

学校编码：10384

分类号_____密级_____

学 号：13620141150217

UDC_____

厦 门 大 学

硕 士 学 位 论 文

混合型争端的管辖权问题

——对《联合国海洋法公约》争端解决机制的思考

A Study on Jurisdiction over Mixed Disputes: A Reflection
on UNCLOS Dispute Settlement Mechanism

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论文提交日期：2017年3月

论文答辩时间：2017年 月

学位授予日期：2017年 月

答辩委员会主席：_____

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内容摘要

许多关于《联合国海洋法公约》（下文简称“《公约》”）的解释或适用的争端（下文简称“《公约》争端”）会同时涉及陆地和海洋两个层面的争议，这就产生了混合型争端问题。因涉及陆地领土主权问题，混合型争端具有极为敏感的政治、民族色彩。但是，一方面《公约》对此种争端的管辖权缺乏明确的规定，另一方面原告国为了满足管辖权的条件，可选择仅将《公约》争端提交裁判或者将陆地领土主权争端包装成《公约》争端进行提交。这就对《公约》第 287 条项下的法院或法庭（下文简称“《公约》法院或法庭”）审理此类争端提出了挑战，这是进一步研究混合型争端的管辖权问题的意义所在。

本文主要从条约和判例两个维度系统地分析和研究混合型争端管辖权的法律机制和运行情况。通过对《公约》相关条款的分析和解释，认为混合型争端不属于《公约》争端，《公约》法院或法庭对此类争端没有管辖权。通过对国际判例的研究，可以看到《公约》法院或法庭在审理混合型争端的实践中，往往具有管辖权扩张的倾向，并主要采取两种路径：第一种路径是通过“相对重心”进行检验从而确定管辖权；第二种路径是将陆地领土主权争端与《公约》争端进行切割，从而建立对《公约》争端的管辖权。

《公约》法院或法庭应积极刺穿原告国伪造讼因的“面纱”，从而对混合型争端进行准确和客观的识别。在此基础上，《公约》法院或法庭应遵守《公约》属物管辖权、国家同意原则和陆地统治海洋原则等规则的限制，避免对此类争端进行管辖。

关键词：海洋法公约；混合型争端；管辖权

ABSTRACT

Many disputes concerning the interpretation or application of the UNCLOS (hereinafter referred to as “UNCLOS disputes”) involve concurrent conflicts in two aspects, namely land and sea, which gives rise to mixed disputes. Due to the connection with land territory sovereignty issues, mixed disputes tend to be of sensitively political and national characteristics. However, for one thing, specific provisions on the jurisdiction over such disputes can be hardly found in the UNCLOS; for another, in a bid to satisfy the requirements for jurisdiction, a claimant state may submit UNCLOS disputes only for arbitration or adjudication or re-characterise land territory sovereignty issues into UNCLOS disputes before filing a suit, posing challenges for the court or tribunal under Article 287 of the UNCLOS (hereinafter referred to as “UNCLOS court or tribunal”) to entertain this kind of disputes. This is the significance for conducting further research on the jurisdiction over mixed disputes.

This thesis, in principle, is intended to conduct systematic analysis of and study on legal mechanisms and operational aspects of the jurisdiction over mixed disputes by the dimensions of treaty law and case law. Through the analysis and interpretation of relevant provisions in the UNCLOS, it is considered that mixed disputes do not fall within the scope of UNCLOS disputes and consequently the UNCLOS court or tribunal shall have no jurisdiction over mixed disputes. Through the study on international cases, it is found that the UNCLOS court or tribunal are likely to expand their jurisdiction in the consideration of mixed disputes. This practice is implemented in two major approaches. The first approach is that the UNCLOS court or tribunal will, by means of evaluating where the relative weight of the mixed dispute lies, address their jurisdiction thereover. The second approach is that the UNCLOS court or tribunal will separate UNCLOS disputes from land territory sovereignty issues with a view to establish jurisdiction over UNCLOS disputes.

The UNCLOS court or tribunal shall pierce the veil of disguised cause of action and thereby realize accurate and objective identification of mixed disputes. On that basis,

the UNCLOS court or tribunal shall comply with limitations generated by the jurisdiction *ratione materiae* under UNCLOS, principle of the domination of the land over the sea and principle of state consent, and refrain from exercising the jurisdiction over mixed disputes.

Keywords: UNCLOS; Mixed Disputes; Jurisdiction

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案例表 Table of Cases

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Nuclear Tests between New Zealand and France	Nuclear Tests(New Zealand v. France), Judgment, I.C.J. Reports 1974 http://www.icj-cij.org/docket/files/59/6159.pdf
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前言

1982年《联合国海洋法公约》（下文简称“《公约》”）是一部综合性的“海洋大宪章”，几乎涵盖了海洋利用和海洋资源的每一个方面，例如渔业管理、海洋环境保护、海洋科学研究和海洋划界等。显然，《公约》的制定是为了在海洋建立法律秩序，从而促进海洋的和平用途，海洋资源的公平而有效的利用，海洋生物资源的养护以及研究、保护和保全海洋环境。^①因此，《公约》调整的范围主要是各沿海国的海洋权利义务法律关系。

《公约》第十五部分为缔约国提供了争端解决机制，其中第二节导致有拘束力裁判的强制程序（下文简称“强制程序”）是《公约》的一大特点，表现为在一定条件下，争端方可以将关于《公约》的解释或适用的任何争端（下文简称“《公约》争端”）单方提交《公约》第287条项下的法院或者法庭（下文简称“《公约》法院或法庭”）进行裁判，^②并且《公约》法院或法庭所作的裁判对争端各方具有法律约束力。对于与《公约》的解释或适用无关的争端（下文简称“非《公约》争端”），《公约》法院或法庭则没有管辖权。^③实践中，争端方为了满足管辖权的条件，往往仅将混合型争端中的《公约》争端单独提交裁判或将陆地领土主权争议包装成《公约》争端后提出。这就产生了混合型争端的管辖权问题。

《公约》仅在第298条第1款（a）项关于任择性例外的规定中提到混合型争端：缔约国可以选择将海洋划界或历史性海湾或所有权的争端从强制程序中排除，但若这种争端发生于《公约》生效后，则争端方可以在一定条件下将该事项提交附件五第二节所规定的强制调解；此外，任何争端如果必然涉及到陆地领土主权争端的审议，则不应将该争端提交强制调解。显然，该条款对于混合型争端管辖权的规定并不清晰，并且该条款仅是任择性例外条款，并非《公约》争端解决机制下的一般性规定。

对于混合型争端的管辖权问题，学术界观点并不统一。有些学者从有效原则或者司法机构充分履行职能的角度出发，认为《公约》法院或法庭可以对混合型

^① 《公约》，序言第4段。

^② 同上，第288条第1款。

^③ 值得注意的是，根据《公约》第288条第2款，第287条项下的法院或者法庭对于争端方按照与《公约》目的有关的国际协定向其提交的有关该协议的解释或适用的任何争端，也应具有管辖权。例如，1995年的《联合国鱼类种群协定》第30条明确规定，有关该协解释释或适用的争端适用《公约》争端解决机制。

争端充分行使管辖权。^①有些学者则否定上述机构对此享有管辖权。^②还有学者在讨论该问题时并未给出明确的答案。^③在司法判例方面,《公约》法院或法庭的“管辖权扩张主义”日趋明显,具体表现为对《公约》争端附带的领土争议进行变相、甚至直接地进行管辖或者绕过必须要解决的领土争议而直接裁决《公约》争端。^④那么,《公约》法院或法庭是否被赋予了以及在何种程度上被赋予了混合型争端的管辖权,近来出现的管辖扩权倾向到底是有利于争端的和平公正解决并切切实实现《公约》的目的和宗旨,还是将会导致国际司法裁判的“碎片化”且不利于维护《公约》的整体性和促进国际法的发展,值得进一步研究。

本文旨在研究和分析混合型争端管辖权当前存在的问题,具体借助条约和判例这两个主要维度,采取演绎、归纳、推理相结合的研究方法,较为系统全面地厘清混合型争端管辖权的法律机制和运行情况,并在此基础上引入一般国际法的相关规则以解决混合型争端管辖权面临的困境,以期对混合型争端管辖权的规制有所助益。

^① BOYLE, ALEN E. Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction [J]. *International and Comparative Law Quarterly*, 1997, 46(1): 49; TZENG, PETER. Supplemental Jurisdiction under UNCLOS [J]. *Houston Journal of International Law*, 2016, 38(2): 573-575; GAUTIER, PHILIPPE. The International Tribunal for the Law of the Sea: Activities in 2005 [J]. *Chinese Journal of International Law*, 2007, 6(2): 390; BUGA, IRINA. Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals [J]. *International Journal of Marine and Coastal Law*, 2012, 27(1): 59; EIRIKSSON, GUDMUNDUR. International Tribunal for the Law of the Sea [EB/OL]. http://www.un.org/depts/los/convention_agreements/convention_20years/PresentationGudmundurEiriksson.pdf, 2002-09-25; WOLFRUM, RÜDIGER. Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs [EB/OL]. https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/legal_advisors_231006_eng.pdf, 2006-11-23.

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