial sovereignty dispute, the Tribunal will be required to exercise its own power (competence-competence) in assessing whether a territorial sovereignty dispute exists.[67]

4 Recognition of the Existence of a Territorial Sovereignty Dispute over Takeshima

4.1 *Potential UNCLOS Dispute*

When initiating the coastal State litigation before the Annex VII Arbitration, it is firstly premised on the existence of an UNCLOS dispute. The various sea areas in the waters around Takeshima will be considered below.

67 Assessment of relative weight in mixed disputes takes place in the context of the characterization of dispute by the Tribunal. Through its exercise of dispute characterization power, the Tribunal decides an important factor in mixed disputes. The right to determine jurisdiction serves as the basis for dispute characterization power. Irina Buga, *supra* note 31, 89–90. The Tribunal in the Coastal State Rights case presented "Nature or Characterisation of the Dispute" as an item and cites the ICJ's Nuclear Tests case (*Nuclear Tests* (*Australia v. France*), Judgment, *I.C.J. Reports 1974*, 253, 262, para. 29) in explaining that "it is ultimately for the Arbitral Tribunal itself to determine … the nature of the dispute[.]" Award of 21 February 2020, para. 151.

First, regarding the EEZ, the Japan-ROK Fisheries Agreement (1998) delimits the areas other than the provisional waters (Article 7, Paragraphs 1 and 2). However, it does not delimit the provisional waters that include Takeshima.[68] Additionally, in the provisional waters, Japan and the ROK both agreed to "not apply its own fisheries-related laws to citizens and fishing vessels of the other Party" (Annex I, Article 2, Paragraph 1). Thus, there has been no delimitation of an EEZ around Takeshima, and since Japan has not established an EEZ, even if it asserted that "the ROK infringed Japan's sovereign rights in the Japanese EEZ," this would not be treated as an UNCLOS dispute.

Second, regarding the continental shelf, the Agreement between Japan and the Republic of Korea concerning the Establishment of Boundary in the Northern Part of the Continental Shelf Adjacent to the Two Countries (1974), the northernmost point of the boundary line is the part that touches the abovementioned provisional waters and the Agreement therefore does not establish a continental shelf boundary around Takeshima. Prior to UNCLOS taking effect, the Japanese Government determined that there is no continental shelf in the area around Takeshima.[69] After it entered into force, however, Japan changed its position and recognized the existence of a continental shelf.[70] Therefore, Japan can claim the existence of an UNCLOS dispute by arguing, for example, that "the actions by the ROK infringed the sovereign rights of its continental shelf around Takeshima."

Third, Japan can claim infringement of its sovereignty and sovereign rights in its territorial sea and the contiguous zone around Takeshima. For example, (1) the ROK is infringing Japan's territorial sea by implementing military exercises in Takeshima's territorial sea. (2) Interference with or prevention

68 Regarding the provisional waters, the Agreement stipulates, "The Parties shall continue negotiations in good faith aimed at the early delimitation of the provisional waters" (Annex I, Article 1).

69 Minister of Foreign Affairs Hatoyama Ichiro responded to a question at the Diet (80th National Diet, House of Representatives Foreign Affairs Committee no. 18 on May 18, 1977) as follows. "Minister Hatoyama: Regarding Takeshima, the seafloor in the surrounding area becomes deeper at a steep incline and our view is that this is not a continental shelf as defined by current international law" at https://kokkai.ndl.go.jp/#/detail?minId=108003968X01819770518&spkNum=102&single.

70 In response to the question "Is Takeshima an island or a rock under UNCLOS?" at the National Diet, Yachi Shotaro replied, "We think it is an island with a continental shelf and an economic zone" (136th National Diet, House of Councilors' Special Committee on UNCLOS no. 3 on June 4, 1996) at https://kokkai.ndl.go.jp/#/detail?minId=113613938X00319960604&spkNum=232&single.

of Japanese fishing vessels from approaching Takeshima's territorial sea[71] infringes the sovereignty of Japan's territorial sea. (3) Implementation of ocean surveys without prior consent from Japan in Takeshima's territorial sea (2017,[72] 2019)[73] infringes the sovereignty of Japan's territorial sea. (4) If Japan carries out its own ocean survey[74] and faces interference from the ROK, Japan can similarly assert infringement of the sovereignty of its territorial sea. As shown above, based on the assumption that Japan possesses territorial sovereignty over Takeshima, it can initiate instances of the infringement of its various UNCLOS rights (in other words, infringements of Japan's sovereignty and sovereign rights as the coastal State) as UNCLOS disputes before the Annex VII Arbitration.

4.2 *Prospective Submissions and Ruling*

If Japan brings the coastal State litigation against the ROK, the following submissions and ruling by the Arbitral Tribunal are conceivable.

Submission A: "Japan is the coastal State of Takeshima, and the sea areas referred to in the following submissions B–W are all attributed to Japan." In response to the submission, the Annex VII Tribunal is likely to *recognize the existence of a territorial sovereignty dispute over Takeshima*, deem that the dispute is a non-UNCLOS dispute because the territorial sovereignty dispute is "predominant" relative to the UNCLOS dispute in accordance with the Chagos Formula A, and reject jurisdiction on submission A.

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71 190th National Diet, House of Representatives' Budget Committee Third Sub-Committee no. 1 on February 25, 2016 (Yamada Kenji), "ROK authorities are currently sending warnings to fishing vessels when they get close to 12 nautical miles out from Takeshima" at https://kokkai.ndl.go.jp/#/detail?minId=119005268X00120160225&spkNum=313&single.

72 193rd National Diet, House of Representatives Foreign Affairs Committee no. 16 on May 31, 2017 (Shindō Yoshitaka) "This is an example from the ROK. A ROK marine survey vessel, without prior consent from Japan, inserted a wire into waters within the EEZ around Takeshima on May 17, 2017. It *entered Japan's territorial sea* and navigated around within them. This has happened four times in the past two years" (emphasis added) at https://kokkai.ndl.go.jp/#/detail?minId=119303968X01620170531&spkNum=10&single.

73 198th National Diet, House of Representatives Environment Committee no. 4 on April 2, 2019 (Nagao Hideki), "In February this year [2019], there was an incident in which the ROK conducted *seafloor survey activities*, such as sediment collection, without Japan's consent, in *Takeshima's territorial sea and contiguous zone*" (emphasis added) at https://kokkai.ndl.go.jp/#/detail?minId=119804006X00420190402&spkNum=56&single.

74 193rd National Diet, House of Representatives Foreign Affairs Committee no. 16 on May 31, 2017 (Shindō Yoshitaka) at https://kokkai.ndl.go.jp/#/detail?minId=119303968X01620170531&spkNum=14&single.

Submissions B–W: "The ROK's XX actions in Japan's YY sea areas (e.g., territorial sea, continental shelf) infringe Japan's rights as the coastal State under UNCLOS." In response to these submissions, the Annex VII Tribunal is likely to *recognize the existence of a territorial sovereignty dispute over Takeshima* and reject jurisdiction on submissions B–W in accordance with the Crimea Formula on the ground that the territorial dispute is a "prerequisite" to settling the UNCLOS dispute.

Submission X is a submission that requires recognition of the facts. Submission Y: "Regardless of whether this is Japan's maritime zone or the ROK's maritime zone, the ROK is violating the duty to protect and preserve the marine environment under UNCLOS." Submission Z: "The ROK has an obligation to provide reparation and remedy for the abovementioned UNCLOS violation." If Japan only submits submissions A and B–W as described above, it is certain to lose the litigation without any progress towards a decision on the merits, due to all the submissions being rejected based on the Tribunal's lack of jurisdiction. To avoid this outcome, Japan needs to include several UNCLOS disputes in the submission as well as submissions that are highly likely to make it to a review of the merits (submissions X, Y, and Z).

As explained above, if Japan submits the coastal State litigation regarding Takeshima, the Tribunal is likely to reject jurisdiction for the core portion of the lawsuit (submission A and submissions B–W). No past cases of the coastal State litigation have made it to the stage of identification as the "coastal State," and the possibility of this happening in the future is almost non-existent.[75]

Nevertheless, the most important point is that when jurisdiction is rejected by the Tribunal, *recognition of the existence of a territorial sovereignty dispute* will inevitably take place. In other words, the Annex VII Tribunal (1) *recognizes the existence of a territorial sovereignty dispute*, (2) evaluates the relative weight of the territorial sovereignty dispute and the UNCLOS dispute, and (3) rejects its jurisdiction over the submitted dispute as the outcome of its evaluation. The Tribunal will hereby inevitably make a decision regarding (1) as the underlying assumption for decisions regarding (2) and (3).

As shown above, the benefit of the coastal State litigation is that Japan potentially can be recognized as the coastal State (having territorial sovereignty) if the litigation makes it to a decision on the merits, and *even if this fails*

75 If there is a possibility of the Annex VII Tribunal deciding Takeshima's "coastal State," it would be in response to a coastal State litigation brought by Japan whereby the Tribunal decides that "because the ROK's claim of territorial sovereignty over Takeshima is a 'mere assertion', no territorial sovereignty 'dispute' exists between Japan and the ROK and the maritime feature is no doubt attributed to Japan's territorial sovereignty."

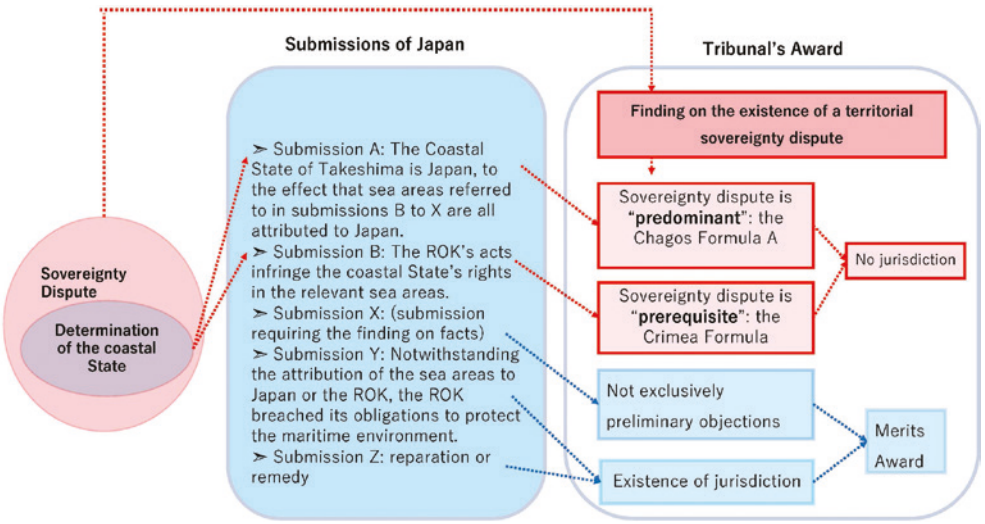

FIGURE 9.1 Japan's coastal State litigation
CREATOR: DAI TAMADA

(i.e., rejection of the Tribunal's jurisdiction), at the minimum, a decision on (1) (i.e., recognition of the existence of a territorial sovereignty dispute) would be made.

4.3 *Other Matters for Consideration*

Attention should also be given to the following points related to the coastal State litigation. First, recognition of the existence of a territorial sovereignty dispute does not immediately enable referral of a case to the ICJ for a judicial decision on the territorial sovereignty of Takeshima. Even though recognition would mean that the ROK could not deny the existence of a territorial sovereignty dispute itself, it would not create any obligation to proceed with a joint referral to the ICJ. The ROK could present a different reason for rejecting a joint referral to the ICJ. Additionally, as seen in the negotiations regarding the Northern Territories with Russia, even if two States agree on the existence of a territorial sovereignty dispute, this alone does not ensure smooth progress in negotiations on the territorial dispute. Recognition of the existence of a territorial sovereignty dispute is simply a prerequisite and first step for starting negotiations between two States. A separate detailed analysis and strategy of the subsequent path towards the settlement of the dispute (including negotiations and referral to the ICJ) is needed.

Second, all UNCLOS States Parties can utilize the UNCLOS coastal State litigation. This means that China, if it is so willing, could utilize it to obtain recognition of the existence of a territorial sovereignty dispute over the Senkaku

Islands. For Japan to maintain its position, it needs to structure its assertion along the line that "the Chinese claim is a 'mere assertion' and no dispute exists on Senkaku," as shown in Section 2 (Criteria for Occurrence of Disputes under International Law) of this chapter.

Third, there is leeway to consider the possibility of the coastal State litigation against Russia regarding the Northern Territories. Although Japan and Russia had differed in their stances on whether a territorial sovereignty dispute existed during the Cold War,[76] Russia has recognized the existence, itself, of a territorial sovereignty dispute after the Cold War.[77] The Japanese-Soviet Union Joint Communiqué (1991) used the phrase "taking into consideration the positions of both sides on the attribution"[78] and the Tokyo Declaration (1993) referred, in Paragraph 2, to agreement "on the issue of where [the islands belong]" to work towards a "solution … based on … the principles of law and justice."[79] In other words, since Japan and Russia are not in disagreement over the existence

76 "In 1960, in connection with the conclusion of the new Japanese-US Security Treaty, the Soviet Union stated that the return of the islands of Habomai and Shikotan to Japan would be conditional upon the withdrawal of all foreign troops from Japanese territory. In response, the Government of Japan raised the objection that the terms of the Joint Declaration between Japan and the USSR could not be changed unilaterally, because it was an international agreement that had been ratified by the Parliaments of both countries. The Soviet side later asserted that the territorial issue in Japanese-Soviet relations had been resolved as a result of World War II and such an issue did not exist." Ministry of Foreign Affairs of Japan and Ministry of Foreign Affairs of the Russian Federation, "Joint Compendium of Documents on the History of Territorial Issue between Japan and Russia" (1992 version) at https://www.mofa.go.jp/mofaj/area/hoppo/1992.pdf.

77 "[A]s the Cold War drew to a close, Russia *acknowledged the existence of the territorial issue* and again confirmed that the Japan-Soviet Joint Declaration remained valid between Japan and Russia" (emphasis added). Ministry of Foreign Affairs "Northern Territories Issue Q&A" at https://www.mofa.go.jp/mofaj/area/hoppo/mondai_qa.html.

78 "… held an in-depth and thorough negotiations on a whole range of issues relating to the preparation and conclusion of a peace treaty between Japan and the Union of Soviet Socialist Republics, including the issue of territorial demarcation, taking into consideration the positions of both sides on the attribution of the islands of Habomai, Shikotan, Kunashiri, and Etorofu. The joint work done previously – particularly the negotiations at the highest level – has made it possible to confirm a series of conceptual understandings: that the peace treaty should be the document marking the *final resolution* of war-related issues, *including the territorial issue*" (emphasis added). Japanese-Soviet Joint Communiqué at https://www8.cao.go.jp/hoppo/shiryou/pdf/gaikou35.pdf.

79 "[Japan and Russia] have undertaken serious negotiations on the issue of where Etorofu, Kunashiri, Shikotan and the Habomai Islands belong. They agree that negotiations towards an early conclusion of a peace treaty through the solution of this issue on the basis of historical and legal facts and based on the documents produced with the two countries' agreement as well as on the principles of law and justice should continue, and that the relations between the two countries should thus be fully normalized." Tokyo

of a territorial sovereignty dispute regarding the Northern Territories, it is not necessary to use the UNCLOS coastal State litigation. However, considering Russia's attitude of rejecting the existence of a dispute between the two sides in recent years,[80] the conclusions reached in this chapter could also be applied to the Northern Territories.

Fourth, as precedents of the UNCLOS coastal State litigation have been rapidly established in recent years, some observers have criticized the abusive use of the arbitration procedure under UNCLOS Annex VII.[81] If such criticism spreads in response to the expanded use of the coastal State litigation, it is not impossible that precedents may change going forward. If Japan is considering the use of the coastal State litigation, it would be better to initiate it prior to any major changes to precedents.

5 Conclusion

As explained in this chapter, it is possible to obtain recognition of the existence of a territorial sovereignty dispute (for example, related to Takeshima) using the coastal State litigation before the Annex VII Tribunal of UNCLOS. An important point is the possibility for Japan to *forcibly* obtain (i.e., despite opposition by the respondent State) *objective* recognition of the existence of a territorial sovereignty dispute in an international tribunal (i.e., Annex VII Tribunal of UNCLOS). Here, it is not necessary to reemphasize the significance and importance of obtaining recognition of the existence of a territorial sovereignty "dispute" (refer to the "Introduction" of this chapter). Thus far, the Japanese Government has always envisioned litigation before the ICJ and actually proposed such a joint referral to the ICJ. However, in the case of ICJ litigation (whether it is joint referral or unilateral referral), the ROK can reject it outright by replying that "there is no reason to respond because no dispute exists." No matter how much Japan strategizes about a referral to the ICJ, there are no hopes of it making any progress towards settling the dispute. Understanding the situation to be thus, the Japanese Government should

Declaration on Japan-Russia Relations at https://www8.cao.go.jp/hoppo/shiryou/pdf/gaikou46.pdf.

80 For example, Russian Foreign Minister Lavrov called on the Japanese side "to recognize all of the results of the Second World War" (January 14, 2019 press conference) at https://www.huffingtonpost.jp/2019/01/14/meeting-taro-kono-sergey-lavrov_a_23642564/.

81 Award of 18 March 2015, *supra* note 19, para. 198.

seriously consider using the coastal State litigation before the Annex VII Tribunal of UNCLOS as explained in this chapter.

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