THE IMPLICATED ISSUE PROBLEM: INDISPENSABLE ISSUES AND INCIDENTAL JURISDICTION

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The doctrine of indispensable parties ensures that international courts and tribunals do not exceed their jurisdiction ratione personae. Should there be a parallel "doctrine of indispensable issues" to ensure that they do not exceed their jurisdiction ratione materiae? This Article answers this question in the negative. In doing so, the Article makes a descriptive and a normative argument. On the descriptive level, the Article argues that courts and tribunals have developed a consistent approach to the implicated party problem (called the doctrine of indispensable parties) but have not developed a consistent approach to the implicated issue problem. On the normative level, the Article argues that the approach courts and tribunals take to the implicated party problem should not necessarily parallel the approach they take to the implicated issue problem because of key differences between jurisdiction ratione personae and jurisdiction ratione materiae.

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I. Introduction

On September 16, 2016, Ukraine instituted proceedings against Russia under the United Nations Convention on the Law of the Sea (UNCLOS).[1] Ukraine is requesting that the

1. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 [hereinafter UNCLOS]; Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), PCA Case No.

UNCLOS tribunal declare, inter alia, that Russia has violated the Convention by interfering with Ukraine's rights in maritime zones adjacent to Crimea.[2]

At first, there does not appear to be a jurisdictional problem.[3] Aside from the exceptions laid out in Part XV of UNCLOS,[4] the tribunal has jurisdiction over any dispute "concerning the interpretation or application" of UNCLOS.[5] The tribunal thus has the jurisdiction to declare whether Russia has violated the Convention.[6] Nevertheless, such a declaration would necessarily require a prior determination on whether Ukraine still has sovereignty over Crimea,[7] and the tribunal

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2017-06, Rules of Procedure, art. 3 (May 18, 2017). The Ministry of Foreign Affairs of Ukraine had reported earlier that Ukraine instituted proceedings on September 14, 2016. *Statement of the Ministry of Foreign Affairs of Ukraine on the Initiation of Arbitration Against the Russian Federation Under the United Nations Convention on the Law of the Sea*, MINISTRY OF FOREIGN AFF. OF UKR. (Sept. 14, 2016), http://mfa.gov.ua/en/press-center/news/50813-zajava-mzs-ukrajini-shhodo-porushennya-arbitrazhnogo-provadzhennya-proti-rosijsykoji-federaciji-vidpovidno-do-konvenciji-oon-z-morsykogo-prava [hereinafter *Ukrainian Statement on Arbitration*]. This UNCLOS arbitration should not be confused with the proceedings that Ukraine has filed against Russia before the International Court of Justice and the European Court of Human Rights. *See* Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Provisional Measures, Order, 2017 I.C.J. Rep. (Apr. 19); *Press Country Profile—Russia*, EUR. CT. HUM. RTS. 18–19 (Feb. 2018), http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf.

2. *Ukrainian Statement on Arbitration*, *supra* note 1.

3. For a discussion on various jurisdictional problems in the dispute, see Peter Tzeng, Ukraine v. Russia *and* Philippines v. China*: Jurisdiction and Legitimacy*, 46 DENV. J. INT'L L. & POL'Y (forthcoming 2018).

4. UNCLOS, *supra* note 1, pt. XV, § 3.

5. UNCLOS, *supra* note 1, art. 288(1).

6. The jurisdiction over disputes "concerning the interpretation or application" of a treaty includes, inter alia, the jurisdiction to declare whether a State party to the treaty has violated the treaty. ROBERT KOLB, LA COUR INTERNATIONALE DE JUSTICE [THE INTERNATIONAL COURT OF JUSTICE] 454–56 (2013). *E.g.*, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 422, ¶¶ 49–52 (July 20); Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 58 (Dec. 5); Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶¶ 27–28 (Mar. 31); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. Rep. 161, ¶ 31 (Nov. 6); LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶ 42 (June 27).

7. The principle of international law known as "the land dominates the sea" provides that maritime entitlements derive from sovereignty over land.

does not have jurisdiction over territorial sovereignty disputes.[8] Therefore, the tribunal must decide whether it may still exercise jurisdiction over the dispute concerning Russia's violation of the Convention.

Ukraine v. Russia presents what this Article calls the "implicated issue problem."[9] Generally speaking, the implicated is-

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See Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶ 140 (Nov. 19); Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. Rep. 61, ¶ 77 (Feb. 3); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, ¶ 126 (Oct. 8); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Merits, Judgment, 2001 I.C.J. Rep. 40, ¶ 185 (Mar. 16); Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can./U.S.), Judgment, 1984 I.C.J. Rep. 246, ¶ 157 (Oct. 12); Continental Shelf (Tunis./Libya), Judgment, 1982 I.C.J. Rep. 18, ¶ 73 (Feb. 24); Aegean Sea Continental Shelf (Greece v. Turk.), 1978 I.C.J. Rep. 3, ¶ 86 (Dec. 19); North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 96 (Feb. 20).

8. Irina Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals*, 27 INT'L J. MARINE & COASTAL L. 59, 68 (2012); *see* Alex G. Oude Elferink, *The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?*, 32 OCEAN DEV. & INT'L L. 169, 172 (2001); Paul C. Irwin, *Settlement of Maritime Boundary Disputes: An Analysis of the Law of the Sea Negotiations*, 8 OCEAN DEV. & INT'L L.J. 105, 114 (1980); Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 394, 400 (Donald Rothwell et al. eds., 2015); Robert W. Smith & Bradford Thomas, *Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes*, *in* SECURITY FLASHPOINTS: OIL, ISLANDS, SEA ACCESS AND MILITARY CONFRONTATION 55, 66 (Myron H. Nordquist & John Norton Moore eds., 1998); Stefan Talmon, *The South China Sea Arbitration: Is There a Case to Answer?*, *in* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 15, 31 (Stefan Talmon & Bing Bing Jia eds., 2014); Sienho Yee, The South China Sea Arbitration (The Philippines v. China): *Potential Jurisdictional Obstacles or Objections*, 13 CHINESE J. INT'L L. 663, 688 (2014). Although some delegates to the Third United Nations Conference on the Law of the Sea proposed that UNCLOS tribunals should have jurisdiction over territorial sovereignty disputes, this position was ultimately rejected. KRIANGSAK KITTICHAISAREE, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA 140 (1987); 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 112, 117 (Myron H. Nordquist et al. eds., 1989); Buga, *supra*, at 70–71; Yee, *supra*, at 689.

9. The present author has previously employed the phrase "implicated issue problem" to describe this phenomenon. *See* Peter Tzeng, *The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond*, EJIL: TALK! (Oct. 14, 2016), https://www.ejiltalk.org/

sue problem is the problem that arises when an international court or tribunal[10] has jurisdiction *ratione materiae* over an issue, but the exercise of such jurisdiction would necessarily implicate the exercise of jurisdiction over an issue outside the court or tribunal's jurisdiction *ratione materiae*. The principal question is whether the court or tribunal may still exercise jurisdiction over the dispute.

The implicated issue problem is not unique to *Ukraine v. Russia*. The problem arose in *Certain German Interests (Germany v. Poland)*,[11] *Aegean Sea Continental Shelf (Greece v. Turkey)*,[12] *Pedra Branca (Malaysia/Singapore)*,[13] *Chagos Marine Protected Area (Mauritius v. United Kingdom)*,[14] *South China Sea (Philippines v. China)*,[15] the eight outer continental shelf delimitations,[16] and the three Mexican sugar investor-State arbitrations.[17] The problem has also arisen in pending disputes, not only *Ukraine v. Russia*,[18] but also the eight Crimea investor-State arbitrations.[19] Furthermore, the problem could arise in a plethora of prospective disputes, such as mixed disputes in maritime delimitation,[20] disputes concerning investments on disputed territory or in disputed waters,[21] the Israel-Palestine football dis-

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the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/.

10. This Article uses the term "international court or tribunal" to cover all international dispute settlement bodies, as well as international criminal courts and tribunals. It uses the term "international court or tribunal" instead of "international dispute settlement body" to conform to contemporary literature on international dispute settlement.

11. *See infra* Section III.C.1.

12. *See infra* Section III.C.2.

13. *See infra* Section III.C.3.

14. *See infra* Section III.C.4.

15. *See infra* Section III.C.5.

16. *See infra* Section III.C.6. This Article calls these eight cases the "outer continental shelf delimitations" because the court or tribunal in each of the eight cases considered whether it had the jurisdiction to delimit the outer continental shelf. It should be noted, however, that in some cases none of the parties clearly requested a delimitation of the outer continental shelf and/or the court or tribunal did not actually delimit the outer continental shelf.

17. *See infra* Section III.C.7.

18. *See infra* Section III.D.1.

19. *See infra* Section III.D.2.

20. *See infra* Section III.E.1.

21. *See infra* Section III.E.2.

pute,[22] the Ercan Airport dispute,[23] and the International Criminal Court's (ICC) prosecution of the crime of aggression.[24]

The implicated issue problem has not completely escaped the attention of commentators, but the current literature on the topic is lacking in three principal ways. First, commentators have not recognized how all the aforementioned disputes raise the very same jurisdictional problem. Scholars have written on the implicated issue problem—though not calling it as such and usually not giving it any name—in some of these disputes: *Pedra Branca*,[25] *Chagos Marine Protected Area*,[26] *South China Sea*,[27] the outer continental shelf delimitations,[28] *Ukraine*

22. *See infra* Section III.E.3.

23. *See infra* Section III.E.4.

24. *See infra* Section III.E.5. The International Criminal Court's prosecutions are not "disputes" in the traditional meaning of the word, but they may raise the implicated issue problem, so they are included in this list.

25. *E.g.*, Buga, *supra* note 8, at 81–82; Yee, *supra* note 8, at 693–94.

26. *E.g.*, *Chagos Marine Protected Area: Arbitral Tribunal Rejects UK's Declaration*, 45 ENVTL. POL'Y & L. 62, 63 (2015); David A. Colson & Brian J. Vohrer, In re *Chagos Marine Protected Area (Mauritius v. United Kingdom)*, 109 AM. J. INT'L L. 845, 846–47, 850–51 (2015); 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 Marine Protected Area (Mauritius v. United Kingdom)*, 12 BRAZ. J. INT'L L. 705, 713–21 (2015); Lan Ngoc Nguyen, The Chagos Marine Protected Area Arbitration*: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?*, 31 INT'L J. MARINE & COASTAL L. 120 (2016); Wensheng Qu, *The Issue of Jurisdiction Over Mixed Disputes in the* Chagos Marine Protection Area Arbitration *and Beyond*, 47 OCEAN DEV. & INT'L L. 40 (2016); Stefan Talmon, The Chagos Marine Protected Area Arbitration: *Expansion of the Jurisdiction of UNLCOS Part XV Courts and Tribunals*, 65 INT'L & COMP. L.Q. 927 (2016); Michael Waibel, Mauritius v. UK: Chagos Marine Protected Area *Unlawful*, EJIL: TALK! (Apr. 17, 2015), http://www.ejiltalk.org/mauritius-v-uk-chagos-marine-protected-area-unlawful/.

27. *E.g.*, Jianjun Gao, *The Obligation to Negotiate in the* Philippines v. China Case*: A Critique of the Award on Jurisdiction*, 47 OCEAN DEV. & INT'L L. 272 (2016); Michael Sheng-ti Gau, *The Agreements and Disputes Crystalized by the 2009-2011 Sino-Philippine Exchange of Notes Verbales and their Relevance to the Jurisdiction and Admissibility Phase of the* South China Sea Arbitration, 15 CHINESE J. INT'L L. 417 (2016); Michael Sheng-ti Gau, *The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015*, 2015 CHINA OCEANS L. REV. 90 (2015) [hereinafter Gau, *The Sino-Philippine Arbitration*]; Ben Love, *Introductory Note to the Republic of the Philippines v. The People's Republic of China*, Award on Jurisdiction and Admissibility (Perm. Ct. Arb.), 55 I.L.M. 805

v. Russia,[29] and the Crimea investor-State arbitrations.[30] But

(2016); John E. Noyes, In re Arbitration Between the Philippines and China, 110 AM. J. INT'L L. 102 (2016); Sreenivasa Rao Pemmaraju, The South China Sea Arbitration (The Philippines v. China)*: Assessment of the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT'L L. 265 (2016); Stefan Talmon, The South China Sea Arbitration*: Observations on the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT'L L. 309 (2016); Chris Whomersley, *The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Critique*, 15 CHINESE J. INT'L L. 239 (2016); Yee, *supra* note 8, at 688; Sienho Yee, The South China Sea Arbitration*: The Clinical Isolation and/or One-sided Tendencies in the Philippines' Oral Arguments*, 14 CHINESE J. INT'L L. 423 (2015); Yu Mincai, *China's Responses to the Compulsory Arbitration on the* South China Sea Dispute*: Legal Effects and Policy Options*, 45 OCEAN DEV. & INT'L L. 1, 8–11 (2014); Andreas Zimmermann & Jelena Bäumler, *Navigating Through Narrow Jurisdictional Straits: The Philippines – PRC South China Sea Dispute and UNCLOS*, 12 L. & PRAC. INT'L CTS. & TRIBUNALS 431, 439–60 (2013); Diane Desierto, *The Jurisdictional Rubicon: Scrutinizing China's Position Paper on the* South China Sea Arbitration – *Part I*, EJIL: TALK! (Jan. 29, 2015), http://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-paper-on-the-south-china-sea-arbitration/; Diane Desierto, *The Jurisdictional Rubicon: Scrutinizing China's Position Paper on the* South China Sea Arbitration – *Part II*, EJIL: TALK! (Jan. 30, 2015), http://www.ejiltalk.org/the-jurisdictional-rubicon-scrutinizing-chinas-position-paper-on-the-south-china-sea-arbitration-part-ii/; André de Hoogh, *Jurisdictional Qualms about the* Philippines v. China *Arbitration Awards*, EJIL: TALK! (Aug. 11, 2016), http://www.ejiltalk.org/jurisdictional-qualms-about-the-philippines-v-china-arbitration-awards/; Monica Feria-Tinta, *The South China Sea Case: Chess Arbitration?*, EJIL: TALK! (Aug. 10, 2016), http://www.ejiltalk.org/the-south-china-sea-case-chess-arbitration/; Douglas Guilfoyle, Philippines v China: *First Thoughts on the Award in the* South China Seas Case, EJIL: TALK! (July 12, 2016), http://www.ejiltalk.org/philippines-v-china-first-thoughts-on-the-award-in-the-south-china-seas-case/.

28. *E.g.*, Massimo Lando, *Delimiting the Continental Shelf Beyond 200 Nautical Miles at the International Court of Justice: The* Nicaragua v. Colombia *Cases*, 16 CHINESE J. INT'L L. 137 (2017).

29. *E.g.*, Julian Ku, *Ukraine's UNCLOS Arbitration Claim Against Russia May Depend Upon Philippines-China Precedent*, OPINIO JURIS (Sept. 17, 2016), http://opiniojuris.org/2016/09/17/ukraines-unclos-arbitration-claim-against-russia-may-depend-upon-philippines-china-precedent/ [hereinafter Ku, *Ukraine's UNCLOS Arbitration Claim*]; Julian Ku, *Ukraine Prepares Even More International Lawsuits That Russia Will Ignore*, OPINIO JURIS (Feb. 27, 2016), http://opiniojuris.org/2016/02/27/ukraine-v-russia-where-can-you-sue/; Brian McGarry, *The Courthouse Proxy Wars, Pt. II*, WESTPHALIAN (Feb. 26, 2016), http://thewestphalian.com/analysis/2016/02/26; Gaiane Nuridzhanian, *Ukraine vs. Russia in International Courts and Tribunals*, EJIL: TALK! (Mar. 9, 2016), http://www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/.

30. *E.g.*, Timur Bondaryev et al., *Protecting Investments in Crimea: Does Ukrainian or Russian Law Apply?*, 44 INT'L L. NEWS 14, 16–17 (2015); Odysseas

none of these scholars have recognized that all these disputes share the same jurisdictional problem. As a result, they have not been able to come up with a common solution, nor have they been able to even consider whether a common solution is appropriate.

Second, commentators have largely ignored the relationship between the implicated issue problem and the age-old question of incidental jurisdiction.[31] As discussed more pre-

G. Repousis, *Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo-Ukrainian Territorial Conflict*, 32 ARB. INT'L 459, 468–72, 478–80 (2016); Sergejs Dilevka, *Arbitration Claims by Ukrainian Investors under the Russia-Ukraine BIT: Between Crimea and a Hard Place?*, CIS ARB. F. (Feb. 17, 2016), http://www.cisarbitration.com/2016/02/17/arbitration-claims-by-ukrainian-investors-under-the-russia-ukraine-bit-between-crimea-and-a-hard-place/; Yaraslau Kryvoi & Maria Tsarova, *Protecting Foreign Investors in Crimea: Is Investment Arbitration an Option?*, CIS ARB. F. (July 29, 2014), http://www.cisarbitration.com/2014/07/29/protecting-foreign-investors-in-crimea-is-investment-arbitration-an-option/; Baiju Vasani et al., *Crisis in Crimea: Is Your Foreign Investment There Protected By a Treaty?*, JONES DAY (Apr. 2014), http://www.jonesday.com/crisis-in-crimea-is-your-foreign-investment-there-protected-by-a-treaty-04-10-2014/.

31. This Article employs the term "incidental jurisdiction" to refer to the jurisdiction of an international court or tribunal over an issue that would otherwise be outside the court or tribunal's jurisdiction *ratione materiae*, but that falls within the court or tribunal's jurisdiction *ratione materiae* because it is incidental to the dispute. Some commentators, like this Article, use the term to refer to incidental jurisdiction over *substantive* matters. *See, e.g.*, BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 266 (2006); LUIZ EDUARDO SALLES, FORUM SHOPPING IN INTERNATIONAL ADJUDICATION: THE ROLE OF PRELIMINARY OBJECTIONS 120 (2014); OLE SPIERMANN, INTERNATIONAL LEGAL ARGUMENT IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE: THE RISE OF THE INTERNATIONAL JUDICIARY 217 (2005); Love, *supra* note 27, at 808–10; Talmon, *supra* note 26, at 934–36. Other commentators, however, use the term to refer to incidental jurisdiction over *procedural* matters, such as ordering provisional measures, issuing procedural orders, and bifurcating proceedings. *See, e.g.*, Northern Cameroons (Cameroon v. U.K.), Preliminary Objections, Judgment, 1963 I.C.J. Rep. 15, 103 (Dec. 2) (separate opinion by Fitzmaurice, J.); TIM HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 559 (1998); 2 SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996, 598–99 (3d ed. 1997); Christian Tomuschat, *Article 36*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 633, 656 (Andreas Zimmermann et al. eds., 2d ed. 2012); Andreas Zimmermann, *Ad Hoc Chambers of the International Court of Justice*, 8 PENN ST. INT'L L. REV. 1, 24–26 (1989). This Article prefers to use the term to refer to incidental jurisdiction over *substantive* matters because many courts, tribunals, and commentators use the term "inherent jurisdiction" to refer to incidental jurisdiction over *procedural* mat-

cisely in Section III.A below, these issues are inextricably related. If the court or tribunal decides to exercise jurisdiction over the dispute, then it will exercise incidental jurisdiction over the outside issue. If the court or tribunal does not exercise jurisdiction over the dispute, then it is effectively saying that it does not have incidental jurisdiction over the outside issue.

Third, and perhaps most surprisingly, commentators have failed to recognize the similarity between the implicated issue problem and the so-called "indispensable party problem" or "necessary party problem"—which this Article calls the "implicated party problem."[32] In fact, the two problems are analogous. The implicated issue problem arises when an international court or tribunal has jurisdiction *ratione materiae* over an issue, but the exercise of such jurisdiction would necessarily implicate the exercise of jurisdiction over an issue outside the

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ters. *See, e.g.*, Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 23 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶ 23 (Dec. 20); In the Matter of El Sayed, Case No. CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, ¶¶ 45–46 (Special Trib. for Leb., Appeals Chamber Nov. 10, 2010); Iran v. United States, Decision No. DEC 134-A3/A8/A9/A14/B61-FT, Decision Ruling on Request for Revision of Partial Award No. 601 by Iran, ¶ 59 (Iran-U.S. Claims Trib. July 1, 2011); Chester Brown, *Inherent Powers in International Adjudication*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 828, 829, 832–39 (Cesare P.R. Romano et al. eds., 2013); 5 Martins Paparinskis, *Inherent Powers of ICSID Tribunals: Broad and Rightly So*, *in* INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 11 (Ian A. Laird & Todd J. Weiler eds., 2012); Friedl Weiss, *Inherent Powers of National and International Courts: The Practice of the Iran-US Claims Tribunal*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 185, 187–99 (Christina Binder et al. eds., 2009). Moreover, other commentators use the term "ancillary jurisdiction" to refer to incidental jurisdiction over *procedural* matters. MAX SØRENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 707 (1968); Michèle Buteau & Gabriël Oosthuizen, *When the Statute and Rules Are Silent: The Inherent Powers of the Tribunal*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 65, 66, 80 (Richard May et al. eds., 2001).

32. This Article employs the word "implicated" instead of "indispensable" or "necessary" because calling a party "indispensable" or "necessary" appears to prejudge the question of whether the court or tribunal may exercise jurisdiction over the dispute. In this sense, the implicated party problem is broader than the indispensable or necessary party problem, because it encompasses situations where the court or tribunal may still exercise jurisdiction over the dispute even though the exercise of jurisdiction over an absent State would be implicated.

court or tribunal's jurisdiction *ratione materiae.* The implicated party problem, on the other hand, arises when an international court or tribunal has jurisdiction *ratione personae* over a State, but the exercise of such jurisdiction would necessarily implicate the exercise of jurisdiction over a State outside the court or tribunal's jurisdiction *ratione personae.*

This Article aims to fill these gaps in the literature. In doing so, it makes a descriptive and a normative argument. On the descriptive level, the Article argues that courts and tribunals have developed a consistent approach to the implicated party problem—called the doctrine of indispensable parties—but have not developed a consistent approach to the implicated issue problem. On the normative level, the Article argues that the approach courts and tribunals take to the implicated party problem should not necessarily parallel the approach they take to the implicated issue problem because of key differences between jurisdiction *ratione personae* and jurisdiction *ratione materiae.*

This Article is organized as follows: Section II reviews the major cases concerning implicated parties to show how courts and tribunals have developed a consistent approach to the implicated party problem (called the doctrine of indispensable parties). Section III then reviews a collection of cases concerning implicated issues to show how courts and tribunals have not developed a consistent approach to the implicated issue problem. Section IV summarizes the differences between the two approaches, and explains why the approach for implicated parties should not necessarily parallel the approach for implicated issues. Finally, Section V concludes the Article by highlighting topics for further research.

II. The Implicated Party Problem

A. *The Problem*

As noted above in Part I, the implicated party problem is the problem that arises when an international court or tribunal has jurisdiction *ratione personae* over a State (i.e., the "participating State"), but the exercise of such jurisdiction would necessarily implicate the exercise of jurisdiction over a State outside the court or tribunal's jurisdiction *ratione personae* (i.e., the "absent State").

As a preliminary matter, two terms in this definition should be explained. First, the term "exercise of jurisdiction over a State" primarily refers to a determination on the legal responsibility of the State, though it can also refer to other forms of exercising jurisdiction over the State, such as a determination on the State's sovereignty over a piece of territory. Second, the word "implicate" has a broad meaning: it could mean, inter alia, that the exercise of jurisdiction over the participating State requires a *prior* determination on the legal responsibility of the absent State (e.g., in the *ratio decidendi*), implies a *concurrent* determination on such responsibility, or affects a *future* determination on such responsibility.

Two questions arise from the implicated party problem. The first question is whether the court or tribunal may exercise jurisdiction over the participating State despite the fact that this exercise of jurisdiction necessarily implicates the exercise of jurisdiction over the absent State (i.e., the "indispensable party question"). The second question is whether the court or tribunal may exercise jurisdiction over the absent State in light of the fact that this exercise of jurisdiction is necessarily implicated by the exercise of jurisdiction over the participating State (i.e., the "incidental party question"). Notably, if the answer to the indispensable party question is in the affirmative, then the answer to the incidental party question must also be in the affirmative, and vice versa. Similarly, if the answer to the indispensable party question is in the negative, then the answer to the incidental party question must also be in the negative, and vice versa. Simply put, although the two questions are theoretically separate, the answers to the two questions must always be the same.

This Article examines the implicated party problem from the perspective of the indispensable party question rather than the incidental party question. This is because courts, tribunals, and commentators have also approached the problem from the perspective of the indispensable party question. That is, for one reason or another, they prefer to ask whether the court or tribunal may exercise jurisdiction over the participating State rather than ask whether the court or tribunal may exercise jurisdiction over the absent State. In any case, the answer to the indispensable party question is effectively also the answer to the incidental party question.

The indispensable party question is often considered as one of admissibility rather than jurisdiction,[33] even though the International Court of Justice (ICJ) has not expressly characterized the question as one of admissibility.[34] This Article does not take a position on this classification, but for consistency it will treat the question as one of admissibility.

When faced with the implicated party problem, international courts and tribunals consistently apply the doctrine of indispensable parties. Notably, the doctrine is often referred to as "the *Monetary Gold* principle."[35] This Article, however, employs the term "doctrine of indispensable parties" to emphasize the fact that, as examined in detail below, the doctrine as it exists today is the product of jurisprudence across many cases, not just *Monetary Gold*. Indeed, although the ICJ does not employ the term "indispensable parties" to refer to the principle,[36] international tribunals,[37] States,[38] and many com-

33. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392, ¶ 86 (Nov. 26) (noting that the United States considered the indispensable party question to be one of admissibility); Yuval Shany, *Jurisdiction and Admissibility*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, *supra* note 31, at 779, 797–98 (stating that the ICJ in *Monetary Gold* held that the application was inadmissible). *But see* 1 HUGH THIRLWAY, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE 971 (2013) (noting that this question "seems to be regarded as one of admissibility," but opining that it "may be regarded as one of 'propriety', and addressed neither to jurisdiction nor to admissibility").

34. *See, e.g.*, East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90, ¶ 35 (June 30) (declaring that "it cannot . . . exercise the jurisdiction it has" instead of declaring the application "inadmissible"); Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. Rep. 240, ¶ 55 (June 26) (declaring that "the Court cannot decline to exercise its jurisdiction" instead of declaring the application "admissible"); Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., U.S.), Judgment, 1954 I.C.J. Rep. 19, 33 (June 15) (declaring that "it cannot exercise this jurisdiction to adjudicate" instead of declaring the application "inadmissible").

35. *See, e.g.*, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment, ¶ 29 (Oct. 5, 2016) (Crawford, J., dissenting); THIRLWAY, *supra* note 33, at 1152.

36. The ICJ has not directly rejected the term "indispensable parties," but in *Military and Paramilitary Activities*, it rejected "an 'indispensable parties' rule of the kind argued for by the United States." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392, ¶ 88 (Nov. 26).

mentators[39] have used the term to refer to this line of jurisprudence.

B. *Theoretical Framework*

Much ink has been spilled analyzing and critiquing the doctrine of indispensable parties. This Part does not aim to repeat what has already been said. Rather, with the benefit of hindsight, this Part puts forth a novel yet simple theoretical

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37. *E.g.*, The M/V "Norstar" Case (Pan. v. It.), ITLOS Case No. 25, Preliminary Objections, Judgment, ¶¶ 171–74 (Nov. 4, 2016); South China Sea (Phil. v. China), PCA Case No. 2013-19, Award, ¶¶ 157, 1202 (July 12, 2016); Chevron Corp. and Texaco Petroleum Co. v. Ecuador, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, ¶ 4.62 (Feb. 27, 2012).

38. *E.g.*, The M/V "Norstar" Case (Pan. v. It.), ITLOS Case No. 25, Preliminary Objections, Judgment, ¶¶ 144–46, 156, 159 (Nov. 4, 2016); Armed Activities on the Territory of the Congo (Dem. Rep. Cong. v. Uganda), Merits, Judgment, 2005 I.C.J. Rep. 168, ¶ 200 (Dec. 19); Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 3.39, WTO Doc. WT/DS34/R (adopted May 31, 1999); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392, ¶ 88 (Nov. 26); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Counter-Memorial of Pakistan, ¶¶ 1.12, 7.70, 7.74, 7.75 n.99, 8.1, 8.76 (Dec. 1, 2015), http://www.icj-cij.org/files/case-related/159/18920.pdf; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Counter-Memorial of India, ¶¶ 2, 42 (Sept. 16, 2015), http://www.icj-cij.org/files/case-related/158/18900.pdf; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v U.K.), Preliminary Objections of the United Kingdom, ¶¶ 83–103 (June 15, 2015), http://www.icj-cij.org/files/case-related/160/20150615_preliminary_objections_en.pdf.

39. *E.g.*, CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 198–212 (1993); VAUGHAN LOWE, INTERNATIONAL LAW 146 (2007); Chester Brown, *Article 59*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1416, 1441 (Andreas Zimmermann et al. eds., 2d ed. 2012); Christine Chinkin, *Article 62*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, *supra*, at 1529, 1536–37; 2 Karin Oellers-Frahm, *Article 92*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1897, 1937 (Bruno Simma et al. eds., 3d ed. 2012); Alexander Orakhelashvili, *Division of Reparation Between Responsible Entities*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 647, 664 (James Crawford et al. eds., 2010); Alain Pellet, *Judicial Settlement of International Disputes*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 10 (July 2013), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e54; Talmon, *supra* note 27, ¶ 91.

framework for understanding the evolution of the doctrine over time. This same framework will then be used to analyze the approach of international courts and tribunals to the implicated issue problem in Part III.

There are two general approaches to dealing with the implicated party problem. The first approach is the characterization approach, where the court or tribunal must characterize the dispute as one relating more to the participating State or the absent State. If the dispute relates more to the participating State, then the court or tribunal may exercise jurisdiction over the dispute. If the dispute relates more to the absent State, then the court or tribunal may not exercise jurisdiction over the dispute. As seen below in Section II.C, the ICJ's "very subject-matter" test follows this approach, at least nominally.

The second approach is the logic-based approach, where the court or tribunal must determine the logical relationship between the exercise of jurisdiction over the participating State and the exercise of jurisdiction over the absent State. In particular, the court or tribunal must determine whether the exercise of jurisdiction over the participating State requires a *prior* determination on the legal responsibility of the absent State (e.g., in the *ratio decidendi*), implies a *concurrent* determination on such responsibility, or affects a *future* determination on such responsibility. Under this test, if and only if the exercise of jurisdiction over the participating State requires a *prior* determination on the legal responsibility of the absent State, then the court or tribunal may not exercise jurisdiction over the dispute. As seen below in Section II.C, the ICJ's "prerequisite determination" test follows this approach.

It must be recognized that the characterization approach and the logic-based approach are, at least in theory, fundamentally different. Although in some cases they may lead to the same result, they do not have to. As seen below in Section II.C, the ICJ started with the characterization approach (i.e., the "very subject-matter" test), but it now follows a logic-based approach (i.e., the "prerequisite determination" test within the framework of the "very subject-matter" test) to the implicated party problem.

C. *Jurisprudence*

1. *Monetary Gold (Italy v. France, United Kingdom, United States)*

The ICJ first confronted the implicated party problem in the 1950s in the case of *Monetary Gold.*[40] During World War II, Albania had expropriated gold reserves owned by Italy from the National Bank of Albania without providing compensation.[41] At the end of the war, France, the United Kingdom, and the United States assumed the responsibility of redistributing the gold.[42] Italy therefore instituted proceedings against the three Allied powers to claim compensation for the expropriation.[43] The problem, however, was that a determination on the responsibility of France, the United Kingdom, and the United States (i.e., the participating States) to pay Italy compensation would necessarily require a prior determination on the responsibility of Albania (i.e., the absent State) for unlawfully expropriating the gold.[44] The Court thus had to determine whether it could still exercise jurisdiction over the dispute.

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40. Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., U.S.), Judgment, 1954 I.C.J. Rep. 19, 32 (June 15). The PCIJ had also confronted the implicated party problem in the context of an advisory opinion in *Eastern Carelia.* Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23). In that case, the Court refused to exercise its jurisdiction because Russia had not consented to the Court's jurisdiction. *Id.* at 28. Nevertheless, if the ICJ today were faced with a similar request for an advisory opinion, it would probably issue the opinion, as the ICJ has since repeatedly held that its advisory jurisdiction does not require the consent of States. *See, e.g.*, Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. Rep. 151 (July 20); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16 (June 21); Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12 (Oct. 16); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 200–01 (1995).

41. Andrew J. Grotto, *Monetary Gold Arbitration and Case, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 8 (Dec. 2008), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e175.

42. Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., U.S.), Judgment, 1954 I.C.J. Rep. 19, 25–26 (June 15).

43. *Id.* at 22.

44. *Id.* at 32.

The Court answered this question in the negative. It justified its decision by noting that "Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision."[45] In general terms, the Court held that if the legal interests of an absent State would form the "very subject-matter" of the decision, then it may not exercise jurisdiction over the dispute.

Notably, the "very subject-matter" test takes a characterization approach to the implicated party problem. That is, it requires the court or tribunal to characterize the "very subject-matter" of the decision in order to decide whether it may exercise jurisdiction over the dispute. The "very subject-matter" test, however, carries two principal difficulties.

First, the test oversimplifies international legal disputes. The use of the language "very subject-matter" seems to imply that only one State's legal interests may form the "very subject-matter" of a decision. In reality, however, international legal disputes may be very complex, implicating the legal interests of many different States in many different respects, such that the final decision might not have a single or even a primary subject matter. All this is not, of course, to say that characterization tests are always problematic; they carry certain advantages and are indeed widely employed in other areas of law, such as conflict of laws. Nevertheless, the tendency for oversimplification inherent in the process of characterization must be recognized.

Second, the test is ambiguous. It is often not easy to define the "very subject-matter" of a decision because disputes often touch on a wide array of issues. As a result, international courts and tribunals are given significant discretion in applying the test. While one can consider this discretion both positively and negatively, one clear negative consequence of this ambiguity is the lack of predictability: States may have a difficult time assessing in advance of submitting a claim whether

45. *Id.* In the following paragraph, the Court provided a more general statement of the rule: "Where . . . the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it." *Id.* at 33. Nevertheless, the "very subject-matter" test rather than this "vital issue" test has become the standard repeatedly cited and adopted by international courts and tribunals, including by the ICJ, in subsequent cases. *See infra* note 68.

an absent State's legal interests would form the "very subject-matter" of the decision.

2. *Military and Paramilitary Activities (Nicaragua v. United States)*

The ICJ confronted these difficulties thirty years later in *Military and Paramilitary Activities.*[46] After the socialist Sandinista government came to power in Nicaragua in 1979, the United States began providing military and financial assistance to the *contras* in the region in order to overthrow the Sandinista government.[47] Nicaragua brought suit against the United States, asserting that the United States had, inter alia, violated the prohibition on the use of force in its operations in Central America.[48] The United States invoked *Monetary Gold,* arguing that Nicaragua's claims were inadmissible because a determination on the responsibility of the United States (i.e., the participating State) "would necessarily implicate the rights and obligations" of Honduras and other States in the region.[49]

The Court, however, decided that it could still exercise jurisdiction over the dispute, noting that "[t]he circumstances of the *Monetary Gold* case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction."[50] Nevertheless, the Court appeared to have trouble applying the "very subject-matter" test of *Monetary Gold.* In applying the test, the Court had to determine whether the legal interests of El Salvador, Honduras, and/or Costa Rica would form the "very subject-matter" of the decision. However, probably because of the complexity of the legal dispute before it and the ambiguity of the "very subject-matter" test, the Court failed to provide

46. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392 (Nov. 26); Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Merits, Judgment, 1986 I.C.J. Rep. 14 (June 27).

47. James R. Crawford, *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America), in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Aug. 2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e170.

48. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. Rep. 14, ¶ 15 (June 27).

49. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392, ¶ 86 (Nov. 26).

50. *Id.* ¶ 88.

any analysis in this regard. It only pithily stated that "none of the States referred to can be regarded as in the same position as Albania in that case,"[51] thereby declaring Nicaragua's claims admissible.[52]

3. *Certain Phosphate Lands (Nauru v. Australia)*

A few years after *Military and Paramilitary Activities*, the Court applied the "very subject-matter" test again in *Certain Phosphate Lands*.[53] In that case, Nauru instituted proceedings against Australia for, inter alia, not complying with its obligations under the Trusteeship Agreement for Nauru. Australia, however, was only one of the three Administering Authorities under the Trusteeship Agreement—the other two being New Zealand and the United Kingdom, which were not parties to the proceedings. Australia therefore argued that the claim was inadmissible because "any decision of the Court as to the alleged breach by Australia of its obligations under the Trusteeship Agreement would necessarily involve a finding as to the discharge by those two other States of their obligations in that respect."[54] In other words, Australia argued that the Court should not exercise jurisdiction over the dispute because a determination on the legal responsibility of Australia (i.e., the participating State) would imply a concurrent determination on the legal responsibility of New Zealand and the United Kingdom (i.e., the absent States).

The Court once again decided that it could still exercise jurisdiction over the dispute. In doing so, the Court more directly confronted the aforementioned difficulties with the "very subject-matter" test. In *Monetary Gold*, the Court seemed to operate under the assumption that the "very subject-matter" of a decision would be the legal interests of just one State. In *Certain Phosphate Lands*, however, the "very subject-matter" of the decision would have been the legal interests of three States in equal proportions. The Court therefore looked elsewhere: the logical relationship between the determinations of legal responsibility. It held that in *Monetary Gold*, the settlement of

51. *Id.*
52. *Id.* ¶ 113.
53. Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. Rep. 240 (June 26).
54. *Id.* ¶ 49.

the dispute would have necessarily required a *prior* determination of Albania's responsibility, whereas, in the case before it, the settlement of the dispute would only have *concurrent* implications for the determination of New Zealand's and the United Kingdom's responsibility.[55] Using this logic-based approach, it held that the legal interests of New Zealand and the United Kingdom would not form the "very subject-matter" of the decision because "the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the [decision of the Court]."[56]

Although the Court was adding a nuance not immediately apparent from *Monetary Gold*,[57] it stood by the language of *Monetary Gold*, concluding that the legal interests of New Zealand and the United Kingdom would not constitute the "very subject-matter" of the decision.[58] The Court thus found that it could exercise jurisdiction over Nauru's claims.[59] In effect, however, the Court avoided applying the ambiguous "very subject-matter" test and instead employed a "prerequisite determination"[60] test in its place. Notably, the "prerequisite determination" test capably addresses the two difficulties with the "very subject-matter" test: first, the test embraces the complexity of international legal disputes, as its inquiry operates on the assumption that a dispute may comprise multiple interrelated legal determinations; and second, the test is less ambiguous, such that, in most cases, a State can apply it to a set of facts and come up with the "correct" answer.

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55. *Id.* ¶ 55.

56. *Id.*

57. In *Monetary Gold*, the Court held: "In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy." Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., U.S.), Judgment, 1954 I.C.J. Rep. 19, 32 (June 15). Nevertheless, the Court did not specify that it refused to exercise jurisdiction because the latter determination was a logical prerequisite of the former determination.

58. Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. Rep. 240, ¶ 55 (June 26).

59. *Id.*

60. Note that this is not a direct quote from the judgment, but the Court in *Certain Phosphate Lands* held: "In the [*Monetary Gold*] case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims." *Id.*

4. *East Timor (Portugal v. Australia)*

Three years later, the Court confronted the implicated party problem again in *East Timor*.[61] Portugal had instituted proceedings against Australia, claiming, inter alia, that Australia's conclusion of a treaty with Indonesia on the exploitation of resources in the Timor Gap had infringed on Portugal's rights as the administering power of East Timor.[62] Australia, however, argued that a determination on the lawfulness of its own conduct (i.e., as the participating State) hinged on whether Indonesia (i.e., the absent State) had acted unlawfully when concluding the treaty on behalf of East Timor,[63] and since Indonesia had not consented to the jurisdiction of the Court, Portugal's claim was inadmissible.[64] The Court agreed with Australia.

As in *Certain Phosphate Lands*, the Court ostensibly applied the "very subject-matter" test espoused in *Monetary Gold*. However, when it came to the application of the test, the Court immediately turned to the new "prerequisite determination" test.[65] In particular, the Court held that the legal interests of Indonesia would form the "very subject-matter" of the decision because "in order to decide the claims . . . , [the Court] would have to rule, as a prerequisite, on the lawfulness of Indonesia's conduct."[66] As a result, the Court found that the claim was inadmissible.[67]

D. *Summary*

These four cases demonstrate a movement from a characterization approach (i.e., the "very subject-matter" test) in *Monetary Gold* to a logic-based approach (i.e., the "prerequisite determination" test within the framework of the "very subject-matter" test) in *Certain Phosphate Lands* and *East Timor*. Although the two latter cases still operated under the banner of the "very subject-matter" test, in reality, they applied the "prerequisite determination" test. In *Certain Phosphate Lands*, the

61. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90 (June 30).
62. *Id.* ¶ 10.
63. *Id.* ¶¶ 23–24.
64. *Id.* ¶ 24.
65. *Id.* ¶¶ 34–35.
66. *Id.* ¶ 35.
67. *Id.* ¶¶ 34–35.

Court held that it could still exercise jurisdiction over a dispute if such an exercise of jurisdiction would imply a *concurrent* determination on the legal responsibility of an absent State. And in *East Timor*, the Court held that it could not exercise jurisdiction over a dispute if such an exercise of jurisdiction would require a *prior* determination on the legal responsibility of an absent State. Retroactively applying this "prerequisite determination" test to *Military and Paramilitary Activities*, one could conclude that the Court in that case held that it could still exercise jurisdiction over the dispute because such an exercise of jurisdiction would only affect a *future* determination on the legal responsibility of an absent State.

On almost every occasion where an international court or tribunal has confronted the implicated party problem, the court or tribunal has applied the doctrine of indispensable parties as developed by the ICJ.[68] In the overwhelming major-

68. *E.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, ¶ 116 (Feb. 3); Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 43 (Dec. 5); Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, ¶ 312 (Oct. 8); Armed Activities on the Territory of the Congo (Dem. Rep. Cong. v. Uganda), 2005 I.C.J. Rep. 168, ¶¶ 203–04 (Dec. 19); Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, 1998 I.C.J. Rep. 275, ¶ 79 (June 11); East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. Rep. 90, ¶¶ 26, 34 (June 30); Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. Rep. 240, ¶¶ 50–55 (June 26); Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application to Intervene, Judgment, 1990 I.C.J. Rep. 92, ¶¶ 54–56 (Sept. 13); Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, ¶ 49 (Dec. 22); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. Rep. 392, ¶ 88 (Nov. 26); Continental Shelf (Libya/Malta), Application to Intervene, Judgment, 1984 I.C.J. Rep. 3, ¶ 40 (Mar. 21); Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., U.S.), Judgment, 1954 I.C.J. Rep. 19, 32 (June 15); The M/V "Norstar" Case (Pan. v. It.), ITLOS Case No. 25, Preliminary Objections, Judgment, ¶¶ 172 (Nov. 4, 2016); South China Sea (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 640 (July 12, 2016); South China Sea (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 181 (Oct. 29, 2015); Larsen v. Hawaiian Kingdom, Award (Feb. 5, 2001), 119 I.L.R. 566, ¶¶ 11.9 (2002); Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶¶ 9.10, 9.10 n.249, WTO Doc. WT/DS34/R (adopted May 31, 1999). There have been other cases where a respondent State invoked the doctrine of indispensable parties, but the court or tribunal did not address

ity of cases, the international court or tribunal adopted and applied the "very subject-matter" test of *Monetary Gold*.[69] Nevertheless, in light of the difficulties with the "very subject-matter" test as discussed above, following *East Timor*, the ICJ and other international courts and tribunals have also given significant weight to the "prerequisite determination" test.

In fact, at times, the ICJ appears to have elevated the "prerequisite determination" test to the same level as the "very subject-matter" test. For example, in *Armed Activities*, the Court, after quoting the relevant passages from *Certain Phosphate Lands*, held: "In the present case, the interests of Rwanda clearly do not constitute 'the very subject-matter' of the decision to be rendered by the Court on the DRC's claims against

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the question. *E.g.*, The M/V "Norstar" Case (Pan. v. It.), ITLOS Case No. 25, Written Preliminary Objections of Italy of Mar. 10, 2016, ¶¶ 21–24, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.25/Preliminary_Objections/Italy/The_MV_Norstar_case_Preliminary_Objections_Italy.pdf; Certain Property (Liech. v. Ger.), Preliminary Objections, Judgment, 2005 I.C.J. Rep. 6, ¶¶ 19, 53 (Feb. 10); Bankovic v. Belgium, App No. 52207/99, 2001-XII Eur. Ct. H.R. 9, ¶¶ 31, 83 (2001); Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), Counter-Memorial of Pakistan, ¶¶ 8.73–8.94 (Dec. 1, 2015), http://www.icj-cij.org/files/case-related/159/18920.pdf; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Counter-Memorial of India, ¶¶ 27–42 (Sept. 16, 2015), http://www.icj-cij.org/files/case-related/158/18900.pdf; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections of the United Kingdom, ¶¶ 83–103 (June 15, 2015), http://www.icj-cij.org/files/case-related/160/20150615_preliminary_objections_en.pdf. The author is aware of only three cases where an international court or tribunal dealt with the implicated party problem without citing any of the aforementioned tests. *E.g.*, Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl./Myan.), ITLOS Case No. 16, Judgment (Mar. 14, 2012); Delimitation of Maritime Areas Between Canada and France (Can./Fr.), Decision of June 10, 1992, 31 I.LM. 1145, ¶¶ 78–82 (1992); Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau (Guinea/Guinea-Bissau), Award (Feb. 14, 1985), 25 I.L.M. 252, ¶¶ 108–112 (1986).

69. *See supra* note 68. The author is aware of only two cases where an international court or tribunal cited one of the aforementioned tests without citing the "very subject-matter" test. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 3, ¶ 116 (Feb. 3); Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, ¶ 312 (Oct. 8).

Uganda, nor is the determination of Rwanda's responsibility a prerequisite for such a decision."[70] Similarly, in *Interim Accord*, the Court held:

> The present case can be distinguished from the *Monetary Gold* case since . . . the rights and obligations of NATO and its member States other than Greece do not form the subject-matter of the decision of the Court . . . nor would the assessment of their responsibility be a "prerequisite for the determination of the responsibility" of the Respondent.[71]

Even more radically, the Court when confronted with the implicated party problem has on two occasions even referred to the "prerequisite determination" test without referring to the "very subject-matter" test at all. For example, in *Territorial and Maritime Dispute*, the Court cited *Monetary Gold* merely for the proposition that "[t]he Court will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined."[72] And, more recently, in *Croatia v. Serbia*, the Court, when asked to apply the doctrine of indispensable parties to the case before it, merely held:

> [I]t is not necessary for the Court to rule on the legal situation of those States as a prerequisite for the determination of the present claim. The principle discussed by the Court in the *Monetary Gold* case is therefore inapplicable.[73]

As Judge Crawford put it in his dissenting opinion in the *Nuclear Disarmament* cases:

> The case law has . . . set firm limits to the *Monetary Gold* principle. It applies only where a determination

70. Armed Activities on the Territory of the Congo (Dem. Rep. Cong. v. Uganda), 2005 I.C.J. Rep. 168, ¶ 204 (Dec. 19).

71. Application of the Interim Accord of 13 September 1995 (Maced. v. Greece), Judgment, 2011 I.C.J. Rep. 644, ¶ 43 (Dec. 5) (quoting Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. Rep. 240, ¶ 55 (June 26)).

72. Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, ¶ 312 (Oct. 8).

73. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Merits, Judgment, 2015 I.C.J. Rep. 3, ¶ 116 (Feb. 3).

of the legal position of a third State is *a necessary prerequisite* to the determination of the case before the Court.[74]

The practical utility of the "prior determination" test can also be seen in two of the most recent cases applying the doctrine of indispensable parties. In the award on jurisdiction and admissibility in *South China Sea*, even though the tribunal cited the "very subject-matter" test of *Monetary Gold*, its justification for exercising jurisdiction despite Vietnam's claims in the South China Sea lay in the fact that "[t]he legal rights and obligations of Viet Nam . . . do not need to be determined as a *prerequisite* to the determination of the merits of the case."[75] And in the judgment on preliminary objections in *M/V Norstar*, even though the International Tribunal for the Law of the Sea (ITLOS) also relied on the "very subject-matter test," it similarly justified its exercise of jurisdiction by noting that "[t]he decision of the Tribunal on jurisdiction and admissibility does not require the *prior determination* of Spain's rights and obligations."[76]

In conclusion, the doctrine of indispensable parties may be summarized as follows: an international court or tribunal may not exercise jurisdiction over a dispute if the legal interests of an absent State would form the "very subject-matter" of the decision, which is the case if and only if the decision requires a "prerequisite determination" on the legal responsibility of the absent State. In other words, courts and tribunals today generally follow a logic-based approach where they apply the "prerequisite determination" test within the framework of the "very subject-matter" test.

III. The Implicated Issue Problem

A. *The Problem*

In order for an international court or tribunal to exercise jurisdiction over a dispute, it must have both jurisdiction *ra-*

74. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment, ¶ 32 (Oct. 5, 2016) (Crawford, J., dissenting) (emphasis added).
75. South China Sea (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 180 (Oct. 29, 2015) (emphasis added).
76. The M/V "Norstar" Case (Pan. v. It.), Preliminary Objections, Judgment, ¶ 173 (Nov. 4, 2016) (emphasis added).

tione personae over the parties and jurisdiction *ratione materiae* over the issues. In theory, then, if the implicated party problem exists, then an "implicated issue problem" should exist as well. As noted in Part I, the implicated issue problem arises when an international court or tribunal has jurisdiction *ratione materiae* over an issue (i.e., the "inside issue"), but the exercise of such jurisdiction would implicate the exercise of jurisdiction over an issue outside the court or tribunal's jurisdiction *ratione materiae* (i.e., the "outside issue").

As a preliminary matter, three key terms should be defined here. First, as used in this Article, the phrase "exercise of jurisdiction over an issue" refers to *making legal determinations* through the application of *primary* rules of international law. It does not refer to merely *taking into account* other rules of international law, which international courts and tribunals may generally do under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[77] It also does not refer to *secondary* rules of international law, such as the rules on treaty interpretation, State responsibility, and diplomatic protection, which international courts and tribunals may generally apply.

Second, as with the implicated party problem, the word "implicate" here has a broad meaning. It could mean, inter alia, that the exercise of jurisdiction over the inside issue requires a *prior* determination on the outside issue (e.g., in the *ratio decidendi*), implies a *concurrent* determination on the outside issue, or affects a *future* determination on the outside issue.

Third, the phrase "outside issue" does not refer to issues to which there is an express *renvoi*, general or specific. In such a case, the implicated issue is usually considered to fall within the jurisdiction *ratione materiae* of the court or tribunal. For example, in *Mavrommatis Concessions*, the Permanent Court of International Justice (PCIJ) had jurisdiction over the interpretation or application of the Mandate for Palestine,[78] Article 11 of which contained a *renvoi* to "international obligations,"[79]

77. Article 31(3)(c) provides: "There shall be taken into account, together with the context . . . [a]ny relevant rules of international law applicable in the relations between the parties." Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.

78. Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), Jurisdiction, Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 10–11 (Aug. 30).

79. *Id.* at 17.

thereby allowing the PCIJ to apply Protocol XII to the Treaty of Lausanne.[80] In light of this *renvoi*, despite language in the judgment that could be interpreted as suggesting otherwise,[81] this case was not one dealing with the implicated issue problem.

As with the implicated party problem, the implicated issue problem gives rise to two questions. The first question is whether the court or tribunal may exercise jurisdiction over the inside issue despite the fact that this exercise of jurisdiction necessarily implicates the exercise of jurisdiction over the outside issue (i.e., the "indispensable issue question"). The second question is whether the court or tribunal may exercise jurisdiction over the outside issue in light of the fact that this exercise of jurisdiction is necessarily implicated by the exercise of jurisdiction over the inside issue (i.e., the "incidental issue question"). Just as with the two questions for the implicated party problem, the answers to the indispensable issue question and the incidental issue question must be the same. Unlike the implicated party problem, however, courts, tribunals, and commentators have examined the implicated issue problem from the perspective of both questions. Notably, debates over the second question often come under the heading of "incidental jurisdiction."

Like Part II, this Part examines the implicated issue problem primarily from the perspective of the indispensable issue question. But since an answer to the incidental issue question is effectively also an answer to the indispensable issue question, this Part will also examine cases that have dealt only expressly with the incidental issue question.

It should be noted here that, unlike the indispensable party question, the indispensable issue question is usually considered as one of jurisdiction rather than admissibility. This Article once again does not take a position on this classification, but for consistency it will treat the question as one of jurisdiction.

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80. *Id.* at 28.

81. *See id.* ("[T]he Court is not competent to interpret and apply . . . [Protocol XII] as such, for it contains no clause submitting to the Court disputes on this subject. On the other hand, the Court has jurisdiction to apply [Protocol XII] in so far as this is made necessary by Article 11 of the Mandate [for Palestine].").

B. *Theoretical Framework*

As with the implicated party problem, there are two general approaches to the implicated issue problem: the characterization approach and the logic-based approach. The characterization approach asks the court or tribunal to characterize the dispute as one relating to the inside issue or the outside issue. If the dispute relates more to the former, then the court or tribunal may exercise jurisdiction over the dispute. If the dispute relates more to the latter, then it may not. This approach is consistent with the general approach of international courts and tribunals towards their jurisdiction *ratione materiae*, under which they often seek to identify the subject-matter of the dispute before them in order to determine whether it falls within their jurisdiction.[82]

The logic-based approach, on the other hand, asks the court or tribunal to determine the logical relationship between the exercise of jurisdiction over the inside issue and the exercise of jurisdiction over the outside issue. In particular, the court or tribunal must determine whether the exercise of jurisdiction over the inside issue requires a *prior* determination on the outside issue (e.g., in the *ratio decidendi*), implies a *concurrent* determination on the outside issue, or affects a *future* determination of the outside issue. Under the "prior determination" test, expressly or impliedly adopted by some courts and tribunals as seen below in Section III.C, if the exercise of jurisdiction over the inside issue requires a prior determination on the outside issue, then the court or tribunal may not exercise jurisdiction over the dispute. Notably, the "prior determination" test is analogous to the "prerequisite determination" test propounded by the ICJ.

For the implicated party problem, as discussed in Part II, international courts and tribunals today consistently apply a logic-based approach (i.e., the "prerequisite determination" test within the framework of the "very subject-matter" test). For the implicated issue problem, however, international courts and tribunals have not followed a consistent approach.

82. *See, e.g.*, Fisheries Jurisdiction (Spain v. Can.), Jurisdiction, Judgment, 1998 I.C.J. Rep. 432, ¶¶ 29–35 (Dec. 4); Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Preliminary Objection, Judgment, 2015 I.C.J. Rep. 592, ¶¶ 31–34 (Sept. 24).

C. *Jurisprudence*

As far as the author is aware, no court, tribunal, or commentator has compiled or attempted to compile a list of cases dealing with the implicated issue problem. This is an attempt to do so, while recognizing that many cases may be unintentionally omitted from this list.

1. *Certain German Interests (Germany v. Poland)*

The implicated issue problem arose in one of the PCIJ's earliest cases, *Certain German Interests.*[83] In this case, Germany instituted proceedings against Poland, relying on Article 23(1) of the Upper Silesia Convention as its jurisdictional basis.[84] Article 23(1) granted jurisdiction to the PCIJ over "differences of opinion respecting the construction and application of Articles 6 to 22 [of the Upper Silesia Convention]."[85] Article 6 provided that, with an array of exceptions, Poland could not expropriate any property owned by German nationals in Polish Upper Silesia.[86] In its pleadings, Germany claimed that Poland had violated Article 6 by expropriating a nitrate factory owned by a German national.[87] Poland, however, argued that the German national did not lawfully own the nitrate factory because Germany had transferred the property to the national in violation of three international agreements—the Armistice Convention, the Protocol of Spa, and the Treaty of Versailles.[88] The implicated issue problem thus arose because the Court's exercise of jurisdiction over the alleged violation of the Upper Silesia Convention (i.e., the inside issue) would implicate the alleged violations of these three international agreements outside the Court's jurisdiction *ratione materiae* (i.e., the outside issues).

The Court ultimately held that it had jurisdiction not only to apply the Upper Silesia Convention—answering the indis-

83. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Preliminary Objections, Judgment, 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25).

84. *Id.* at 13.

85. *Id.*

86. *Id.* at 16 ("Except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia.").

87. *Id.* at 5–6.

88. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Merits, Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 25 (May 25).

pensable issue question in the affirmative—but also to interpret the three international agreements—answering the incidental issue question in the affirmative.[89] In its judgment on preliminary objections, the Court held:

> It is true that the application of the [Upper Silesia Convention] is hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and the other international stipulations cited by Poland. But these matters then constitute merely questions preliminary or incidental to the application of the [Upper Silesia Convention]. Now the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction.[90]

Through this passage, the Court appeared to take a logic-based approach and potentially also a characterization approach to the incidental issue question. It took a logic-based approach by stating that it could answer questions "preliminary" to the application of the Upper Silesia Convention. It may have also taken a characterization approach by stating that it could answer questions "incidental" to the application of the Upper Silesia Convention. The word "incidental" here is ambiguous: it could mean "preliminary" (suggesting a logic-based approach), but it could also mean "minor" (suggesting a characterization approach). One could argue that the impact of the Court's statement is slightly mitigated by the fact that the Court held that it had jurisdiction only over the "interpretation" of the outside international agreements, not their "application."[91] Nevertheless, in its decision on the merits, the Court indeed undertook to apply the other international agreements to the case before it.[92]

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89. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Preliminary Objections, Judgment, 1925 P.C.I.J. (ser. A) No. 6, at 18 (Aug. 25).

90. *Id.*

91. *Id.*

92. On the merits, the Court found that Poland was not a party to either the Armistice Convention or the Protocol of Spa, so they were inapplicable. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Merits, Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 27–29 (May 25). As for the Treaty of Versailles, the Court observed that the treaty did not contain any prohibition on alienation, let alone one that would apply before entry into force of the

Despite the ambiguity in the Court's holding, one thing is clear: the Court rejected a "prior determination" test. This is evident because the Court held that it could apply the Upper Silesia Convention even though it acknowledged that the interpretation of other treaties was "preliminary" to the application of the Upper Silesia Convention.[93] Had the Court adopted a "prior determination" test, it would have found that it could not exercise jurisdiction over the Upper Silesia Convention.

2. *Aegean Sea Continental Shelf (Greece v. Turkey)*

Fifty years after the PCIJ's judgment in *Certain German Interests*, the implicated issue problem arose again, but this time in an ICJ case: *Aegean Sea Continental Shelf*.[94] In this case, Greece instituted proceedings against Turkey, requesting the Court to, inter alia, delimit the continental shelf between the two States.[95] Greece based the jurisdiction of the Court on, inter alia, the General Act for the Pacific Settlement of International Disputes (the General Act).[96] Greece, however, had made a reservation to the General Act that excluded "disputes relating to the territorial status of Greece,"[97] which the Court considered to include issues of entitlement to the continental shelf.[98] The implicated issue problem thus arose because the Court had jurisdiction over the delimitation issue (i.e., the inside issue), but the exercise of such jurisdiction would implicate the issue of entitlement to the continental shelf that fell

treaty. *Id.* at 29–31. As a result, the Court concluded that none of these instruments interfered with Poland's obligation to not expropriate any property owned by German nationals in Polish Upper Silesia. *Id.* at 31.

93. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Preliminary Objections, Judgment, 1925 P.C.I.J. (ser. A) No. 6, at 18 (Aug. 25).

94. Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. Rep. 3 (Dec. 19).

95. *Id.* ¶ 12(ii).

96. *Id.* ¶ 33.

97. *Id.* ¶ 48(b). To be precise, Greece's reservation excluded "disputes concerning questions which by international law are solely within the domestic jurisdiction of States, and in particular disputes relating to the territorial status of Greece." *Id.* The Court held that this clause "comprises two reservations, one of disputes concerning questions of domestic jurisdiction and the other a distinct and autonomous reservation of 'disputes relating to the territorial status of Greece.'" *Id.* ¶ 68.

98. *Id.* ¶ 84.

outside the Court's jurisdiction *ratione materiae* (i.e., the outside issue).

The Court held that it could not exercise jurisdiction over the delimitation issue—answering the indispensable issue question in the negative.[99] In doing so, the Court at first appeared to adopt a characterization approach: it decided that it had to identify "the subject-matter of the dispute,"[100] not unlike how the Court sought to identify the "very subject-matter" of the decision in *Monetary Gold.* Nevertheless, in identifying the subject-matter of the dispute, the Court followed a logic-based approach by adopting a version of the "prior determination" test. It found:

> The very essence of the dispute, as formulated in the Application, is . . . the entitlement of [the] Greek islands to a continental shelf, and the delimitation of the boundary is a secondary question *to be decided after,* and in the light of, the decision upon the first basic question.[101]

In light of this reasoning, the Court held that the dispute fell within Greece's reservation, such that the Court did not have jurisdiction over the delimitation dispute.[102] This reasoning resembles a logic-based approach because the Court examined the logical relationship between the exercise of jurisdiction over the dispute and the determination of the outside issue, noting in particular that the former was "to be decided after" the latter.

The Court's approach to the implicated issue problem in *Aegean Sea Continental Shelf* is thus much like the Court's modern approach to the implicated party problem, as exemplified in *Certain Phosphate Lands* and *East Timor.* That is, the Court applied a logic-based approach (i.e., a version of the "prior determination" test) within the framework of a characterization approach (i.e., a "subject-matter" test).

3. *Pedra Branca (Malaysia/Singapore)*

Thirty years after its judgment in *Aegean Sea Continental Shelf,* the ICJ appeared to impliedly apply the "prior determi-

99. *Id.* ¶ 109.
100. *Id.* ¶ 82.
101. *Id.* ¶ 83 (emphasis added).
102. *Id.* ¶ 90.

nation" test to the implicated issue problem in *Pedra Branca*.[103] In this case, Malaysia and Singapore concluded a special agreement wherein they requested the ICJ to determine who had sovereignty over three maritime features: Pedra Branca, Middle Rocks, and South Ledge.[104] The Court held that Singapore had sovereignty over Pedra Branca,[105] Malaysia had sovereignty over Middle Rocks,[106] but with regards to South Ledge, the implicated issue problem arose.[107]

Unlike Pedra Branca or Middle Rocks, South Ledge constituted a low-tide elevation,[108] and was therefore subject to the rule that "a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea."[109] And since South Ledge lay within twelve nautical miles—the breadth of the territorial sea[110]—of both Pedra Branca and Middle Rocks,[111] the determination of who had sovereignty over South Ledge depended entirely on the maritime delimitation between the territorial seas of Malaysia and Singapore. The problem was that, by virtue of the special agreement, the Court had jurisdiction only to settle the sovereignty dispute, not to delimit the territorial seas of the two States.[112] In more general terms, the implicated issue problem arose because the Court had jurisdiction over the sovereignty issue (i.e., the inside issue), but the exercise of such jurisdiction would implicate the delimitation issue that fell outside the Court's jurisdiction *ratione materiae* (i.e., the outside issue).

The Court effectively held that it could not exercise jurisdiction over the sovereignty dispute, but it did not say so expressly. Rather, it simply stated that "sovereignty over South Ledge . . . belongs to the State in the territorial waters of which

103. Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), Judgment 2008 I.C.J. Rep. 12 (May 23).
104. *Id.* ¶¶ 2, 31.
105. *Id.* ¶ 277.
106. *Id.* ¶ 290.
107. *See id.* ¶¶ 291–99.
108. *See id.* ¶ 291.
109. *See id.* ¶ 295 (quoting Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Merits, Judgment, 2001 I.C.J. Rep. 40, ¶ 204 (Mar. 16)).
110. UNCLOS, *supra* note 1, art. 3.
111. Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), 2008 I.C.J. Rep. 12, ¶ 297 (May 31).
112. *Id.* ¶ 298.

it is located."[113] Unlike in *Aegean Sea Continental Shelf*, the Court did not expressly adopt a characterization approach or a logic-based approach. But, this simple sentence revealed that the Court was taking a logic-based approach to the implicated issue problem. That is, the Court refused to exercise jurisdiction over the sovereignty issue because a determination on the sovereignty issue required a prior determination on the delimitation issue.

4. *Chagos Marine Protected Area (Mauritius v. United Kingdom)*

Like the PCIJ in *Certain German Interests*, the UNCLOS tribunal in *Chagos Marine Protected Area* impliedly rejected a "prior determination" test for the implicated issue problem.[114] As early as 1980, Mauritius and the United Kingdom had each claimed sovereignty over the Chagos Archipelago.[115] After the United Kingdom established a marine protected area (MPA) around the archipelago in 2010, Mauritius instituted UNCLOS proceedings against the United Kingdom.[116] Mauritius's first submission was that "the United Kingdom is not entitled to declare [the MPA] because it is not the 'coastal State' within the meaning of [UNCLOS]."[117] The implicated issue problem arose because the tribunal had jurisdiction over the validity of the MPA (i.e., the inside issue), but the exercise of such jurisdiction would implicate the issue of territorial sovereignty over the Chagos Archipelago (i.e., the identity of the relevant "coastal State"), which fell outside the tribunal's jurisdiction *ratione materiae* (i.e., the outside issue).

In addressing the indispensable issue question, the tribunal adopted a characterization approach. In order to determine whether it still had jurisdiction over the dispute, the tribunal first sought to characterize the dispute.[118] In making this evaluation, the tribunal observed:

> There is an extensive record, extending across a range of fora and instruments, documenting the Par-

113. *Id.* ¶ 299.
114. Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, Award (Mar. 18, 2015).
115. *Id.* ¶ 103.
116. *Id.* ¶ 14.
117. *Id.* ¶ 158.
118. *See id.* ¶¶ 208, 211.

> ties' dispute over sovereignty. . . . Moreover, . . . the consequences of a finding that the United Kingdom is not the coastal State extend well beyond the question of the validity of the MPA.[119]

As a result, the tribunal concluded that "the Parties' dispute . . . is properly characterized as relating to land sovereignty over the Chagos Archipelago,"[120] leading it to the conclusion that it did not have jurisdiction over Mauritius's first submission.[121] Notably, an application of the prior determination test would have led it to the same conclusion. Since the determination of the "coastal State" within the meaning of UNCLOS required a prior determination on the sovereignty issue, the tribunal could not exercise its jurisdiction. Nevertheless, as seen in the quote excerpted above, the tribunal relied not on this prior determination analysis, but rather on the historical record of the dispute and the consequences of its decision to find that it did not have jurisdiction.

Notably, the tribunal in *obiter dicta* also addressed the incidental issue question. The tribunal held:

> As a general matter, the Tribunal concludes that, where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or 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.[122]

The tribunal thus held that a determination of law would have to be "ancillary" and "necessary" in order for it to exercise incidental jurisdiction over that issue. The "necessary" criterion demonstrates a logic-based approach, whereas the "ancillary" criterion could reflect a characterization or logic-based approach. Regardless, the mere presence of the logic-based "necessary" criterion is further evidence of the tribunal's rejection of a "prior determination" test for the implicated issue problem. The reason is that, had the tribunal accepted a "prior determination" test, then it would never have incidental jurisdiction—and would not need to have made that statement of

119. *Id.* ¶ 211.
120. *Id.* ¶ 212.
121. *Id.* ¶ 221.
122. *Id.* ¶ 220.

obiter dicta above—because any outside issue that is "necessary" to resolve the dispute would have rendered the tribunal without jurisdiction to do so.

5. *South China Sea (Philippines v. China)*

In *South China Sea*,[123] another UNCLOS tribunal took a logic-based approach to the indispensable issue question by adopting the "prior determination" test, at least in part. As is now well known, the Philippines and China had long been involved in a complex regional dispute in the South China Sea concerning, inter alia, territorial sovereignty over maritime features (i.e., sovereignty issues) and the maritime entitlements of States in the region (i.e., entitlement issues).[124] In January 2013, the Philippines instituted UNCLOS proceedings against China, requesting, inter alia, that the tribunal specify the maritime entitlements of certain maritime features in the South China Sea.[125] The implicated issue problem arose because the tribunal had jurisdiction over the entitlement issues, but the exercise of such jurisdiction would arguably implicate sovereignty issues, which fell outside the jurisdiction of the tribunal.[126]

In order to determine whether it had jurisdiction over the dispute, the tribunal proceeded to identify and characterize the dispute.[127] In order to do so, the tribunal held:

> The Tribunal might consider that the Philippines' Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines' claims would *require the Tribu-*

123. South China Sea (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 45 (Oct. 29, 2015).

124. *See* THE SOUTH CHINA SEA DISPUTES AND LAW OF THE SEA (S. Jayakumar et al. eds., 2014); THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL, LEGAL AND REGIONAL PERSPECTIVES (Leszek Buszynski & Christopher B. Roberts eds., 2015); Bing Bing Jia & Stefan Talmon, *Introduction*, *in* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 1, 2–8 (Stefan Talmon & Bing Bing Jia eds., 2014).

125. This claim can be seen in the Philippines' third, fourth, sixth, and seventh submissions. South China Sea (Phil. v. China), PCA Case No. 2013-19, Award, ¶¶ 112(B)(3), 112(B)(4), 112(B)(6), 112(B)(7) (July 12, 2016).

126. *See supra* note 8.

127. South China Sea (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶¶ 130–31 (Oct. 29, 2015).

> *nal to first render a decision on sovereignty,* either expressly or implicitly; or (b) the actual objective of the Philippines' claims was to advance its position in the Parties' dispute over sovereignty.[128]

The tribunal found that neither of these two elements was true,[129] and therefore upheld its jurisdiction over the dispute.[130]

As seen in the quote above, the tribunal directly applied a "prior determination" test. The tribunal, however, added an alternative element to the test: whether the actual objective of the applicant's claims was to advance its position in the dispute concerning the outside issue.

6. *The Outer Continental Shelf Delimitations*

The ICJ, ITLOS, and arbitral tribunals have also faced the implicated issue problem in the context of maritime delimitation. In *St. Pierre and Miquelon (Canada/France),*[131] *Barbados v. Trinidad and Tobago,*[132] *Nicaragua v. Honduras,*[133] *Bangladesh/Myanmar,*[134] *Territorial and Maritime Dispute (Nicaragua v. Colombia),*[135] *Bangladesh v. India,*[136] *Delimitation Beyond 200 Nautical Miles (Nicaragua v. Colombia),*[137] and *Ghana/Côte d'Ivoire,*[138] the

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128. *Id.* ¶ 153 (emphasis added).

129. *Id.*

130. *Id.*

131. Delimitation of Maritime Areas Between Canada and France (Can./Fr.), Decision, 31 I.LM. 1145, ¶ 77–79 (June 10, 1992).

132. Arbitration Between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them (Barb. v. Trin. & Tobago), PCA Case No. 2004-02, Decision, ¶ 368 (Apr. 11, 2006).

133. Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, ¶ 319 (Oct. 8).

134. Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl./Myan.), ITLOS Case No. 16, Judgment, ¶¶ 360–94 (Mar. 14, 2012).

135. Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶¶ 125–31 (Nov. 19).

136. Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), PCA Case No. 2010-16, Award, ¶¶ 74–83 (July 7, 2014).

137. Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objections, Judgment, 2016 I.C.J. Rep., ¶¶ 97–115 (Mar. 17).

court or tribunal considered whether it could delimit the outer continental shelf, that is, the continental shelf beyond 200 nautical miles. The complicating factor is that Article 76(8) of UNCLOS contains a procedure for how a coastal State establishes the outer limits of its continental shelf: (1) the State must make submissions to the Commission on the Limits of the Continental Shelf (CLCS); (2) the CLCS makes recommendations to the State; and (3) the State establishes the limits of the shelf on the basis of the CLCS recommendations.[139] Without going through this process, a coastal State cannot lawfully claim an outer continental shelf.

The implicated issue problem arose in each of these eight cases because the delimitation of the outer continental shelf between two States (i.e., the inside issue) necessarily implicates the delineation of the limits of the outer continental shelf for the two States (i.e., the outside issue). Specifically, delimiting the outer continental shelf presumes that each of the parties to the dispute have established an outer continental shelf. Nevertheless, in all of the aforementioned cases, at least one party to the dispute had not yet formally established the limits of its outer continental shelf in accordance with the procedure provided in Article 76(8) of UNCLOS. As a result, in five of the eight cases, one of the parties argued that the court or tribunal could not delimit the outer continental shelf because it would interfere with the Article 76 procedure.[140]

The international courts and tribunals that have considered whether they may delimit the outer continental shelf in

138. Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), ITLOS Case No. 23, Judgment, ¶¶ 489–95 (Sept. 23, 2017).

139. UNCLOS, *supra* note 1, art. 76(8).

140. Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objections, Judgment, 2016 I.C.J. Rep. 154, ¶¶ 99–100 (Mar. 17); Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶¶ 122–24 (Nov. 19); Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl./Myan.), ITLOS Case No. 16, Judgment, ¶ 345 (Mar. 14, 2012); Arbitration Between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them (Barb. v. Trin. & Tobago), PCA Case No. 2004-02, Decision, ¶ 82 (Apr. 11, 2006); Delimitation of Maritime Areas Between Canada and France (Can./Fr), Decision, 31 I.LM. 1145, ¶ 76 (June 10, 1992).

the absence of both parties having followed the Article 76 procedure are divided. There appears, however, to be a majority in favor of delimiting the outer continental shelf. In *St. Pierre and Miquelon (Canada/France)*,[141] *Nicaragua v. Honduras*,[142] and *Territorial and Maritime Dispute (Nicaragua v. Colombia)*,[143] the court or tribunal held that it could not delimit the outer continental shelf. But in *Barbados v. Trinidad and Tobago*,[144] *Bangladesh/Myanmar*,[145] *Bangladesh v. India*,[146] *Delimitation Beyond 200 Nautical Miles (Nicaragua v. Colombia)*,[147] and *Ghana/Côte d'Ivoire*,[148] the court or tribunal held—or at least appeared to hold—that it could.

The reasons why the court or tribunal decided the way it did vary. In the ICJ's most recent judgment on the question, in *Delimitation Beyond 200 Nautical Miles (Nicaragua v. Colombia)*, the Court appeared to apply the "prior determination" test. It held:

> [S]ince the delimitation of the continental shelf beyond 200 nautical miles can be undertaken independently of a recommendation from the CLCS, the lat-

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141. Delimitation of Maritime Areas Between Canada and France (Can./Fr.), Decision, 31 I.LM. 1145, ¶ 79 (June 10, 1992).

142. Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, ¶ 319 (Oct. 8).

143. Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶¶ 129, 131 (Nov. 19).

144. Arbitration Between Barbados and the Republic of Trinidad and Tobago, Relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between Them (Barb. v. Trin. & Tobago), PCA Case No. 2004-02, Decision, ¶¶ 217, 368 (Apr. 11, 2006). Notably, the tribunal did not actually delimit the outer continental shelf. *Id.* ¶ 368; *see* STEPHEN FIETTA & ROBIN CLEVERLY, A PRACTITIONER'S GUIDE TO MARITIME BOUNDARY DELIMITATION 437–38 (2016).

145. Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl./Myan.), ITLOS Case No. 16, Judgment, ¶ 394 (Mar. 14, 2012).

146. Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), PCA Case No. 2010-16, Award, ¶ 83 (July 7, 2014).

147. Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objections, Judgment, 2016 I.C.J. Rep. 100, ¶¶ 114–15 (Mar. 17).

148. Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), ITLOS Case No. 23, Judgment, ¶ 495 (Sept. 23, 2017).

> ter is not a *prerequisite* that needs to be satisfied by a State party to UNCLOS before it can ask the Court to settle a dispute with another State over such a delimitation.[149]

In applying the test, the Court thus concluded that undertaking an outer continental shelf delimitation did not require prior action from the CLCS. Nevertheless, one must wonder, if the three-step delimitation methodology is applied to the outer continental shelf, how a court or tribunal can identify the "relevant area" and conduct a disproportionality analysis without first knowing the exact extent of the outer continental shelf.

7. *The Mexican Sugar Investor-State Arbitrations*

At around the same time of the *Pedra Branca* dispute, three investor-State tribunals were also dealing with the implicated issue problem in the context of countermeasures, and they too appeared to adopt the "prior determination" test. The disputes arose in 2001, when Mexico imposed a twenty percent tax on the importation of any drink that used high fructose corn syrup as a sweetener.[150] In response, three U.S. investors—Archer Daniels Midland (*ADM v. Mexico*),[151] Corn Products International (*CPI v. Mexico*),[152] and Cargill (*Cargill v. Mexico*)[153]—instituted arbitration proceedings against Mexico under Chapter XI of the North American Free Trade Agreement (NAFTA). In all three cases, Mexico argued, inter alia, that if the imposition of the tax breached its obligations under Chapter XI of NAFTA, the wrongfulness of this conduct could be precluded on the basis of countermeasures, since the United States had allegedly violated other provisions of

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149. Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objections, Judgment, 2016 I.C.J. Rep. 100, ¶ 114 (Mar. 17) (emphasis added).

150. Archer Daniels Midland Co. v. United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, ¶ 82 (Nov. 21, 2007).

151. *Id.*

152. Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (Jan. 15, 2008).

153. Cargill, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009).

NAFTA.[154] The implicated issue problem arose because the tribunals had jurisdiction *ratione materiae* over the alleged violation of Chapter XI, but not over the alleged violation of other NAFTA provisions. As the *CPI v. Mexico* tribunal noted:

> Mexico maintained that it was entitled to take countermeasures because the United States had violated [other] obligations under the NAFTA . . . . But the Tribunal . . . does not have jurisdiction to determine whether any provision of the NAFTA falling outside Chapter XI has been violated. How, then, can the Tribunal determine whether the HFCS tax was a response to *a prior violation of international law*? And if it cannot determine that this requirement of a lawful countermeasure is satisfied, how can it uphold Mexico's countermeasures defence?[155]

All three tribunals ultimately avoided the problem. The *ADM v. Mexico* tribunal held that the other requirements for countermeasures were not met, so that in any case the tax was not a valid countermeasure.[156] And the *CPI v. Mexico* and *Cargill v. Mexico* tribunals held that, as a general matter, Mexico could not invoke countermeasures against an investor in Chapter XI proceedings.[157]

In *obiter dicta*, however, the *ADM v. Mexico* and *CPI v. Mexico* tribunals appeared to support the "prior determination" test. The *ADM v. Mexico* tribunal held that had the other requirements for countermeasures been satisfied, it would have to consider Mexico's request for a stay of the proceedings.[158]

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154. Cargill, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, ¶ 379 (Sept. 18, 2009); Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶ 150 (Jan. 15, 2008); Archer Daniels Midland Co. v. United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, ¶¶ 110, 124 (Nov. 21, 2007).

155. Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶ 182 (Jan. 15, 2008) (emphasis added).

156. Archer Daniels Midland Co. v. United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, ¶¶ 180, 182 (Nov. 21, 2007).

157. Cargill, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/05/2, Award, ¶¶ 385, 429 (Sept. 18, 2009); Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶ 161 (Jan. 15, 2008).

158. Archer Daniels Midland Co. v. United Mexican States, ICSID Case No. ARB(AF)/04/05, Award, ¶ 133 (Nov. 21, 2007).

And the *CPI v. Mexico* tribunal suggested that Mexico could not succeed on its countermeasures defense because Mexico had the burden of proof for establishing each of the requirements for countermeasures.[159] In both cases, the tribunals thus agreed that they would not be able to make an affirmative finding on Mexico's defense of countermeasures because doing so required a prior determination on the lawfulness of the U.S. measures.

D. *Pending Disputes*

1. *Ukraine v. Russia*

As noted above in Part I, Ukraine instituted proceedings against Russia under UNCLOS in September 2016.[160] Ukraine seeks "to vindicate its rights as the coastal state in maritime zones adjacent to Crimea in the Black Sea, Sea of Azov, and Kerch Strait."[161] Ukraine should have no problem identifying a plethora of UNCLOS provisions of which the dispute concerns the interpretation and application. The tribunal, however, may confront the implicated issue problem because the exercise of jurisdiction over the dispute would implicate the issue of territorial sovereignty over Crimea. Under the "land dominates the sea" principle,[162] Russia's alleged violation of Ukrainian rights in the maritime zones adjacent to Crimea would require a prior determination on the question of who has sovereignty over Crimea.

There appears to be at least one way of getting around the implicated issue problem. The UNCLOS tribunal could—although it would most certainly be controversial—treat Ukraine's sovereignty over Crimea as an established fact. After all, according to Ukraine, Russia violated the prohibition on the use of force and the principle of territorial integrity in annexing Crimea, and, under the principle of *ex injuria jus non oritur* ("facts which flow from wrongful conduct [cannot] determine the law").[163] Moreover, the U.N. General Assembly,[164]

159. *See* Corn Products Int'l, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶ 189 (Jan. 15, 2008).
160. *Ukrainian Statement on Arbitration, supra* note 1.
161. *Ukrainian Statement on Arbitration, supra* note 1.
162. *See supra* note 7.
163. Gabçikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, ¶ 133 (Sept. 25).

the Venice Commission,[165] the Chair of the Organization for Security and Co-operation in Europe,[166] and many commentators[167] have considered the Crimea referendum to be invalid. Under this theory, Ukraine would argue that its sovereignty over Crimea is a factual matter, such that the only relevant legal dispute for the UNCLOS tribunal is whether Russia interfered with its rights in the maritime zones adjacent to Crimea.

2. *The Crimea Investor-State Arbitrations*

A similar story may be told about the Crimea investor-State arbitrations. As of September 2017, Ukrainian investors have instituted at least eight investor-State arbitrations against Russia under the Russia-Ukraine Bilateral Investment Treaty (BIT) with regard to their investments in Crimea.[168] Article 9

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164. G.A. Res. 68/262, ¶ 5 (Mar. 27, 2014).

165. Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Opinion on "Whether the Decision Taken By the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum Becoming a Constituent Territory of the Russian Federation or Restoring Crimea's 1992 Constitution is Compatible with Constitutional Principles,"* Opinion No. 762/2014, ¶¶ 27–28 (2014).

166. Organization for Security and Co-operation in Europe [OSCE], *OSCE Chair Says Crimean Referendum in its Current Form is Illegal and Calls for Alternative Ways to Address the Crimean Issue* (Mar. 11, 2014), http://www.osce.org/cio/116313.

167. *E.g.*, Kryvoi & Tsarova, *supra* note 30 ("There is a strong argument that non-recognition by nearly all states in the world of Crimea's annexation means that under international law Crimea is not a part of Russia . . . ."); Vasani, *supra* note 30 ("The international community, including the United Nations, is likely to continue to see Crimea as part of Ukraine under international law . . . .").

168. The eight publicly known cases are: (1) Aeroport Belbek LLC v. Russian Federation, PCA Case No. 2015-07, https://pca-cpa.org/en/cases/123; (2) PJSC CB PrivatBank v. Russian Federation, PCA Case No. 2015-21, https://pca-cpa.org/en/cases/130; (3) Ltd. Liab. Co. Lugzor v. Russian Federation, PCA Case No. 2015-29, https://pca-cpa.org/en/cases/124; (4) Stabil LLC v. Russian Federation, PCA Case No. 2015-35, https://pca-cpa.org/en/cases/122; (5) PJSC Ukrnafta v. Russian Federation, PCA Case No. 2015-34, https://pca-cpa.org/en/cases/121; (6) Everest Estate LLC v. Russian Federation, PCA Case No. 2015-36, https://pca-cpa.org/en/cases/133/; (7) NJSC Naftogaz of Ukraine v. Russian Federation, PCA Case No. 2017-16, https://pca-cpa.org/en/cases/151/; and (8) Oschadbank v. Russian Federation. For information on the first seven cases, see Permanent Court of Arbitration, *Cases*, https://pca-cpa.org/en/cases/. For information on the eighth case, see Luke Eric Peterson, *In the First of a Possible Wave of BIT Claims by Ukraine State-owned Entities Against Russia, an UNCITRAL Tribunal Is Finalized*, INV. ARB. REPORTER (Aug. 14, 2016), https://www.iareporter.com/

of the BIT grants the tribunals jurisdiction over the investment disputes.[169] Nevertheless, the implicated issue problem arises because Article 1(1) of the BIT defines "investment" as "all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the *territory* of the other Contracting Party in conformity with the latter's legislation,"[170] and investor-State tribunals generally do not have jurisdiction over territorial sovereignty disputes.

If the tribunals were to adopt the "prior determination" test, they would likely find that they do not have jurisdiction over the dispute because the tribunal would first have to determine whether Crimea is part of the "territory of Russia" to see whether the investments are protected under the BIT. Nevertheless, as of September 2017, five of the eight tribunals have rendered decisions on jurisdiction without dismissing their respective proceedings,[171] suggesting that they have not adopted

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articles/in-the-first-of-a-possible-wave-of-bit-claims-by-ukraine-state-owned-entities-against-russia-an-uncitral-tribunal-is-finalized/; Lacey Yong, *Russia faces US$2.6 Billion Claim Over Losses in Crimea*, GLOBAL ARB. REV. (Oct. 20, 2016), http://globalarbitrationreview.com/article/1069603/russia-faces-ususd26-billion-claim-over-losses-in-crimea. For information on a potential ninth case, *DTEK Krymenergo v. Russian Federation*, see *Russia BIT Claims: Recent Developments in Arbitrations Against the Russian Federation*, INV. ARB. REP. (Apr. 13, 2017), https://www.iareporter.com/articles/russia-bit-claims-recent-developments-in-arbitrations-against-the-russian-federation/; Lacey Yong, *More Crimea Claims Clear Threshold*, GLOBAL ARB. REV. (July 4, 2017), http://globalarbitrationreview.com/article/1143949/more-crimea-claims-clear-threshold.

169. Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments art. 9, Russ.-Ukr., Nov. 27, 1998, 7 Bulletin of International Treaties 18–23 (Russ.) [hereinafter Russia-Ukraine BIT].

170. *Id.* art. 1(1) (emphasis added). Most BITs use similar language. States can, however, specify the exact meaning of the word "territory" in their BITs. For example, Article 1(c) of the Netherlands-Venezuela BIT provides: "[T]he term 'territory' includes the maritime areas adjacent to the coast of the State concerned, to the extent to which that State exercises sovereign rights or jurisdiction in those areas according to international law." Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Venez., Oct. 22, 1991, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2094.

171. Press Release, Permanent Court of Arbitration, Arbitration Between Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky as Claimants and the Russian Federation: The Tribunal Issues Its Interim Award (Mar. 9, 2017), https://pcacases.com/web/sendAttach/2090; Press Release, Permanent Court of Arbitration, Arbitration Between Everest Estate LLC and Others as Claimants and the Russian Federation: The Tribunal Issues Its De-

the "prior determination" test. But, neither the decisions nor the written and oral submissions of the parties are publicly available. As a result, it is not clear whether these five tribunals made a determination on sovereignty over Crimea.

It should be noted that the investor-State tribunals could avoid the implicated issue problem in a number of ways.[172] First, the tribunals could, like the *Ukraine v. Russia* tribunal, find that, as a factual matter, Ukraine has sovereignty over Crimea, such that there is no legal dispute concerning sovereignty over Crimea.[173] Second, the tribunals could interpret Article 1(1) of the BIT to require only that the investment be in territory under the "effective control" and/or "jurisdiction and/or control" of Russia.[174] Third, the tribunals could hold that the word "territory" in Article 1(1) should be interpreted in reference to the time at which the BIT was concluded.[175] As the argument would go, Russia consented only to apply investment protection over its "territory" as it existed at the time it signed the BIT. Nevertheless, this argument could possibly contradict the customary "moving treaty frontiers" rule.[176] Fourth, along the same lines, the tribunals could emphasize that Article 1(1) requires that the investment be "*put in* by the investor of one Contracting Party *on the territory* of the other

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cision on Jurisdiction (Apr. 5, 2017), https://pcacases.com/web/sendAttach/2105; Press Release, Permanent Court of Arbitration, Arbitration Between PJSC Privatbank and Finance Company Finilon LLC as Claimants and the Russian Federation: The Tribunal Issues Its Interim Award (Mar. 9, 2017), https://www.pcacases.com/web/sendAttach/2093; Press Release, Permanent Court of Arbitration, Arbitration Between PJSC Ukrnafta as Claimant and the Russian Federation—Arbitration Between Stabil LLC and Ten Others as Claimants and the Russian Federation: The Tribunal Issues Its Awards on Jurisdiction (July 4, 2017), https://www.pcacases.com/web/sendAttach/2184.

172. For details, see Peter Tzeng, *Investments on Disputed Territory: Indispensable Parties and Indispensable Issues*, 14 BRAZILIAN J. INT'L L. 122, 132–34 (2017) (outlining five possible ways that the tribunals could find or decline jurisdiction, all while avoiding the doctrine of indispensable parties).

173. *See supra* text accompanying notes 163–167.

174. *See* Richard Happ & Sebastian Wuschka, *Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories*, 33 J. INT'L ARB. 245, 260 (2016).

175. Kryvoi & Tsarova, *supra* note 30.

176. Vienna Convention on Succession of States in Respect of Treaties art. 15, Aug. 23, 1978, 1946 U.N.T.S. 3.

Contracting Party *in conformity with the latter's legislation.*"[177] Accordingly, regardless of which State currently has sovereignty over Crimea, the investments were originally put in by the Ukrainian investors on the territory of Ukraine in conformity with Ukraine's legislation. Fifth, the tribunals could find that, despite the sovereignty dispute over Crimea, Russia is estopped from asserting that Crimea does not constitute part of its "territory" given its consistent behavior over the past few years in treating Crimea as part of its territory. Beyond these possibilities, the tribunals may come up with other ways to find or decline jurisdiction while avoiding the implicated issue problem,[178] and, of course, the tribunals could rely on different grounds for making their decision.

E. *Prospective Disputes*

In addition to the past and pending disputes discussed above, many prospective disputes in diverse fields of international law can also raise the implicated issue problem. Five are discussed below. For some of them, the general dispute has already arisen, but it is still placed under this Section because there is no active dispute before an international court or tribunal that faces the implicated issue problem.

1. *Mixed Disputes in Maritime Delimitation*

The implicated issue problem could arise with respect to so-called "mixed disputes" in maritime delimitation. Although there are varying definitions of a "mixed dispute," this Article, like many commentators,[179] uses the phrase to refer to the spe-

177. Russia-Ukraine BIT, *supra* note 169, art. 1(1) (emphasis added); *see* Bondaryev et al., *supra* note 30, at 16; Dilevka, *supra* note 30.

178. For example, one team of authors asserts that, following the jurisprudence of *Berschader v. Russia*, the tribunals could decline jurisdiction by holding that there is only a dispute with respect to the fact of expropriation, whereas Article 9(1) of the BIT only gives jurisdiction to the tribunals for disputes "arising in connection with investments, including disputes related to the amount, terms or compensation payment procedure envisaged in Article 5." Bondaryev et al., *supra* note 30, at 17 (quoting Russia-Ukraine BIT, *supra* note 169, art. 9(1)).

179. *E.g.*, Philippe Gautier, *The Settlement of Disputes*, *in* 1 THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW: LAW OF THE SEA 533, 551 (David Attard et al. eds., 2014); Louis B. Sohn, *Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?*, 46 L. & CONTEMP. PROBS. 195, 198 (1983); Talmon, *supra* note 8, at 46.

cific type of dispute mentioned in Article 298(1)(a)(i) of UNCLOS, namely, a maritime delimitation dispute that "necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory."[180] There are two paradigmatic scenarios of mixed disputes: first, two coastal States have a maritime delimitation dispute, but each claims sovereignty over an island that lies in the area of the delimitation; and second, two adjacent coastal States have a maritime delimitation dispute but do not agree on a land boundary terminus—the point at which their land boundary meets the sea. Mixed disputes brought before UNCLOS tribunals raise the implicated issue problem because maritime delimitation disputes fall within the jurisdiction of UNCLOS tribunals,[181] whereas territorial sovereignty disputes—including disputes over sovereignty over an island and disputes over the terminus of a land boundary—do not.[182]

Many commentators have discussed the question of jurisdiction over mixed disputes.[183] Most leading commentators

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180. UNCLOS, *supra* note 1, art. 298(1)(a)(i).

181. UNCLOS tribunals generally have jurisdiction over disputes concerning the interpretation or application of the Convention. UNCLOS, *supra* note 1, art. 288(1). Maritime delimitation disputes fall within the jurisdiction of UNCLOS tribunals because they involve the interpretation and application of Article 15 (territorial sea), Article 74 (exclusive economic zone), and/or Article 83 (continental shelf). *Id.*, arts. 15, 74, 83. Maritime delimitation disputes do not, however, fall within the jurisdiction of UNCLOS tribunals if a State party to the dispute has made a declaration under Article 298(1)(a)(i). *See id.*, art. 298(1)(a)(i).

182. *See supra* note 8.

183. *E.g.*, GUDMUNDUR EIRIKSSON, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 113 (2000); Alan E. Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 INT'L & COMP. L.Q. 37, 44 (1997); Buga, *supra* note 8, at 70–71, 91; Michael Sheng-ti Gau, *Issues of Jurisdiction in Cases of Default of Appearance*, *in* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 81, 105 (Stefan Talmon & Bing Bing Jia eds., 2014); Philippe Gautier, *The International Tribunal for the Law of the Sea: Activities in 2005*, 5 CHINESE J. INT'L L. 381, 389–90 (2006); Bing Bing Jia, *The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New Challenges*, 57 GERMAN Y.B. INT'L L. 63, 86 (2014); Oxman, *supra* note 8, at 400; P. Chandrasekhara Rao, *Delimitation Disputes Under the United Nations Convention on the Law of the Sea: Settlement Procedures*, *in* LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES 877, 891–92 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007); Tullio Treves, *What Have the United Nations Convention and the International*

believe that UNCLOS tribunals should, at least in some cases, be able to exercise jurisdiction over mixed disputes.[184] Others, however, believe that mixed disputes should not fall within the jurisdiction of UNCLOS tribunals.[185] In practice, international courts and tribunals have been seized of many mixed disputes.[186] Nevertheless, to this day, not a single court or tribunal has addressed the implicated issue problem arising from such disputes. The reason is twofold. First, many of these disputes have come before the ICJ in cases where the ICJ had jurisdiction over both the delimitation dispute and the territorial sovereignty dispute.[187] Second, UNCLOS tribunals confronted with mixed disputes have managed to avoid the implicated issue problem by either assuming away the territorial sovereignty dispute[188] or by having the parties agree on their jurisdiction over the territorial sovereignty dispute.[189] It is not unlikely, however, for an international court or tribunal to confront the implicated issue problem in the context of a mixed dispute in the near future.

Tribunal for the Law of the Sea to Offer as Regards Maritime Delimitation Disputes?, *in* MARITIME DELIMITATION 63, 77 (Rainer Lagoni & Daniel Vignes eds., 2006); Yoshifumi Tanaka, *Current Legal Developments: International Tribunal for the Law of the Sea*, 28 INT'L J. MARINE & COASTAL L. 375, 383–84 (2013); Xinjun Zhang, *Mixed Disputes and the Jurisdictional Puzzle in Two Pending Cases:* Mauritius v. U.K. *and the* Philippines v. China, 7 J. EAST ASIA & INT'L L. 529, 533–36 (2014).

184. *E.g.*, EIRIKSSON, *supra* note 183, at 113; Boyle, *supra* note 183, at 44; Gautier, *supra* note 183, at 389–90; Rao, *supra* note 183, at 891–92; Treves, *supra* note 183, at 77; Rüdiger Wolfrum, Pres. of the Int'l Tribunal for the Law of the Sea, Statement to the Informal Meeting of Legal Advisers of Ministries of Foreign Affairs, at 6 (Oct. 23, 2006). Note, however, that most of these commentators are or were affiliated with ITLOS.

185. *E.g.*, Gau, *supra* note 183, at 105; Jia, *supra* note 183, at 86; Talmon, *supra* note 8, at 46–48; Yee, *supra* note 8, at 689.

186. *See* Shi Jiuyong, *Maritime Delimitation in the Jurisprudence of the International Court of Justice*, 9 CHINESE J. INT'L L. 271, 275 (2010).

187. *E.g.*, Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Merits, Judgment, 2001 I.C.J. Rep. 40, ¶ 186 (Mar. 16); Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections, Judgment, 2007 I.C.J. Rep. 832, ¶ 142 (Dec. 13); Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, ¶ 116 (Oct. 8).

188. *E.g.*, Guyana v. Suriname, PCA Case No. 2004-04, Award, ¶ 308 (Sept. 17, 2007).

189. *E.g.*, Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), PCA Case No. 2010-16, Award, ¶ 58 (July 7, 2014).

2. *Disputes Concerning Investments on Disputed Territory or in Disputed Waters*

The implicated issue problem could also arise with respect to investor-State disputes concerning investments on disputed territory or in disputed waters,[190] such as the Crimea investor-State arbitrations. The reason is that practically all modern investment treaties require the investment to be on the "territory" or in the "area" of the respondent State for the tribunal to have jurisdiction over the dispute.[191] As a result, in order to settle any investment dispute, the tribunal must make a prerequisite determination on an issue outside of its jurisdiction—whether the "territory" or "area" in which the investment is located belongs to the respondent State or another State. To date, it appears that the Crimea investor-State arbitrations are the only investor-State arbitrations that have been filed concerning investments on disputed territory or in disputed waters.

3. *The Israel-Palestine Football Dispute*

The implicated issue problem could furthermore arise in the context of the ongoing Israel-Palestine football dispute. At the present moment, six Israeli football clubs are based in and play matches on occupied Palestinian territory.[192] The Palestinian Football Association (PFA) has claimed that the six Israeli football clubs are in breach of Article 72(2) of the FIFA Statutes,[193] which provides: "Member associations and their

190. *See* Tzeng, *supra* note 172, at 130-32.

191. *E.g.*, Agreement on Reciprocal Encouragement and Protection of Investments Between the Kingdom of the Netherlands and the Republic of Turkey arts. 2(2), 8, Aug. 28, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2090; Energy Charter Treaty art. 26, Dec. 17, 1994, 2080 U.N.T.S. 95, 34 ILM 360.

192. *CAS to Hear Palestinian FA Appeal over FIFA Decision*, REUTERS (June 13, 2017), https://www.reuters.com/article/uk-soccer-palestinians-fifa/cas-to-hear-palestinian-fa-appeal-over-fifa-decision-idUKKBN19424T; Barak Ravid, *In Win for Israel, FIFA Kills Vote on Palestinian Bid to Sanction Settlement Soccer Teams*, HAARETZ (May 11, 2017), https://www.haaretz.com/israel-news/.premium-1.788664.

193. REUTERS, *supra* note 192; Ravid, *supra* note 192.

clubs may not play on the territory of another member association without the latter's approval."[194]

At the 65th FIFA Congress in 2015, the Congress established a FIFA Monitoring Committee for Israel and Palestine,[195] but it was not supposed to handle "political or territorial matters."[196] At the 66th FIFA Congress in 2016, the Congress extended the mandate of the Monitoring Committee to deal with the territorial issue.[197] In March 2017, the chairman of the Monitoring Committee presented a draft report to the Committee,[198] but in May 2017 the FIFA Council decided that it was "premature for the FIFA Congress to take any decision."[199] At the 67th FIFA Congress in 2017, the PFA made a "[r]equest for official recognition of the Palestinian Football Association's entitlements to all of its rights as described in the FIFA Statutes."[200] However, on the basis of a proposal by the FIFA President, the FIFA Congress decided not to hold a vote on the PFA proposal, and to instead give the FIFA Council a nine-month extension to study and evaluate reports from the

194. Fédération Internationale de Football Association [FIFA], *FIFA Statutes,* art. 72(2) (Apr. 2016).

195. Fédération Internationale de Football Association [FIFA], *Minutes of the 65th FIFA Congress,* at 30 (May 2015), http://resources.fifa.com/mm/document/affederation/bodies/02/90/54/63/fifacongressminutes2015web_neutral.pdf.

196. *Id.*

197. Fédération Internationale de Football Association [FIFA], *Minutes of the 66th FIFA Congress,* at 20 (May 2016), http://resources.fifa.com/mm/document/affederation/bodies/02/90/54/54/fifacongressminutes2016v071016_neutral.pdf.

198. Ali Abunimah, *FIFA Boss Rigs Vote for Israel at Last Minute,* ELECTRONIC INTIFADA (May 11, 2017), https://electronicintifada.net/blogs/ali-abunimah/fifa-boss-rigs-vote-israel-last-minute; Ali Abunimah, *FIFA Capitulates to Israel Again,* ELECTRONIC INTIFADA (May 10, 2017), https://electronicintifada.net/blogs/ali-abunimah/fifa-capitulates-israel-again; Adam Rasgon, *FIFA Submits Draft Report on Settler Soccer Teams,* JERUSALEM POST (Mar. 23, 2017), http://www.jpost.com/Arab-Israeli-Conflict/FIFA-submits-draft-report-on-settler-soccer-teams-484924.

199. Media Release, Fédération Internationale de Football Association, FIFA Council Prepares Congress, Takes Key Decisions for the Future of the FIFA World Cup (May 9, 2017), http://www.fifa.com/about-fifa/news/y=2017/m=5/news=fifa-council-prepares-congress-takes-key-decisions-for-the-future-of-t-2883353.html.

200. Fédération Internationale de Football Association [FIFA], *Agenda of the 67th FIFA Congress* (May 11, 2017), http://resources.fifa.com/mm/document/affederation/bodies/02/87/91/29/agendaen_neutral.pdf.

Monitoring Committee.[201] In response, the PFA filed an appeal against these decisions at the Court of Arbitration for Sport (CAS).[202]

There is little doubt that the CAS has jurisdiction over the dispute concerning the FIFA Congress's decisions under Article 58(1) of the FIFA Statutes.[203] The implicated issue problem could arise, however, with respect to the underlying dispute: whether the six Israeli football clubs may play on occupied Palestinian territory. It is not clear what judicial body, if any, would have the power to render a decision on this dispute. The PFA has threatened to bring the dispute before the CAS,[204] but the jurisdictional basis for such a dispute is unclear, and in any case, the FIFA Congress and the FIFA Council have been the bodies dealing with the dispute thus far.[205] The judicial body tasked with settling the dispute could face the implicated issue problem because it would probably have jurisdiction over disputes concerning the FIFA Statutes, but arguably not over the territorial sovereignty dispute between Israel and Palestine. At the very least, this is Israel's position. At the 65th FIFA Congress in 2015, the president of the Israeli Football Association "insisted that the issue of territory should be decided by the United Nations," as "FIFA was not a forum for politics."[206] In order for any judicial body to determine whether Article 72(2) has been violated, it would have to determine whether occupied Palestinian territory is the territory of the PFA.

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201. Ravid, *supra* note 192; Abunimah, *FIFA Boss Rigs Vote for Israel at Last Minute*, *supra* note 198.

202. Media Release, Court of Arbitration for Sport, The Court of Arbitration for Sport (CAS) Registers an Appeal Filed by the Palestine Football Association (June 13, 2017), http://www.tas-cas.org/fileadmin/user_upload/Media_Release_5166.pdf.

203. Fédération Internationale de Football Association [FIFA], *FIFA Statutes*, art. 58(1) (Apr. 2016).

204. Tom Jones, *Palestine Threatens CAS Claim over West Bank Clubs*, GLOBAL ARB. REV. (Nov. 25, 2016), http://globalarbitrationreview.com/article/1076719/palestine-threatens-cas-claim-over-west-bank-clubs; Ravid, *supra* note 192.

205. *See supra* text accompanying notes 195–201.

206. Fédération Internationale de Football Association [FIFA], *Minutes of the 65th FIFA Congress*, at 30 (May 2015), http://resources.fifa.com/mm/document/affederation/bodies/02/90/54/63/fifacongressminutes2015web_neutral.pdf.

Like Ukraine in *Ukraine v. Russia*, the PFA could argue that the territory in question, as a factual matter, belongs to Palestine, such that there is no legitimate legal dispute over the territory. Indeed, at the 66th FIFA Congress in 2016, the president of the PFA "insisted that the question of the jurisdiction of the [Israeli] clubs was not controversial as they were plainly in Palestinian territory."[207] Nevertheless, in response to the draft report of March 2017 of the chairman of the Monitoring Committee, the Israeli Football Association submitted a memorandum to FIFA Officials, arguing that the occupied Palestinian territory in question "is best understood as territory over which both the Israeli and Palestinian side [sic] maintain competing claims."[208]

4. *The Ercan Airport Dispute*

The implicated issue problem could similarly arise in the context of the ongoing dispute between Cyprus and Turkey over the Ercan Airport.[209] In February 1975, a Turkish Cypriot airline began operating regular flights between Turkey and Ercan Airport in Northern Cyprus.[210] Since Cyprus has not designated Ercan Airport as an airport for landing under the Chicago Convention, Cyprus has for decades argued that the flights are in violation of Article 10 of the Chicago Convention,[211] which provides: "[E]very aircraft which enters the *territory* of a contracting State shall, if the regulations of that State so require, land at an airport designated by that State for the purpose of customs and other examination."[212]

207. Fédération Internationale de Football Association [FIFA], *Minutes of the 66th FIFA Congress*, at 20 (May 2016), http://resources.fifa.com/mm/document/affederation/bodies/02/90/54/54/fifacongressminutes2016v071016_neutral.pdf.

208. Abunimah, *FIFA Capitulates to Israel Again*, *supra* note 198.

209. *See* Stefan Talmon, *Air Traffic with Non-Recognised States: The Case of Northern Cyprus*, at 6, http://users.ox.ac.uk/~sann2029/FCO_Paper%20by%20Dr%20Stefan%20Talmon.pdf (last visited Jan. 7, 2018).

210. Permanent Rep. of Cyprus to the U.N., Letter dated Feb. 21, 1975 from the Permanent Rep. of Cyrus to the United Nations addressed to the Secretary-General, U.N. Doc. S/11644 (Feb. 26, 1975).

211. *See id.* (arguing that since the Ercan Airport is not an approved aerodrome in accordance with the Chicago Convention, the flights are violating Cyprus' complete and exclusive sovereignty over their airspace).

212. Convention on International Civil Aviation art. 10, Dec. 7, 1944, 15 U.N.T.S. 295 (emphasis added).

Under Article 84 of the Chicago Convention, Cyprus could take this dispute to the Council of the International Civil Aviation Organization (ICAO), the decision of which may be appealed to an *ad hoc* arbitral tribunal or the PCIJ (now the ICJ).[213] If the dispute comes before the ICAO Council, the implicated issue problem could arise because even though the ICAO Council would have the jurisdiction to apply Article 10 (i.e., the inside issue), it arguably does not have jurisdiction to settle the sovereignty dispute in Northern Cyprus (i.e., the outside issue).

5. *The ICC's Prosecution of the Crime of Aggression*

As yet another example, the implicated issue problem could arise with respect to the ICC's prosecution of the crime of aggression.[214] Article 8 *bis* of the Kampala Amendments defines the "crime of aggression" as "the planning, preparation, initiation or execution, by a person . . . of an act of aggression which . . . constitutes a manifest violation of the Charter of the United Nations."[215] As a result, if the States Parties to the Rome Statute activate the ICC's jurisdiction over the crime of aggression, then the ICC in determining whether an individual committed the crime of aggression would have to make a prerequisite determination on whether a State committed an act of aggression in violation of the U.N. Charter, which at least some would argue falls within the exclusive jurisdiction of the U.N. Security Council.[216] Notably, Article 15(6) *bis* of the Kampala Amendments attempts to manage this conflict, It provides that before proceeding with an investigation in re-

213. *Id.*, art. 84.

214. *See* Dapo Akande & Antonios Tzanakopoulos, *The Crime of Aggression in the ICC and State Responsibility*, 58 HARV. INT'L L.J. ONLINE J. 33 (2017).

215. Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression art. 8(1) *bis* (June 11, 2010), https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf.

216. *See* Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 257, 262–63 (2015) (explaining that these determinations would run contrary the mainstream view that core responsibility for determining whether or not aggression has occurred belongs with the Security Council); D. Stephen Mathias, *Remarks*, 96 AM. SOC'Y INT'L L. PROC. 181, 181–82 (2002) (stating that the intentions of the Charter, as well as the logic and structure of the U.N. system, make clear that the existence of an act of aggression is a determination to be made exclusively by the Council).

spect of a crime of aggression, the ICC Prosecutor "shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned."[217] Nevertheless, Article 15(8) provides that even if the Security Council has not made such a determination, then after six months the Prosecutor may still proceed with the investigation.[218]

F. *Summary*

In conclusion, courts and tribunals have not followed a consistent approach to the implicated issue problem. The courts and tribunals in *Aegean Sea Continental Shelf*, *Pedra Branca*, *South China Sea*, and the Mexican investor-State arbitrations appeared to support a "prior determination" test, but the PCIJ in *Certain German Interests* and *Chagos Marine Protected Area* impliedly rejected such a test. It should further be noted that a strict application of the "prior determination" test could potentially render the tribunals in *Ukraine v. Russia* and the Crimea investor-State arbitrations—as well as the courts and tribunals capable of dealing with the prospective disputes listed above—without jurisdiction.

IV. Comparison

A. *Lack of Parallelism*

The modern approach to the implicated party problem (i.e., the doctrine of indispensable parties) is clear. International courts and tribunals apply the "prerequisite determination" test within the framework of the "very subject-matter" test. That is, the court or tribunal cannot exercise jurisdiction over the dispute if and only if the legal interests of an absent State would form the "very subject-matter" of the dispute, which is the case if and only if the exercise of jurisdiction requires a "prerequisite determination" on the legal responsibility of the absent State.[219]

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217. Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression art. 15(6) *bis* (June 11, 2010), https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf.
218. *Id.*, art. 15(8) *bis.*
219. *See supra* Section II.D.

The modern approach to the implicated issue problem, on the other hand, is not clear. Some cases appear to apply a "prior determination" test (e.g., *Aegean Sea Continental Shelf, Pedra Branca, South China Sea,* and the Mexican sugar investor-State arbitrations), whereas other cases stand for a characterization approach, or at the very least, reject the "prior determination" test (e.g., *Certain German Interests* and *Chagos Marine Protected Area*).[220]

In summary, while international courts and tribunals have developed a consistent approach to the implicated party problem (i.e., the doctrine of indispensable parties), they have not developed a consistent approach to the implicated issue problem. There is something discomforting about the lack of parallelism between the approach international courts and tribunals take to the implicated party problem and the approach they take to the implicated issue problem. After all, an international court or tribunal needs both jurisdiction *ratione personae* over the parties and jurisdiction *ratione materiae* over the issues to settle any dispute. Why should one dimension of jurisdiction be treated differently from another?

B. *Justifications for the Lack of Parallelism*

There are at least four reasons why the approach international courts and tribunals take to the implicated party problem should not necessarily parallel the approach they take to the implicated issue problem. All four reasons boil down to the fact that there are key differences between jurisdiction *ratione personae* and jurisdiction *ratione materiae.* The four reasons are discussed here.

First, an international court or tribunal facing the implicated party problem may make use of the principle of *res inter alios acta,* whereas there is no equivalent principle for the implicated issue problem. The principle of *res inter alios acta* is enshrined in, for example, Article 59 of the ICJ Statute,[221] Article 296(2) of UNCLOS,[222] and Article 33(2) of the ITLOS Statute.[223] It ensures that, in the case of the implicated party

220. *See supra* Section III.C.
221. Statute of the International Court of Justice art. 59, June 26, 1945, 33 U.N.T.S. 933.
222. UNCLOS, *supra* note 1, art. 296(2).
223. *Id.* annex VI, art. 33(2).

problem, any determination on the legal responsibility of the absent State is not binding on that State. By contrast, in the case of the implicated issue problem, a legal determination on the outside issue, even if only in the *ratio decidendi* of the decision, could potentially still have some binding effect on the parties to the dispute.[224]

Second, an international court or tribunal facing the implicated issue problem may more readily examine the intent of the parties to determine whether it should exercise jurisdiction, whereas a court or tribunal facing the implicated party problem may not be able to examine the intent of the absent State. More specifically, an international court or tribunal facing the implicated issue problem could examine the treaty conferring jurisdiction and its *travaux préparatoires*, and could even ask the parties to litigate the question of the scope of the court or tribunal's jurisdiction *ratione materiae*, to determine whether the parties intended to consent to a determination of the issue allegedly outside the jurisdiction *ratione materiae* of the court or tribunal. For example, the *Chagos Marine Protected Area* tribunal and various scholars have considered whether the drafters of UNCLOS intended for UNCLOS tribunals to exercise jurisdiction over territorial sovereignty issues arising in mixed disputes.[225] An international court or tribunal facing the implicated party problem, on the other hand, may not be able to examine the intent of the absent State to the same extent, given that the absent State may not be party to the treaty conferring jurisdiction, and is in any case absent from the proceedings.

Third, an international court or tribunal facing the implicated party problem should in theory apply the same principles to resolve the problem regardless of the identity of the

224. Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicar. v. Colom.), Preliminary Objections, Judgment, 2016 I.C.J. Rep. 100 ¶ 61 (Mar. 17); Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thai.), 2013 I.C.J. Rep. 281, ¶ 34 (Nov. 11).

225. Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, Award, ¶ 219 (Mar. 18, 2015); Buga, *supra* note 8, at 60, 67, 72, 91; Jia, *supra* note 183, at 86–87; Talmon, *supra* note 8, at 47; *see* Qu, *supra* note 26, at 45; Sienho Yee, *Conciliation and the 1982 UN Convention on the Law of the Sea,* 44 OCEAN DEV. & INT'L L. 315, 324–25 (2013).

absent State, as all States are sovereign equals. On the other hand, a court or tribunal facing the implicated issue problem could reasonably apply different principles to resolve the problem depending on the exact issues in question. For example, perhaps UNCLOS tribunals engaging in maritime delimitation should apply a more permissive test when asked to make an outside determination on territorial sovereignty over an island but a more stringent test when asked to make an outside determination on a violation of the prohibition on the use of force. This potential variation perhaps explains why there is no consistent approach to the implicated issue problem. Indeed, it might be more rational for the approach to depend on the subject matter of the dispute and the outside issues in question.

Fourth, an international court or tribunal facing the implicated issue problem may be able to rely on the relevant applicable law provision to justify its exercise of jurisdiction, whereas a court or tribunal facing the implicated party problem cannot. For example, an UNCLOS tribunal may be able to justify its power to make a determination of an issue outside its jurisdiction *ratione materiae* by relying on the applicable law provision of UNCLOS, Article 293(1), which provides that UNCLOS tribunals "shall apply this Convention *and other rules of international law not incompatible with this Convention.*"[226] Such an exercise of jurisdiction would, undoubtedly, be controversial.[227] After all, most tribunals and commentators agree that applicable law provisions cannot be invoked to expand jurisdiction.[228] Nevertheless, one line of UNCLOS jurisprudence stands for the proposition that applicable law provisions can, at the very least, help justify the power of an international

226. UNCLOS, *supra* note 1, art. 293(1) (emphasis added).

227. *See* Peter Tzeng, *Jurisdiction and Applicable Law Under UNCLOS*, 126 YALE L.J. 242 (2016).

228. *E.g.*, Duzgit Integrity (Malta v. São Tomé & Príncipe), PCA Case No. 2014-07, Award, ¶¶ 207–08 (Sept. 5, 2016); Arctic Sunrise (Neth. v. Russ.), PCA Case No. 2014-02, Award on the Merits, ¶ 188 (Aug. 14, 2015); ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW 123 n.3 (2014); Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL J. DISP. RESOL. 1, 2 (2014).

court or tribunal to make a determination of an issue outside its jurisdiction *ratione materiae*.[229]

V. Conclusion

The implicated issue problem is here to stay. Not only has it arisen in ICJ disputes, UNCLOS disputes, and investor-State disputes, but it is also present in pending disputes, and it could also arise in future disputes. As a result, courts, tribunals, and commentators should give it the attention it deserves. This Article is only the first step towards better understanding the implicated issue problem. Many questions raised in this Article remain unresolved, and would serve as attractive topics for future research. Eight are listed here.

First, if the implicated party problem and the implicated issue problem exist for jurisdiction *ratione personae* and jurisdiction *ratione materiae*, should there similarly be an implicated time problem and an implicated space problem for jurisdiction *ratione temporis* and jurisdiction *ratione loci*? The answer appears to be in the affirmative. Further research could thus be conducted to determine whether the approaches of international courts and tribunals to the implicated time problem and the implicated space problem are—or should be—consistent, and whether they parallel—or should parallel—the doctrine of indispensable parties.

Second, how should a court or tribunal deal with cases where both the implicated party problem and the implicated issue problem arise? It should be noted that many of the disputes examined in Section III on the implicated issue problem also raise the implicated party problem. Should the court or tribunal consider both problems separately or together when determining whether it should exercise jurisdiction over the dispute?

Third, if the implicated party problem parallels the implicated issue problem, why is the former largely treated as a question of admissibility while the latter largely treated as a question of jurisdiction? Does this determination of whether

229. *See* Tzeng, *supra* note 227, at 248-51 (discussing M/V Saiga (No. 2) (St. Vincent v. Guinea), ITLOS Case No. 2, Judgment, ¶ 155 (July 1, 1999); Guyana v. Suriname, PCA Case No. 2000-04, Award, ¶ 413 (Sept. 17, 2007); and M/V Virginia G (Pan. v. Guinea-Bissau), ITLOS Case No. 19, Judgment, ¶ 359 (Apr. 14, 2014)).

the question is one of jurisdiction or admissibility depend on the approach—characterization or logic-based—one takes to the problems?

Fourth, what is the substantive threshold for the existence of a good faith legal dispute? The implicated issue problem is premised on the notion that the court or tribunal must make a determination on a *legal* issue outside its jurisdiction *ratione materiae*; thus, there would not be a problem if the court or tribunal only had to make a determination on a *factual* issue. But how does one know whether the issue is legal or factual? In *Bangladesh/Myanmar*,[230] *Bangladesh v. India*,[231] and *Ghana/Côte d'Ivoire*,[232] the tribunals were able to get around the implicated issue problem concerning the outer continental shelf by determining, as a factual matter, that the parties had outer continental shelf entitlements; there was thus no good faith legal dispute over the existence of such entitlements. Along the same lines, as mentioned above, the *Ukraine v. Russia* tribunal could potentially hold that it may exercise jurisdiction over the dispute because there is no good faith legal dispute over Ukraine's sovereignty over Crimea. And Palestine and Cyprus may make similar arguments with respect to the Israel-Palestine football dispute and the Ercan Airport dispute. Nevertheless, one must specify the substantive threshold for the existence of a good faith legal dispute.[233]

Fifth, as a way around the implicated issue problem, can international courts and tribunals render conditional decisions? That is, can they render a decision that is conditional upon a legal determination over which they do not have jurisdiction? One can interpret *Pedra Branca* in this light. The ICJ did not simply refuse to exercise jurisdiction over the sovereignty dispute over South Ledge. Rather, it rendered a condi-

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230. Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangl./Myan.), ITLOS Case No. 16, Judgment, ¶¶ 360-94 (Mar. 14, 2012).

231. *See* Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India), PCA Case No. 2010-16, Award, ¶¶ 444–46 (July 7, 2014).

232. *See* Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), ITLOS Case No. 23, Judgment, ¶¶ 489–96 (Sept. 23, 2017).

233. The recent *Ghana/Côte d'Ivoire* judgment provides another context where legal consequences arise from whether or not there is a good faith legal dispute. *See id.* ¶ 592.

tional decision: it held that South Ledge belonged to Malaysia if it fell on Malaysia's side of the delimitation line but to Singapore if it fell on Singapore's side of the delimitation line. The ICJ was on track to doing something similar in *Qatar v. Bahrain*. In delimiting the territorial seas of Qatar and Bahrain, the Court drew one equidistance line under the assumption that the maritime feature Fasht al Azm was a part of the island of Sitrah, and another equidistance line under the assumption that Fasht al Azm was not.[234] The Court ultimately held, however, that special circumstances rendered both equidistance lines inappropriate.[235] On the one hand, courts and tribunals may render conditional decisions to get around the implicated issue problem. On the other hand, in rendering conditional decisions, courts and tribunals may be criticized for not fulfilling their duty to definitively settle disputes over which they have jurisdiction. In the end, it would appear that conditional decisions may be appropriate for some disputes but not for others.

Sixth, in the implicated issue problem, should the solution depend on whether the outside issue is expressly or impliedly outside the jurisdiction of the court or tribunal? In *South China Sea*, although not discussed in full above, the tribunal faced the implicated issue problem with respect to two outside issues: maritime delimitation and territorial sovereignty. An important difference between the two, however, was that issues of maritime delimitation were expressly excluded from the tribunal's jurisdiction by virtue of a Chinese reservation, whereas issues of territorial sovereignty lay outside the tribunal's jurisdiction simply because there is no provision in UNCLOS that would grant the tribunal jurisdiction over those issues. In light of this difference, should the two outside issues be treated differently?

Seventh, in light of the principle of *res inter alios acta*, why should a court or tribunal ever refuse to exercise jurisdiction when facing the implicated party problem? Should we just allow courts and tribunals to exercise jurisdiction over disputes implicating absent parties with the understanding that those

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234. Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Merits, Judgment, 2001 I.C.J. Rep. 40, ¶ 216 (Mar. 16).

235. *Id.* ¶ 218.

absent parties would not be bound by the decision? Along the same lines, if one were to assume that the principle of *res judicata* only renders determinations on inside issues (i.e., not outside issues) binding, why should a court or tribunal ever refuse to exercise jurisdiction when facing the implicated issue problem? Why not just allow courts and tribunals to exercise jurisdiction over disputes implicating outside issues with the understanding that determinations on those outside issues would not be binding on the parties?

Eighth, in the context of the implicated issue problem, what is the relationship between the "prior determination" test and *renvoi* provisions? In general, if a court or tribunal has jurisdiction *ratione materiae* to apply a treaty provision, and that provision contains a *renvoi* to an outside rule of international law, then the court or tribunal may also have jurisdiction to determine violations of that rule of international law. Nevertheless, an application of the "prior determination" test would ironically lead to the exact opposite result: an exercise of jurisdiction over the *renvoi* provision would require a prior determination on the outside rule of international law, thereby rendering the court or tribunal unable to exercise jurisdiction. Are *renvoi* provisions thus exceptions to the "prior determination" test? Or do *renvoi* provisions reveal that the "prior determination" test is in itself flawed? In general, further research could be conducted on *renvoi* provisions, in particular their identification and scope. As for their identification, it is sometimes difficult to determine whether a provision is a *renvoi* provision or not. Does the mere fact that a provision contains the word "territory"—as in many international investment agreements, the FIFA Statutes, and the Chicago Convention—make the provision a *renvoi* provision? In *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, where the *renvoi* was to "the principles of sovereign equality [and] territorial integrity of States," the ICJ held that the provision did not bring the issue of immunity *ratione personae* within the Court's jurisdiction.[236] As for the scope of *renvoi* provisions, it is sometimes difficult to determine how the scope of a *renvoi* provision affects the scope of the jurisdiction *ratione materiae* of the court or tribunal. In *Chagos Marine Protected Area*, where the *renvoi*

236. Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Provisional Measures, Order, 2016 I.C.J. Rep., ¶ 49 (Dec. 7).

was to "other rules of international law" (i.e., a very broad scope), the arbitral tribunal held that the provision brought the "general rules of international law" within the tribunal's jurisdiction.[237] Yet in *Mavrommatis Concessions*, where the *renvoi* was to "international obligations" (i.e., also a very broad scope), the PCIJ held that the provision only brought certain international obligations within the Court's jurisdiction.[238] It thus appears that the interpretation of *renvoi* provisions often depends on the specific context in which it appears.

In the end, international courts and tribunals will continue to face the implicated issue problem. It is therefore the hope of the author that this Article serves not as a solution, but rather as a starting point for an ongoing discussion on how best to deal with the implicated issue problem. On the one hand, it is important for international courts and tribunals to exercise their jurisdiction when appropriate, as doing so contributes to the peaceful settlement of international disputes. On the other hand, inappropriate exercises of jurisdiction can undermine the principle of consent and challenge the legitimacy of dispute settlement in international law. In order for international courts and tribunals to consistently find the appropriate balance, the implicated issue problem, and its potential solutions, must be addressed head on.

237. Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, Award, ¶ 516 (Mar. 18, 2015).

238. Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), Jurisdiction, Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 24–26 (Aug. 30).