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**Investments on Disputed Territory:** Indispensable Parties and Indispensable Issues  
**Investimentos nos Territórios disputados:** Partes e assuntos indispensáveis

Peter Tzeng

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# Investments on Disputed Territory: Indispensable Parties and Indispensable Issues\*

## Investimentos nos Territórios disputados: Partes e assuntos indispensáveis

Peter Tzeng\*\*

### ABSTRACT

International investment agreements generally only protect investments in the ‘territory’ of the respondent State. As a result, an investment tribunal seized of a dispute concerning an investment on disputed territory may have to determine whether the respondent State has sovereignty over the territory in question. This should create some discomfort for two reasons. First, the tribunal may be exceeding its jurisdiction *ratione personae*, as it would be ruling on the sovereignty dispute with only one of the disputing States at the table. Second, the tribunal may be exceeding its jurisdiction *ratione materiae*, as it generally only has the power to rule on investment disputes, not sovereignty disputes. This Article explores the merits of two preliminary objections—corresponding to these two jurisdictional problems—to claims concerning investments on disputed territory: the doctrine of indispensable parties and the doctrine of indispensable issues.

**Keywords:** investment, arbitration, dispute, territory, indispensable, Monetary Gold, Crimea

### RESUMO

Os acordos internacionais de investimento geralmente protegem apenas os investimentos no “território” do Estado anfitrião. Como resultado, um tribunal de investimento constituído após uma disputa poder ter que determinar se o Estado respondente tem soberania sobre o território em questão. Isso deve criar algum desconforto por dois motivos. Primeiramente, o tribunal pode exceder a sua jurisdição *ratione personae*, como seria julgando a disputa referente à soberania com apenas o Estado anfitrião, sem o Estado de origem. Em segundo lugar, o tribunal pode exceder a sua jurisdição *ratione materiae*, uma vez que geralmente só tem o poder de julgar disputas atinentes aos investimentos e não questões de soberania. Este artigo explora os méritos de duas objeções preliminares - correspondentes a estes dois problemas jurisdicionais - às reivindicações sobre investimentos em território em disputa: a doutrina de indispensável partidos e a doutrina de questões indispensáveis.

**Palavras-chave:** arbitragem; disputas; território; indispensável; Crimeia

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\*\* Associate, Foley Hoag LLP; Diploma, Hague Academy of International Law; J.D., Yale Law School; A.B., Princeton University. Email: ptzeng90@gmail.com.

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## 1. INTRODUCTION

International investment agreements (IIAs) generally only protect investments in the ‘territory’ of the respondent State.<sup>1</sup> As a result, an investment tribunal seized of a dispute concerning an investment on disputed territory may have to determine whether the respondent State has sovereignty over the territory in question.<sup>2</sup> This should create some discomfort for two reasons. First, the tribunal may be exceeding its jurisdiction *ratione personae*, as it would be ruling on the sovereignty dispute with only one of the disputing States at the table. Second, the tribunal may be exceeding its jurisdiction *ratione materiae*, as it generally only has the power to rule on investment disputes, not sovereignty disputes.

This Article explores the merits of two preliminary objections—corresponding to these two jurisdictional problems—to claims concerning investments on disputed territory: the doctrine of indispensable parties and the doctrine of indispensable issues. The doctrine of indispensable parties, also called the *Monetary Gold* principle, is an objection based on the limited jurisdiction *ratione personae* of international courts and tribunals. The doctrine is widely recognized in public international law, though it has never been successfully applied in investment arbitration.<sup>3</sup> The doctrine of indispensable

issues, on the other hand, is a hypothetical objection considered by the present author in an attempt to fill a conceptual gap—that is, the lack of an equivalent of the doctrine of indispensable parties for jurisdiction *ratione materiae*. The doctrine of indispensable issues is thus directly analogous to the doctrine of indispensable parties, but it arises from the limited jurisdiction *ratione materiae* of international courts and tribunals, rather than their limited jurisdiction *ratione personae*. It should be emphasized that the present author is not necessarily of the opinion that such a ‘doctrine of indispensable issues’ exists or should exist in international law.<sup>4</sup> Nevertheless, the author wishes to explore the merits of this doctrine in light of its potential applicability to disputes concerning investments on disputed territory.

This Article is organized as follows. Section II explains how the existing doctrine of indispensable parties may affect claims concerning investments on disputed territory. Section III introduces the hypothetical doctrine of indispensable issues, and then explains how it may affect such claims. Section IV then examines one line of cases in particular—the Crimea arbitrations—to show how investment tribunals seized of disputes concerning investments in disputed territory may sometimes avail themselves of ‘escape mechanisms’ in order to avoid considering the two doctrines. Section V then concludes the Article.

## 2. INDISPENSABLE PARTIES

Two preliminary remarks regarding the doctrine of indispensable parties should be made here. First, the doctrine is often referred to as ‘the *Monetary Gold* principle’ in public international law. This Article, however, employs the term ‘doctrine of indispensable parties’ not only to elucidate the parallel with the proposed ‘doctrine of indispensable issues’, but also to emphasize the

1 Many modern IIAs employ the word ‘area’ instead of ‘territory’, but they ultimately define ‘area’ in terms of ‘territory’. See eg Agreement on Reciprocal Encouragement and Protection of Investments Between the Kingdom of the Netherlands and the Republic of Turkey (signed 28 August 2016) art 1(f) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2090>> accessed 12 September 2017; Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) art 1(10) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2090>> accessed 12 September 2017.

2 A similar issue arises for investments in disputed waters, as many IIAs define ‘territory’ to include the territorial sea, exclusive economic zone, and/or continental shelf of the respondent State. See eg Agreement Establishing the Free Trade Area Between the Caribbean Community and the Dominican Republic (signed 22 August 1998) art 1(2) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/3110>> accessed 12 September 2017; Agreement Concerning the Reciprocal Promotion and Protection of Investments Between Bosnia and Herzegovina and the Government of the State of Qatar (signed 1 June 1998, entered into force 5 February 2009) art 1(2)(b) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/487>> accessed 12 September 2017.

3 The respondent States invoked the doctrine in *Ping An Life Insurance v Belgium* and *Chevron Corporation v Ecuador*, but the tribunals did not find the doctrine applicable. See *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v Kingdom of*

*Belgium*, ICSID Case No ARB/12/29, Award (30 April 2015) paras 127–28; *Chevron Corporation and Texaco Petroleum Company v Ecuador*, PCA Case No 2009–23, Third Interim Award on Jurisdiction and Admissibility (27 February 2012) para 4.60.

4 For further discussion on the doctrine of indispensable issues, see Peter Tzeng, ‘The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond’, EJIL: Talk! (14 October 2016) <<https://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/>> accessed 12 September 2017.

fact that the doctrine as it exists today is the product of jurisprudence across multiple cases before the International Court of Justice (ICJ), not just *Monetary Gold*. Indeed, although the ICJ does not employ the term ‘indispensable parties’ to refer to the principle, international tribunals,<sup>5</sup> States,<sup>6</sup> and many commentators<sup>7</sup> have used the term to refer to this line of ICJ jurisprudence.

Second, commentators generally consider the doctrine of indispensable parties as an objection to admissibility rather than jurisdiction,<sup>8</sup> and the ICJ’s jurisprudence suggests the same.<sup>9</sup> This Article does not take a position on this classification, but for consistency will treat the question as one of admissibility.

## 2.1. Public International Law

Much ink has been spilled over the doctrine of indispensable parties, in particular over its application in three ICJ cases: *Monetary Gold*, *Certain Phosphate Lands*, and *East Timor*.<sup>10</sup> As is now well known, in *Monetary Gold*, the ICJ held that a claim is inadmissible if the legal interests of a State outside of its jurisdiction *ratione*

*personae* ‘would not only be affected by a decision, but would form the very subject-matter of the decision’.<sup>11</sup> The critical question, however, is how one should go about identifying the ‘very subject-matter’ of the decision.

The Court answered this question in its subsequent jurisprudence. In *Certain Phosphate Lands*, the Court 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 to the [decision of the Court]’.<sup>12</sup> And in *East Timor*, the Court held that the legal interests of Indonesia would form the ‘very subject-matter’ of the decision because ‘[i]n order to decide the claims . . . , [the Court] would have to rule, as a prerequisite, on the lawfulness of Indonesia’s conduct’.<sup>13</sup>

Two tests thus lie at the heart of the doctrine: the ‘very subject-matter’ test of *Monetary Gold* and the ‘prerequisite determination’<sup>14</sup> test of *Certain Phosphate Lands* and *East Timor*. A close examination of the passages from *Certain Phosphate Lands* and *East Timor* cited above reveal that satisfaction of the ‘prerequisite determination’ test is both a necessary<sup>15</sup> and sufficient<sup>16</sup> condition for the satisfaction of the ‘very subject-matter’ test.

The literature most often associates the doctrine of indispensable parties with the ‘very subject-matter’ test, but the ‘prerequisite determination’ test is just as important: there is no question that courts and tribunals consider the ‘prerequisite determination’ test to be determinative on whether they can exercise jurisdiction over a dispute. This can be seen first and foremost in ICJ jurisprudence. In *Armed Activities* and *Interim Accord*, the Court in considering the doctrine of indispensable parties applied the ‘prerequisite determination’ test alongside the ‘very subject-matter’ test.<sup>17</sup> And in two recent cases, *Nicaragua v Honduras* and *Croatia v Serbia*, the

5 See eg *The M/V ‘Norstar’ Case (Panama v Italy)* (Preliminary Objections) (2016) IJLOS Case No 25, paras 171-74; *South China Sea (Philippines v China)* (Merits) (2016) PCA Case No 2013-19, paras 157, 1202; *Chevron v Ecuador* (n 3) para 4.62.

6 See eg *Armed Activities on the Territory of the Congo (DRC v Uganda)* (Merits) [2005] ICJ Rep 168, para 200; *Turkey—Restrictions on Imports of Textile and Clothing Products* (31 May 1999) WTO Doc WT/DS34/R, para 3.39; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v UK)* (Preliminary Objections of the United Kingdom) (15 June 2015), paras 83-103.

7 See eg Christine Chinkin, *Third Parties in International Law* (OUP 1993) 198-212; Vaughan Lowe, *International Law* (OUP 2007) 146; Chester Brown, ‘Article 59’ in Andreas Zimmermann and others (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, 2012) 1416, 1441; Alain Pellet, ‘Judicial Settlement of International Disputes’ in *Max Planck Encyclopedia of Public International Law* (2013) para 10.

8 See eg Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol 1 (OUP 2013) 971; Yuval Shany, ‘Jurisdiction and Admissibility’ in Cesare PR Romano and others (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 779, 797-98.

9 See eg *East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 35; *Certain Phosphate Lands in Nauru (Nauru v Australia)* (Preliminary Objections) [1992] ICJ Rep 240, para 55; *Monetary Gold Removed from Rome in 1943 (Italy v France, UK, US)* [1954] ICJ Rep 19, 33.

10 See eg Chinkin (n 7) 198-212; Natalie S Klein, ‘Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case’ (1996) 21 *Yale JIL* 305; Tobias Thienel, ‘Third States and the Jurisdiction of the International Court of Justice: The Monetary Gold Principle’ (2014) 57 *GYBIL* 321.

11 *Monetary Gold* (n 9) 32.

12 *Certain Phosphate Lands* (n 9) para 55.

13 *East Timor* (n 9) para 35.

14 Note that this is not a direct quote from the Court’s jurisprudence, but in *Certain Phosphate Lands* and *East Timor*, the Court used the word ‘prerequisite’ in this sense in determining whether the ‘very subject-matter’ test was satisfied.

15 See text to n 12.

16 See text to n 13.

17 See *Armed Activities* (n 6) para 204; *Application of the Interim Accord of 13 September 1995 (Macedonia v Greece)* [2011] ICJ Rep 644, para 43.



Court in considering the doctrine referred to the ‘prerequisite determination’ test without referring to the ‘very subject-matter’ test at all.<sup>18</sup> Other international tribunals have also held that, under the doctrine of indispensable parties, they would not be able to exercise jurisdiction over a dispute if the decision requires a prerequisite determination on the legal responsibility of a State outside of their jurisdiction *ratione personae*.<sup>19</sup> As Judge Crawford put it recently 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 of the legal position of a third State is a *necessary prerequisite* to the determination of the case before the Court.<sup>20</sup>

In conclusion, then, the doctrine of indispensable parties can be summarized as follows: an international court or tribunal cannot exercise jurisdiction over a dispute if the legal interests of a State outside of its jurisdiction *ratione personae* 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 that State.

## 2.2. Investment Law

To this day, no investment tribunal has applied the doctrine of indispensable parties to declare a claim inadmissible.<sup>21</sup> This should not come as a surprise, as investment disputes are typically bilateral disputes that take place between an investor and a State. Nevertheless, claims concerning investments on disputed territory could render the doctrine of indispensable parties applicable. The applicability of the doctrine may depend on whether the territory is (1) disputed between two States; or (2) disputed between a State and a non-State actor. These two scenarios will be discussed in turn.

18 *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 659, para 312; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Merits) [2015] ICJ Rep, para 116.

19 *M/V Norstar* (Preliminary Objections) (n 5) para 173; *South China Sea (Philippines v China)* (Jurisdiction and Admissibility) (2015) PCA Case No 2013-19, para 180; *Larsen v Hawaiian Kingdom* (2001) PCA Case No 1999-01, 119 ILR 566, para 11.23.

20 *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Dissenting Opinion of Judge Crawford) [2016] ICJ Rep, para 32 (emphasis added).

21 See n 3.

In the first scenario, the application of the doctrine of indispensable parties would likely render the claim inadmissible. Suppose, for example, that a US corporation makes an investment on the Falkland Islands, and subsequently sues Argentina for not having afforded it the protections guaranteed under the Argentina-US BIT. Article I(1)(a) of the BIT defines ‘investment’ as ‘every kind of *investment* in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party’.<sup>22</sup> As a result, assuming that the tribunal does not avail itself of an escape mechanism (as discussed below in Section IV), the decision on the US corporation’s claim would require a ‘prerequisite determination’ on whether the Falkland Islands constitute Argentinian territory. Since the United Kingdom also claims sovereignty over the Falkland Islands, this determination on sovereignty would constitute a determination on the legal interests of the United Kingdom, a State over which the tribunal does not have jurisdiction *ratione personae*. As a result, applying the doctrine of indispensable parties, the tribunal would find that the legal interests of the United Kingdom would form the ‘very subject-matter’ of the decision, rendering the claim inadmissible.

It is worth evaluating whether, normatively speaking, this is the preferable result. On the one hand, the result makes sense, as it would be antithetical to the principles of consent and *audi alteram partem* for the tribunal to rule on sovereignty over the Falkland Islands without the United Kingdom at the table. Allowing the tribunal to make such a determination would be particularly concerning in light of the fact that the two parties to the arbitration—the US corporation and Argentina—have an interest in convincing the tribunal that the Falkland Islands constitute Argentinian territory. The corporation has such an interest because the Falkland Islands must constitute Argentinian territory for its investment to qualify as an ‘investment’ under Article I(1)(a) of the BIT, and Argentina has such an interest because it would not want to undermine the legitimacy of its claim of sovereignty over the Falkland Islands. Moreover, the parties would likely have the right to appoint a majority

22 Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991, entered into force 20 October 1994) art I(1)(a) (emphasis added) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/127>> accessed 12 September 2017.

of the arbitrators sitting on each tribunal,<sup>23</sup> so the tribunal itself may not be completely impartial.

On the other hand, declaring the claims inadmissible may be normatively unappealing for at least four reasons. First, the application of the doctrine appears inappropriate. It is true that the tribunal's settlement of the investment claim would require a 'prerequisite determination' on the legal interests of the United Kingdom. Nevertheless, putting aside the plethora of jurisprudence on the doctrine mentioned above,<sup>24</sup> it is difficult to understand how the legal interests of the United Kingdom would form the 'very subject-matter' of the decision in the ordinary sense of the phrase 'very subject-matter'. Absent any indication otherwise, the 'very subject-matter' of the investment claim is undoubtedly the investment claim itself, not the underlying issue of sovereignty. Therefore, one could make a cogent argument that the doctrine of indispensable parties as developed by the ICJ and accepted by other courts and tribunals should be either revised or rejected in the context of investment disputes concerning investments on disputed territory.

Second, the application of the doctrine appears unjustified. The determination on sovereignty would be *res inter alios acta* between the investor and the respondent State only, and in any case would merely form part of the *ratio decidendi*, not the *dispositif*. As a result, the determination would neither be binding on the absent State, nor would it have *res judicata* effect on the absent State, nor would it give rise to any legal consequences aside from the settlement of the investment dispute. The counterargument, however, is that any determination by an international court or tribunal, even if not formally binding, may carry significant informal weight. After all, it should be recalled that these arguments have also been raised against the doctrine of indispensable parties in general, but they did not stop the ICJ from applying the doctrine and refusing to exercise jurisdiction in *Monetary Gold* and *East Timor*.

Third, the application of the doctrine appears inequitable. The reason is that the respondent State would

on the one hand be able to claim sovereignty over a certain piece of territory, but on the other hand not be held responsible for obligations that should apply to its entire territory on that piece of territory. The claimant could try to invoke estoppel, but the tribunal may decide that it must determine its jurisdiction and the admissibility of the claim *proprio motu*, without relying on the objections of the parties.<sup>25</sup> In the end, this concern is best addressed through the drafting (or redrafting) of IIAs. If one is truly concerned about activities of States on territory under their 'effective control' and/or 'jurisdiction and/or control', then IIAs should employ those terms rather than 'territory'.

Fourth, the application of the doctrine could incentivize the respondent State to engage in misconduct. In particular, in light of the potential for an estoppel argument as discussed above, the respondent State may choose to not participate in the proceedings. This way, it can avoid the difficult scenario of claiming sovereignty over a certain piece of territory while asserting that obligations that should apply to its entire territory do not apply to that piece of territory. Indeed, Russia may have chosen to not participate in the Crimea arbitrations (discussed below in Section IV), for this very reason. In addition, the application of the doctrine could also incentivize the respondent State to claim the existence of territorial disputes in order to render investment claims inadmissible. This concern, however, is mitigated by the fact that, more often than not, respondent States would not wish to admit that certain territory that they claim is in dispute. For example, it would be peculiar for Russia to argue before the Crimea tribunals that Crimea is disputed territory; rather, if it were to participate in the arbitrations, it would likely argue that Crimea lawfully acceded to Russia via popular referendum. In any case, under the principle of competence-competence, the tribunal would be the one deciding whether a genuine territorial dispute exists.

In the second scenario mentioned above—where

23 Like many other IIAs, the US-Argentina BIT allows for arbitrations to be instituted under the ICSID Convention or the UNCITRAL Rules. See *ibid* art VII(3). In the common scenario of a three-member tribunal, Article 37(2)(b) of the ICSID Convention and Article 9(1) of the UNCITRAL Rules provide that each party has the right to appoint one arbitrator.

24 See text to n 10-20.

25 See *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* [1972] ICJ Rep 46, para 13; Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility (24 September 2008) para 65; Baiju S. Vasani and Timothy L Foden, 'Burden of Proof Regarding Jurisdiction' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP 2010) 271, 271; Alex Grabowski, 'The Definition of Investment Under the ICSID Convention: A Defense of Salini' (2014) 15 Chicago JIL 287, 289.

the territory is disputed between a State and a non-State actor—the application of the doctrine of indispensable parties would probably not render the claim inadmissible. The same logic applies, but the difference is that the ‘indispensable party’ is no longer a State, but rather a non-State actor. Suppose, for example, that a British corporation makes an investment in Western Sahara, and subsequently sues Morocco for not having afforded it the protections guaranteed under the Morocco-UK BIT. Article 1(a) of the BIT defines ‘investment’ as ‘every kind of investment made in accordance with legislation and regulations in force in the *territory* of each of the Contracting Parties’.<sup>26</sup> As a result, assuming that the tribunal does not avail itself of an escape mechanism, it may have to determine whether Western Sahara constitutes Moroccan territory. The tribunal could attempt to invoke the doctrine of indispensable parties, citing the Sahrawi Arab Democratic Republic as the ‘indispensable party’. But the question arises as to whether non-State actors can be indispensable parties under the doctrine.

As a matter of public international law, the answer is a resounding ‘no’. The reason is that the principle of consent—the ultimate source of the doctrine of indispensable parties—only requires the consent of States, not the consent of non-State actors. *East Timor* is a prime example. While the ICJ accepted the argument that Indonesia was an indispensable party to the proceedings, the Court did not even consider whether the people of East Timor could be an ‘indispensable party’.<sup>27</sup> To cite another example, in *Obligation to Prosecute or Extradite*, the ICJ rendered a judgment where the rights of former Chadian President Hissène Habré arguably formed the ‘very subject-matter’ of the decision, but he was not a party to the dispute.<sup>28</sup> In short, as a matter of public international law, non-State actors may not constitute ‘indispensable parties’.

Should this also be true for investment tribunals? As many scholars have noted, investment arbitration stands at the juncture between public and private in-

ternational law. The very fact that one of the parties to almost every investment dispute is a non-State actor may suggest that investment tribunals should recognize non-State actors as subjects of the international legal order. Moreover, from the perspective of public policy, it would seem peculiar if the doctrine of indispensable parties applied only to some disputed territories (those disputed between two States) but not others (those disputed between a State and a non-State actor). Nevertheless, the policy consequences of allowing *any* non-State actor to be an indispensable party would be significant: non-governmental organizations and international corporations whose rights are implicated by the decisions of investment tribunals could start claiming indispensable party status. As a result, if one allows non-State actors to be indispensable parties, there must be a line drawn regarding the sorts of entities that may qualify as indispensable parties.

It would thus be difficult for the doctrine of indispensable parties to render a claim concerning an investment on territory disputed between a State and a non-State actor inadmissible. Nevertheless, in such a case, the doctrine of indispensable issues may be of use.

### 3. INDISPENSABLE ISSUES

In order for an international court or tribunal to exercise jurisdiction over a dispute, it must have both jurisdiction *ratione personae* over the parties and jurisdiction *ratione materiae* over the issues. In theory, then, if the doctrine of indispensable parties exists, a corresponding doctrine for jurisdiction *ratione materiae*—which this Article calls ‘the doctrine of indispensable issues’—should exist as well. As mentioned above in Section I, the present author is not necessarily of the opinion that such a ‘doctrine of indispensable issues’ exists or should exist in international law. Nevertheless, the author wishes to explore this hypothetical doctrine in light of its potential applicability to disputes concerning investments on disputed territory.

As examined above in Section II, under the doctrine of indispensable parties, an international court or tribunal cannot exercise jurisdiction over a dispute if the legal interests of a State outside of its jurisdiction *ratione personae* would form the ‘very subject-matter’ of the decision, which is the case if and only if the decision

26 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Morocco for the Promotion and Protection of Investments (signed 30 October 1990, entered into force 14 February 2002) art 1(a) (emphasis added) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2051>> accessed 12 September 2017.

27 *East Timor* (n 9); see Chinkin (n 7) 210.

28 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422.

requires a ‘prerequisite determination’ on the legal responsibility of that State. Analogously, then, under the doctrine of indispensable issues, an international court or tribunal cannot exercise jurisdiction over a dispute if a legal issue outside of its jurisdiction *ratione materiae* forms the ‘very subject-matter’ of the decision, which is the case if and only if the decision requires a ‘prerequisite determination’ on that legal issue.

Unlike the doctrine of indispensable parties, courts and tribunals dealing with indispensable issues have tended to treat the question as one of jurisdiction. This Article once again does not take a position on this classification, but for consistency will treat the question as one of jurisdiction.

### 3.1. Public International Law

At least two ICJ disputes and two disputes under the United Nations Convention on the Law of the Sea (UNCLOS)<sup>29</sup> have raised the question of indispensable issues. Neither the ICJ nor the UNCLOS tribunals expressly recognized or applied all elements of the doctrine of indispensable issues as defined above. Nevertheless, in at least three of the disputes, the holding was consistent with the doctrine and the reasoning reflected at least some elements of the doctrine.

The first ICJ case is *Aegean Sea Continental Shelf*.<sup>30</sup> In that case, Greece instituted proceedings against Turkey, requesting the Court to, *inter alia*, delimit the continental shelf between Greece and Turkey.<sup>31</sup> The Court had jurisdiction over the delimitation dispute under the General Act for the Pacific Settlement of International Disputes (the General Act).<sup>32</sup> A Greek reservation to the General Act, however, excluded the Court’s jurisdiction over ‘disputes relating to the territorial status of Greece’,<sup>33</sup> which the Court considered to include issues

of entitlement to the continental shelf.<sup>34</sup>

In order to determine whether it had jurisdiction over the dispute, the Court decided that it had to identify ‘the subject-matter of the dispute’.<sup>35</sup> It then held:

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.<sup>36</sup>

The Court therefore held that the dispute fell within the Greek reservation, such that it did not have jurisdiction over the delimitation dispute.<sup>37</sup>

The Court’s holding was consistent with the doctrine of indispensable issues: the delimitation would have required a prerequisite determination on the entitlement issue, which fell outside the Court’s jurisdiction *ratione materiae*. The Court’s reasoning also contained elements of the doctrine. The Court relied on its identification of ‘the subject-matter of the dispute’, just as the Court in *Monetary Gold* relied on its identification of the ‘very subject-matter’ of the decision. And the Court noted that the delimitation issue could only be decided after a determination on the entitled issue; in other words, settling the delimitation dispute required a prerequisite determination on the entitlement issue. The Court’s reasoning, however, slightly parted from the doctrine of indispensable issues in that, as seen in the quote excerpted above, the Court considered the formulation of the dispute in Greece’s Application in identifying the ‘very essence of the dispute’.

The second ICJ case is *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*.<sup>38</sup> In that case, Malaysia and Singapore requested the Court to determine, *inter alia*, whether Malaysia or Singapore had sovereignty over a low-tide elevation called South Ledge.<sup>39</sup> By virtue of the special agreement, the Court had jurisdiction over this sovereignty dispute.<sup>40</sup> Nevertheless, this dispute implicated the question of maritime delimitation between the two States, over which the

29 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

30 *Aegean Sea Continental Shelf (Greece v Turkey)* [1978] ICJ Rep 3.

31 *ibid* para 15.

32 *ibid* para 33.

33 *ibid* para 48. 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’. *ibid*. 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”’. *ibid* para 68.

34 *ibid* para 84.

35 *ibid* para 82.

36 *ibid* para 83 (emphasis added).

37 *ibid* para 90.

38 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* [2008] ICJ Rep 12.

39 *ibid* paras 1-2, 31.

40 *ibid* para 298.

Court did not have jurisdiction *ratione materiae*.<sup>41</sup> This was because, as a low-tide elevation, South Ledge was subject to the rule that ‘a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea’,<sup>42</sup> and yet South Ledge lied within twelve nautical miles (the breadth of the territorial sea<sup>43</sup>) of both Pedra Branca and Middle Rocks.<sup>44</sup>

The Court’s handling of this matter was very concise. It did not specify who had sovereignty over South Ledge, instead merely observing that ‘sovereignty over South Ledge . . . belongs to the State in the territorial waters of which it is located’.<sup>45</sup> Like the Court’s holding in *Aegean Sea Continental Shelf*, the Court’s holding here was consistent with the doctrine of indispensable issues because the settlement of the sovereignty dispute would have required a prerequisite determination on the delimitation issue. The Court’s reasoning, however, was very sparse and thus did not contain any reference to the ‘very subject-matter’ or ‘prior determination’ tests.

Two recent UNCLOS tribunals have also rendered decisions concerning the doctrine of indispensable issues. In *Chagos Marine Protected Area*, Mauritius requested an UNCLOS tribunal to interpret and apply the term ‘coastal State’ as used in UNCLOS with respect to the Chagos Archipelago.<sup>46</sup> The tribunal had jurisdiction over disputes concerning the interpretation or application of UNCLOS, but this UNCLOS dispute implicated the issue of whether Mauritius or the United Kingdom had sovereignty over the archipelago, an issue that fell outside the jurisdiction of the tribunal.<sup>47</sup>

In order to determine whether the dispute fell within its jurisdiction, the tribunal began by characterizing the dispute.<sup>48</sup> In making this evaluation, the tribunal ob-

served:

There is an extensive record, extending across a range of fora and instruments, documenting the Parties’ 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.<sup>49</sup>

As a result, the tribunal concluded that ‘the Parties’ dispute . . . is properly characterized as relating to sovereignty over the Chagos Archipelago’,<sup>50</sup> such that the tribunal did not have jurisdiction over Mauritius’s first submission.<sup>51</sup>

At first glance, one might consider that the decision was consistent with the doctrine of indispensable issues. Since the determination of the ‘coastal State’ within the meaning of UNCLOS required a prerequisite 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 ‘prerequisite 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. Moreover, in *obiter dicta*, the tribunal went on to note that if the dispute had been properly characterized as an UNCLOS dispute, then its jurisdiction would ‘extend[] to making such . . . ancillary determinations of law as are necessary to resolve the dispute presented to it’.<sup>52</sup> Therefore, although the tribunal’s disposition on Mauritius’s first submission was consistent with the doctrine of indispensable issues, the tribunal’s reasoning was inconsistent with the doctrine.

A second UNCLOS case that dealt with indispensable issues is *South China Sea*.<sup>53</sup> In this case, the Philippines asked an UNCLOS tribunal to declare that China had violated multiple UNCLOS provisions through its activities in the South China Sea. China, however, argued that the tribunal did not have jurisdiction because, *inter alia*, the ‘essence of the subject-matter of the arbitration is the territorial sovereignty over maritime features in the South China Sea’,<sup>54</sup> which generally falls

41 *ibid.*

42 See *ibid* para 295 (quoting *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 40, para 204).

43 UNCLOS (n 29) art 3.

44 *Pedra Branca* (n 38) para 297.

45 *ibid* para 299.

46 *Chagos Marine Protected Area (Mauritius v UK)* (2015) PCA Case No 2011-03, para 203.

47 See Kriangsak Kittichaisaree, *The Law of the Sea and Maritime Boundary Delimitation in South-East Asia* (OUP 1987) 140; Bernard H Oxman, ‘Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals’ in Donald R Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 394, 400; Irina Buga, ‘Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals’ (2012) 27 *IJMCL* 59, 68, 70-71.

48 See *Chagos Marine Protected Area* (n 46) paras 208, 211.

49 *ibid* para 211.

50 *ibid* para 212.

51 *ibid* para 221.

52 *ibid* para 220.

53 *South China Sea* (Merits) (n 5); *South China Sea* (Jurisdiction and Admissibility) (n 19).

54 ‘Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines’ (7 December 2014) (Position Paper of China) para 3.

outside the jurisdiction of UNCLOS tribunals.<sup>55</sup>

In order to determine whether it had jurisdiction over the dispute, the tribunal held that it was required to ‘identify the object of the claim’.<sup>56</sup> It then 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 Tribunal 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.<sup>57</sup>

The tribunal found that neither of these two elements was true,<sup>58</sup> and therefore upheld its jurisdiction over the dispute.<sup>59</sup>

This holding was consistent with the doctrine of indispensable issues, as the adjudication of the Philippines’ claims did not require a prerequisite determination on questions of sovereignty. Moreover, the tribunal’s reasoning in many ways reflected the doctrine of indispensable issues. The tribunal first sought to ‘identify the object of the claim’, just like identifying the ‘very subject-matter’ of the decision. It then applied the test of whether the Philippines’ claims would require it to ‘first render a decision on sovereignty’, not unlike making a prerequisite determination on sovereignty. Indeed, it expressly upheld its jurisdiction with respect to certain of the Philippines’ claims because the exercise of such jurisdiction would ‘not [be] dependent on a prior determination of sovereignty’.<sup>60</sup> Some differences, however, remain. The tribunal, for example, also examined the ‘actual objective’ of the Philippines’ claims. And it furthermore held that the satisfaction of the ‘prerequisite determination’ test or the ‘actual objective’ test ‘might’ (not ‘would’) lead it to consider that the Philippines’ submissions ‘could be understood to relate to sovereignty’ (not ‘have sovereignty as its subject-matter’).

55 See n 47.

56 *South China Sea* (Jurisdiction and Admissibility) (n 19) para 150 (quoting *Nuclear Tests (New Zealand v France)* [1974] ICJ Rep 457, para 30).

57 *South China Sea* (Jurisdiction and Admissibility) (n 19) para 153 (emphasis added).

58 *ibid.*

59 *ibid.*

60 *ibid.* para 153; see *South China Sea* (Merits) (n 5) paras 545, 759, 927, 1045. Note that the tribunal upheld its jurisdiction based on this abstract, logical analysis, rather than through an interpretation of Article 298(1)(a)(i).

### 3.2. Investment Law

Elements of the doctrine of indispensable issues may also be seen in two of the three Mexican sugar investor-State arbitrations. In 2001, Mexico imposed a 20% tax on the importation of any drink that used high fructose corn syrup as a sweetener.<sup>61</sup> In response, three U.S. investors—Archer Daniels Midland (*ADM v Mexico*),<sup>62</sup> Corn Products International (*CPI v Mexico*),<sup>63</sup> and Cargill (*Cargill v Mexico*)<sup>64</sup>—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 NAFTA.<sup>65</sup> The question of indispensable issues arose because the tribunals had jurisdiction 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?<sup>66</sup>

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.<sup>67</sup> And the *CPI v Mexico* and *Cargill v Mexico* tribunals held that, as

61 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v The United Mexican States*, ICSID Case No ARB(AF)/04/05, Award (21 November 2007) para 82.

62 *ADM v Mexico* (n 61).

63 *Corn Products International, Inc v The United Mexican States*, ICSID Case No ARB(AF)/04/01, Decision on Responsibility (15 January 2008).

64 *Cargill, Incorporated v United Mexican States*, ICSID Case No ARB(AF)/05/2, Award (17 September 2008).

65 *ADM v Mexico* (n 61) paras 110, 124; *CPI v Mexico* (n 63) para 150; *Cargill v Mexico* (n 64) para 379.

66 *CPI v Mexico* (n 63) para 182 (emphasis added).

67 *ADM v Mexico* (n 61) paras 180, 182.

a general matter, Mexico could not invoke countermeasures against an investor in Chapter XI proceedings.<sup>68</sup>

In *obiter dicta*, however, the *ADM v Mexico* and *CPI v Mexico* tribunals appeared to support the doctrine of indispensable issues. 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.<sup>69</sup> 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.<sup>70</sup> In both cases, the tribunals thus agreed that it would not be able to make an affirmative finding on Mexico's defense of countermeasures because doing so required a prerequisite determination on the lawfulness of the U.S. measures.

These two decisions, of course, are insufficient to establish a *jurisprudence constante*. And they arise from a context that is, for many reasons, distinguishable from the context of investments on disputed territory. Nevertheless, these two decisions reveal that even investment tribunals may refuse to make certain legal determinations when doing so would require them to render a prerequisite determination on a legal issue outside of their jurisdiction *ratione materiae*.

If this doctrine of indispensable issues is applied to claims concerning investments on disputed territory, the claims would likely be rendered inadmissible. The reason is that, since investment protections typically apply only on the 'territory' of the respondent State under the relevant IIA, the determination of sovereignty over the territory in question would be a necessary prerequisite to the determination of whether the investment on such territory is protected.

Although the status of the doctrine of indispensable issues is not well established in public international law generally, there are four reasons why the doctrine is particularly appropriate for investment tribunals, at least when compared to the ICJ and UNCLOS tribunals.

First, in the investment context, it is clear that the States party to the IIA never intended investment tribunals to make determinations on territorial sovereignty

disputes. The principal function of investment tribunals is to settle investment disputes. It is now widely accepted that they can apply secondary rules of international law and take into account primary rules of international law to aid in its settlement of these disputes.<sup>71</sup> But investment tribunals were never intended to make determinations on territorial sovereignty disputes. On the other hand, the ICJ has long settled territorial sovereignty disputes.<sup>72</sup> As for UNCLOS tribunals, some argue that the drafters had intended them to settle territorial disputes in the mixed dispute scenario.<sup>73</sup> And even those that disagree would acknowledge that the drafters intended them to solve maritime delimitation disputes, so extending their jurisdiction to resolve territorial disputes would not be as significant of a leap.

Second, in the investment context, it is not clear that the arbitrators would always have the requisite expertise for settling territorial disputes. Some arbitrators appointed for investment disputes have expertise in public international law; however, others come from a commercial background and have little familiarity with public international law. As a result, it may not be appropriate to have arbitrators appointed to settle an investment dispute also decide serious matters of public international law such as territorial sovereignty. Judges and arbitrators on the ICJ and UNCLOS tribunals, on the other hand, typically have significant background in

71 See *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability (27 October 1989) 95 ILR 184; *Mondev International Ltd v United States of America*, Award, ICSID Case No ARB(AF)/99/2 (11 October 2002) 42 ILM 85; *Técnicas Medioambientales Tecmed, SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003) 43 ILM 133; *Azurix Corp v The Argentine Republic*, ICSID Case No ARB/01/12, Award (14 July 2006); Eric De Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP 2016) 142; Moshe Hirsch, 'Investment Tribunals and Human Rights: Divergent Paths' in Pierre-Marie Dupuy and others (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 97, 99-105.

72 See eg *Territorial and Maritime Dispute (Nicaragua v Colombia)* [2012] ICJ Rep 624; *Pedra Branca* (n 38); *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6; *Sovereignty over Certain Frontier Land (Belgium/Netherlands)* [1959] ICJ Rep 209.

73 See eg Gudmundur Eiriksson, *The International Tribunal for the Law of the Sea* (Brill 2000) 113; Alan E Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46 ICLQ 37, 44; Philippe Gautier, 'The International Tribunal for the Law of the Sea: Activities in 2005' (2006) 5 Chinese JIL 381, 389-390; P Chandrasekhara Rao, 'Delimitation Disputes Under the United Nations Convention on the Law of the Sea: Settlement Procedures' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (Brill 2007) 877, 891-92.

68 *CPI v Mexico* (n 63) para 161; *Cargill v Mexico* (n 64) paras 385, 429.

69 *ADM v Mexico* (n 61) paras 133.

70 See *CPI v Mexico* (n 63) para 189.

public international law.

Third, in the investment context, there would be greater questions concerning the legitimacy of the tribunal to make determinations on territorial disputes. Disputes over territorial sovereignty are matters that primarily concern the interests of States. The fact that typically only one member of the tribunal is appointed by a State may undermine the legitimacy of the tribunal to rule on such matters. By contrast, States indirectly nominate the judges of the ICJ<sup>74</sup> and ITLOS,<sup>75</sup> and usually appoint at least two arbitrators on UNCLOS arbitral tribunals.<sup>76</sup>

Fourth, if one were to accept the doctrine of indispensable parties for only territory disputed between two States (and not for territory disputed between a State and a non-State actor), then it would lead to the arguably unreasonable result that investment claims concerning investments on some disputed territory (disputed between two States) would be inadmissible, but claims concerning investments on other disputed territory (disputed between a State and a non-State actor) would be admissible. The doctrine of indispensable issues could be invoked in the latter case to also render those claims inadmissible.

These four reasons provide some support for why, even if the doctrine of indispensable issues is not widely recognized in public international law generally, it may be appropriate in the context of investment claims concerning investments on disputed territory.

#### 4. ESCAPE MECHANISMS: THE CRIMEA ARBITRATIONS

As with many prominent legal issues that come before international courts and tribunals, there are often various ‘escape mechanisms’ that allow the court or tribunal to avoid addressing them. The availability of such mechanisms would depend on the specific case in question. For demonstrative purposes, this Section examines one line of cases: the Crimea investor-State arbitrations. It should be noted that the Crimea arbitrations

arise from a particular factual situation; as a result, escape mechanisms available to the Crimea tribunals may not necessarily be available to other tribunals seized of disputes concerning investments on disputed territory.

As of August 2017, Ukrainian investors have instituted at least eight arbitrations against Russia under the Russia-Ukraine Bilateral Investment Treaty (BIT) for expropriating their investments in Crimea.<sup>77</sup> 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’.<sup>78</sup> It thus appears that the eight tribunals may have to confront the doctrines of indispensable parties and indispensable issues. Nevertheless, as of August 2017, five of the eight tribunals have already rendered confidential decisions on jurisdiction without

77 The eight publicly known cases are: (1) *Aeroporto Belbek LLC and Mr. Igor Valerievich Kolomoisky v The Russian Federation*; (2) *PJSC CB PrivatBank and Finance Company Finlon LLC v The Russian Federation*; (3) *Limited Liability Company Lugzor, Limited Liability Company Libset, Limited Liability Company Ukrinterinvest, Public Joint Stock Company DniproAzot, Limited Liability Company Aberon Ltd v The Russian Federation*; (4) *Stabil LLC, Rubenor LLC, Rustel LLC, Novel-Estate LLC, PII Kirovograd-Nafta LLC, Crimea-Petrol LLC, Pirsan LLC, Trade-Trust LLC, Elefteria LLC, VKF Satek LLC, Stemm Group LLC v The Russian Federation*; (5) *PJSC Ukrnafta v The Russian Federation*; (6) *Everest Estate LLC et al v The Russian Federation*; (7) *NJSC Naftogaz of Ukraine (Ukraine) et al v The Russian Federation*; and (8) *Oschadbank v The Russian Federation*. For information on the first seven cases, see Permanent Court of Arbitration, ‘Cases’ <<https://pca-cpa.org/en/cases/>> accessed 12 September 2017. 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’ (2016) *Inv Arb Rep* <<https://www.iareporter.com/articles/in-the-first-of-a-possible-wave-of-bit-claims-by-ukraine-state-owned-entities-against-russia-an-uncitral-tribunal-is-finalized/>> accessed 12 September 2017; Lacey Yong, ‘Russia Faces US\$2.6 Billion Claim Over Losses in Crimea’ (2016) *Global Arb Rev* <<http://globalarbitrationreview.com/article/1069603/russia-faces-ususd26-billion-claim-over-losses-in-crimea>> accessed 12 September 2017. For information on a potential ninth case, *DTEK Krymenergo v The Russian Federation*, see IAREporter, ‘Russia BIT Claims: Recent Developments in Arbitrations Against the Russian Federation’ (2017) *Inv Arb Rep* <<https://www.iareporter.com/articles/russia-bit-claims-recent-developments-in-arbitrations-against-the-russian-federation/>> accessed 12 September 2017; Lacey Yong, ‘More Crimea Claims Clear Threshold’ (2017) *Global Arb Rev* <<http://globalarbitrationreview.com/article/1143949/more-crimea-claims-clear-threshold>> accessed 12 September 2017.

78 Agreement Between the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments (signed 27 November 1998, entered into force 27 January 2000) (Russia-Ukraine BIT) art 1(1) (emphasis added) <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/2233>> accessed 12 September 2017.

74 Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945) UKTS 67 (1946) (ICJ Statute) art 4(1).

75 UNCLOS (n 29) annex VI, art 4(1).

76 *ibid* annex VII, art 3.



dismissing their respective proceedings.<sup>79</sup> Although the tribunals may have considered the two doctrines, they could also simply have availed themselves of the aforementioned escape mechanisms. A non-exhaustive list of such mechanisms available to the Crimea tribunals is provided here.

First, the tribunals could determine that there is actually no legal dispute over Crimea. They could find that, as a factual matter, Ukraine has sovereignty over Crimea. The tribunals could base this ‘factual’ finding on determinations by the United Nations General Assembly,<sup>80</sup> the Venice Commission,<sup>81</sup> and the Chair of the Organization for Security and Co-operation in Europe<sup>82</sup> that the referendum is invalid. This would lead to the determination that Crimea is still the territory of Ukraine, thereby relieving Russia of responsibility under the Russia-Ukraine BIT for the alleged expropriations. From a broader policy perspective, propo-

nents of such a factual finding may point out that the recognition of the existence of a legitimate legal dispute concerning sovereignty over Crimea would incentivize States to take unlawful actions to create legal ‘disputes’ in order to raise an objection based on the doctrines of indispensable parties and indispensable issues before international courts and tribunals, thereby undermining the efficient settlement of disputes.

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.<sup>83</sup> While this would go against the text of the BIT, it would arguably be in line with the object and purpose of the treaty.<sup>84</sup> Indeed, this is reportedly the line of argumentation adopted by Ukraine in its non-disputing party submissions to the various Crimea tribunals that have accepted such submissions.<sup>85</sup> The result would be that the tribunals would find that they may exercise jurisdiction over the investment claims, since it is undeniable that Russia has ‘effective control’ and/or ‘jurisdiction and/or control’ over Crimea.

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.<sup>86</sup> 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. The tribunals would thus conclude that they may not exercise jurisdiction over the dispute. Nevertheless, this argument could contradict the customary ‘moving treaty frontiers’ rule.<sup>87</sup>

Fourth, along the same lines, the tribunals could

79 Permanent Court of Arbitration, Press Release, ‘Arbitration Between Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky as Claimants and the Russian Federation: The Tribunal Issues Its Interim Award’ (9 March 2017); Permanent Court of Arbitration, Press Release, ‘Arbitration Between PJSC Privatbank and Finance Company Finilon LLC as Claimants and the Russian Federation: The Tribunal Issues Its Interim Award’ (9 March 2017); Permanent Court of Arbitration, Press Release, ‘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’ (4 July 2017); Permanent Court of Arbitration, Press Release, ‘Arbitration Between Everest Estate LLC and Others as Claimants and the Russian Federation: The Tribunal Issues Its Decision on Jurisdiction’ (5 April 2017).

80 UNGA Resolution 68/262, Territorial Integrity of Ukraine, UN Doc A/RES/68/262 (27 March 2014) para 6; see *ibid* para 5; see also Baiju S. Vasani and others, ‘Crisis in Crimea: Is Your Foreign Investment There Protected by a Treaty?’, 10 April 2014, Jones Day <<http://www.jonesday.com/crisis-in-crimea-is-your-foreign-investment-there-protected-by-a-treaty-04-10-2014/>> accessed 12 September 2017; Yaraslau Kryvoi and Maria Tsarova, ‘Protecting Foreign Investors in Crimea: Is Investment Arbitration an Option?’, 29 July 2014, CIS Arbitration Forum <<http://www.cisarbitration.com/2014/07/29/protecting-foreign-investors-in-crimea-is-investment-arbitration-an-option/>> accessed 12 September 2017.

81 European Commission for Democracy Through Law (Venice Commission), 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 (21 March 2014) para 27.

82 Organization for Security and Co-operation in Europe, ‘OSCE Chair Says Crimean Referendum in its Current Form is Illegal and Calls for Alternative Ways to Address the Crimean Issue’ (11 March 2014) <<http://www.osce.org/cio/116313>> accessed 12 September 2017.

83 See Richard Happ and Sebastian Wuschka, ‘Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories’ (2016) 33 *Journal of International Arbitration* 245, 260.

84 See *ibid*.

85 Yong, ‘More Crimea Claims Clear Threshold’ (n 77).

86 Kryvoi and Tsarova (n 80) (‘Apparently when Russia entered into investment treaties Crimea was not controlled by it. Therefore Russia can argue that its consent did not cover the territory of Crimea.’).

87 See Vienna Convention on Succession of States in Respect of Treaties (opened for signature 23 August 1978, entered into force 6 November 1996) 1946 UNTS 3. Commentators and at least one tribunal agree that this principle reflects customary international law. See eg *Sanum Investments v Laos* (Jurisdiction) (2013), PCA Case No 2013-13, para 221; Gerhard Hafner and Gregor Novak, ‘State Succession in Respect of Treaties’ in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 396, 399; Mustafa Kamil Yasseen, ‘La Convention de Vienne sur la Succession d’Etats en Matière de Traités’ [‘Vienna Convention on Succession of States in Respect of Treaties’] (1978) 24 *AFDI* 59, 92.

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 Contracting Party *in conformity with the latter’s legislation*’.<sup>88</sup> 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. Therefore, the tribunal would not have jurisdiction over the dispute.

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 behaviour over the past few years in treating Crimea as part of its territory. Nevertheless, such a holding may contravene the principle that the tribunal should *proprio motu* consider whether it has jurisdiction over the dispute, and not depend solely on the objections of the parties.<sup>89</sup>

Beyond these possibilities, the tribunals could come up with other ways to find or decline jurisdiction while avoiding the doctrines of indispensable parties and indispensable issues,<sup>90</sup> and, of course, each of the tribunals could rely on different grounds for making its decision. Therefore, although the application of the doctrines of indispensable parties and indispensable issues may lead to certain results, it is very possible that they may not be applied at all in these cases.

88 Russia-Ukraine BIT (n 78) art 1(1) (emphasis added); see Sergejs Dilevka, ‘Arbitration Claims by Ukrainian Investors under the Russia-Ukraine BIT: Between Crimea and a Hard Place?’, 17 February 2016, CIS Arbitration <<http://www.cisarbitration.com/2016/02/17/arbitration-claims-by-ukrainian-investors-under-the-russia-ukraine-bit-between-crimea-and-a-hard-place/>> accessed 12 September 2017; Timur Bondaryev and others, ‘Protecting Investments in Crimea: Does Ukrainian or Russian Law Apply?’ (2015) 44 International Law News 14, 16.

89 See *Jurisdiction of the ICAO Council* (n 25) para 13; *Micula v Romania* (n 25) para 65; Vasani and Foden (n 25) 271; Grabowski (n 25) 289.

90 For example, one team of authors asserts that, following the case 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 and others (n 88) 17 (quoting Russia-Ukraine BIT (n 78) art 9(1)). See also Ofilio J Mayorga, ‘Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories’ (2017) 19 Palestine YBIL (forthcoming).

## 5. FINAL CONCLUSIONS

In conclusion, it is not contended that investment tribunals *must* or even *should* apply the doctrines of indispensable parties and indispensable issues to disputes concerning investments on disputed territory. This is particularly the case for the doctrine of indispensable issues because, as emphasized earlier, the author is not necessarily of the opinion that such a doctrine exists or should exist in international law. Nevertheless, it is the hope of the author that investment tribunals at least *consider* the applicability of these two doctrines. If applied in an appropriate manner, they could serve as an appropriate means of regulating the jurisdiction *ratione personae* and jurisdiction *ratione materiae* of investment tribunals.

Notably, the two doctrines may also be applied by other international courts and tribunals that may similarly be asked to make a determination on a sovereignty dispute prior to settling a dispute of another subject-matter. For example, Article 12(2) of the Rome Statute of the International Criminal Court (ICC) provides that ‘the Court may exercise its jurisdiction if . . . [t]he State on the *territory* of which the conduct in question occurred [is Party to this Statute]’.<sup>91</sup> As another example, Article 10 of the Chicago Convention provides that ‘every 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’.<sup>92</sup> As a third example, Article 72(2) of the FIFA Statutes provide that ‘[m]ember associations and their clubs may not play on the *territory* of another member association without the latter’s approval’.<sup>93</sup> In all of these cases, if a court or tribunal has jurisdiction over a dispute concerning the application of the provision in question in disputed territory, it may have to make a prerequisite determination on the sovereignty dispute. The doctrines of indispensable parties and indispensable issues could potentially bar

91 Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 12(2) (emphasis added).

92 Convention on International Civil Aviation (signed 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention) art 10 (emphasis added).

93 FIFA Statutes: Regulations Governing the Application of the Statutes (May 2008) art 72(2) (emphasis added) <[https://resources.fifa.com/mm/document/affederation/generic/01/09/75/14/fifa\\_statutes\\_072008\\_en.pdf](https://resources.fifa.com/mm/document/affederation/generic/01/09/75/14/fifa_statutes_072008_en.pdf)> accessed 12 September 2017.

the court or tribunal from exercising jurisdiction over such cases.

The key takeaway is that international courts and tribunals must not go beyond the limited scope of their jurisdiction. Staying within the powers conferred upon them is critical not only for the legitimacy of their decisions, but also for the overarching stability of the dispute settlement system of the international legal order. It is thus the hope of the author that, at the very least, investment tribunals seized of disputes concerning investments on disputed territories consider applying the doctrines of indispensable parties and indispensable issues.

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