INCIDENTAL DETERMINATIONS IN PROCEEDINGS UNDER COMPROMISSORY CLAUSES

CALLISTA HARRIS*

Abstract A dispute brought before an international court or tribunal pursuant to a compromissory clause in a specific treaty may involve issues under rules of international law found outside of the treaty in question. In what circumstances can a court or tribunal determine such external issues? At present, there is no clear answer to this question. This article sets out a framework for how courts and tribunals exercising jurisdiction under compromissory clauses could approach external issues.

Keywords: public international law, compromissory clauses, subject-matter jurisdiction, applicable law, International Court of Justice, UNCLOS.

I. INTRODUCTION

Recent proceedings before the International Court of Justice (ICJ or Court) and tribunals established under the United Nations Convention on the Law of the Sea (UNCLOS) have highlighted an area of uncertainty: it is unclear precisely what determinations international courts and tribunals can make when exercising jurisdiction under compromissory clauses.

Compromissory clauses typically grant a court or tribunal jurisdiction to decide 'disputes' concerning the 'interpretation or application' of the treaty containing the clause.[1] As recent proceedings illustrate, the disputes brought before courts and tribunals under compromissory clauses may not only concern the treaty containing the clause. They may also involve issues under rules of international law found outside of the treaty in question ('external rules' and 'external issues'). Since 2015, at least eight proceedings brought before UNCLOS tribunals, pursuant to the compromissory clause in UNCLOS,[2] have raised external issues. Across the eight proceedings, a variety of external issues have been raised, including issues relating to

* The University of Sydney Law School, callista.harris@sydney.edu.au. The author would like to thank Camille Boileau, Professor Chester Brown, Professor Terry Carney and Catherine Drummond for their comments on earlier drafts of this article. The views expressed in this article are the author's own and do not necessarily reflect the position of any entity with which the author is associated.

[1] There are variations in the wording of compromissory clauses, which are not relevant for the purposes of this article. See eg Convention on the Prevention and Punishment of the Crime of Genocide, art IX.

[2] UNCLOS, art 288(1).

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sovereignty over territory,[3] human rights,[4] State immunities,[5] and the use of force.[6] In the same period, at least six proceedings brought before the ICJ, pursuant to compromissory clauses in a variety of treaties, have also raised external issues.[7] For example, the *Certain Iranian Assets* proceedings, which were brought under a bilateral treaty relating to amity, economic relations and consular rights, involved issues relating to State immunities.[8] The *ICAO Qatar Appeals* concerned proceedings brought under two treaties relating to international civil aviation, which involved issues relating to non-intervention in the internal affairs of other States and terrorism.[9]

It is presently unclear whether, and if so when, courts and tribunals can decide such external issues. Different approaches have been taken in different proceedings. Even within one set of proceedings, different approaches have been taken in relation to different external issues,[10] and individual judges and arbitrators have taken different approaches from one another.[11]

By returning to foundational concepts relating to inter-State dispute settlement—subject-matter jurisdiction, applicable law, *res judicata* and

[3] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, PCA Case 2011-03, Award, 18 March 2015, [163]–[230]; *The South China Sea Arbitration (The Philippines v China)*, PCA Case 2013-19, Award on Jurisdiction and Admissibility, 29 October 2015, [133]–[137], [140]–[145], [148]–[154]; *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v Russia)*, PCA Case 2017-06, Award concerning Preliminary Objections, 21 February 2020, [43]–[198]; *Dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, ITLOS Case 28, Preliminary Objections, Judgment, 28 January 2021, [101]–[251].

[4] *The Arctic Sunrise Arbitration (The Netherlands v Russia)*, PCA Case 2014-02, Award on the Merits, 14 August 2015, [193]–[198]; *The Duzgit Integrity Arbitration (Malta v São Tomé and Príncipe)*, PCA Case 2014-07, Award, 5 September 2016, [128], [203]–[210]; *The M/V 'Norstar' Case (Panama v Italy)*, ITLOS Case 25, Judgment, 10 April 2019, [139]–[146].

[5] *The 'Enrica Lexie' Incident (Italy v India)*, PCA Case 2015-28, Award, 21 May 2020, [226], [238]–[245], [732]–[874].

[6] ibid, [1065]–[1077].

[7] *Immunities and Criminal Proceedings (Equatorial Guinea v France)* (Preliminary Objections) [2018] ICJ Rep 292, 319–323 [84]–[102]; *Certain Iranian Assets (Iran v United States)* (Preliminary Objections) [2019] ICJ Rep 7, 25–34 [48]–[80]; *Jadhav (India v Pakistan)* (Judgment) [2019] ICJ Rep 418, 430–431 [36]–[37]; *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 (Ukraine v Russia)* (Preliminary Objections) [2019] ICJ Rep 558, 576–577 [27]–[29]; *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v Qatar)*, Judgment, 14 July 2020 (*Chicago Convention Appeal*), [41]–[62]; *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v Qatar)*, Judgment, 14 July 2020 (*IASTA Appeal*; together, the *ICAO Qatar Appeals*), [41]–[62].

[8] See eg *Certain Iranian Assets* (n 7) 25 [48].

[9] See eg *Chicago Convention Appeal* (n 7) [42].

[10] See eg C Harris, 'Claims with an Ulterior Purpose: Characterising Disputes Concerning the "Interpretation or Application" of a Treaty' (2019) 18(3) LPICT 279, 282–5, 294–6.

[11] See eg *Enrica Lexie* (n 5), Dissenting Opinion of Judge Robinson, [30]–[54]; Concurring and Dissenting Opinion of Arbitrator Rao, [24]–[59]; *Immunities and Criminal Proceedings* (Preliminary Objections) (n 7), Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge ad hoc Kateka, 342–345 [7]–[14].

abuse of process—this article proposes a framework for how courts and tribunals exercising jurisdiction under compromissory clauses could approach such external issues. The article explains that framework with reference to one particular type of claim that is often brought under compromissory clauses: claims that an obligation under the relevant treaty has been breached.

In short, the framework proposed for courts and tribunals exercising jurisdiction under compromissory clauses is the following:

1. These courts and tribunals have jurisdiction over claims that an obligation under the relevant treaty has been breached. They have jurisdiction even if the claim involves issues under external rules.
2. Whether the court or tribunal can apply those external rules and determine the pertinent external issues is a question of applicable law, not of jurisdiction.
3. A court or tribunal can determine an external issue if it has to determine the issue to be able to rule on a claim within its jurisdiction, such as a claim of breach ('incidental issues' and 'incidental determinations').
4. Incidental determinations cannot be included in the *dispositif* of a judgment or an award. In a *dispositif*, a court or tribunal can only rule on matters within its jurisdiction, such as a claim of breach. Incidental determinations, made in application of the applicable law, can only be dealt with in the court or tribunal's reasons.
5. Incidental determinations have no *res judicata* effect. *Res judicata* only attaches to findings ruled on in a *dispositif*.
6. A claim brought for the purpose of having an incidental issue determined, to circumvent a lack of consent to settle disputes relating to that issue, may be inadmissible as an abuse of process.

This article elaborates on and provides support for the above framework, with reference to the various proceedings recently heard by the ICJ and UNCLOS tribunals. Section II deals with subject-matter jurisdiction, Sections III and IV with applicable law, Section V with *res judicata* and abuse of process, and Section VI concludes with a discussion of consent.

II. SUBJECT-MATTER JURISDICTION

When considering how international courts and tribunals should approach external issues, there are two key matters relating to jurisdiction that need to be addressed at the outset. The first is the scope of subject-matter jurisdiction under compromissory clauses (subsection A). The second is the distinction between jurisdiction and applicable law (subsection B).

A. The Scope of Subject-Matter Jurisdiction

It should be uncontroversial that a court or tribunal exercising jurisdiction under a compromissory clause has jurisdiction over claims that an obligation under the relevant treaty has been breached.[12] Expressed another way, it should be uncontroversial that a claim by one State that an obligation contained in a treaty has been breached, which is opposed by another State,[13] constitutes a dispute concerning the interpretation or application of the relevant treaty. Indeed, claims of breach are the type of claim most commonly made and ruled on under compromissory clauses. When exercising jurisdiction under compromissory clauses, the ICJ has ruled on breaches of the Vienna Convention on Consular Relations (the VCCR),[14] the Vienna Convention on Diplomatic Relations (the VCDR),[15] the Convention against Torture,[16] and the Genocide Convention,[17] among other treaties.[18]

Until 2015, it was uncontroversial that such claims of breach made by an applicant State, and opposed by a respondent State, constituted disputes concerning the interpretation or application of the relevant treaty. However, in recent years, rather than assessing jurisdiction based on the claims made by an applicant, UNCLOS Annex VII tribunals have adopted a practice of 'characterising' disputes. This approach was first used in 2015 by the tribunal in the *Chagos* proceedings. That tribunal was faced with claims under UNCLOS raising a particularly controversial external issue: sovereignty over territory. The tribunal characterised certain disputes between the parties by assessing where the 'relative weight' of the dispute lay: by assessing whether the dispute primarily concerned the interpretation or application of UNCLOS or primarily concerned the external issue (sovereignty over territory).[19]

[12] Assuming that there is no relevant subject-matter exclusion from jurisdiction and that the claim of breach 'falls within' the provisions of the treaty. On the latter point, see Section II.B.

[13] Regarding the requirement that a claim be 'positively opposed', see eg *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 328; *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) [2016] ICJ Rep 833, 849 [37].

[14] See eg *Jadhav* (n 7) 459–460 [149(3)–(5)].

[15] See eg *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Judgment, 11 December 2020, [126(2)].

[16] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, 462–463 [122(4)–(5)].

[17] See eg *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, 237–238 [471(2)–(6)].

[18] See eg *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, 147–148 [292(7), (11)]; *Elettronica Sicula S.p.A. (ELSI) (United States v Italy)* (Judgment) [1989] ICJ Rep 15, 81 [137(2)]; *Oil Platforms (Iran v United States)* (Judgment) [2003] ICJ Rep 161, 218 [125(1)–(2)]; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, 106 [282(1)–(2)]; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* (Judgment) [2011] ICJ Rep 644, 693 [170(2)].

[19] *Chagos* (n 3) [207]–[212], [229]–[230]. See also Harris (n 10) 282–3.

A number of subsequent Annex VII tribunals have engaged in similar processes of characterisation.[20]

As argued elsewhere, this practice of characterising disputes when determining whether there is a dispute concerning the interpretation or application of a particular treaty is not supported by authority and is not a principled development in the law.[21] Additionally, the ICJ appears to have rejected such an approach in its 2020 judgments in the *ICAO Qatar Appeals*. Those proceedings were appeals from decisions of the Council of the International Civil Aviation Organization (ICAO Council), in which the ICAO Council had upheld its jurisdiction to hear certain claims brought by Qatar under the compromissory clauses in two treaties relating to international civil aviation: the Convention on International Civil Aviation (the Chicago Convention) and the International Air Services Transit Agreement (the IASTA).

Before the Court, the four States that Qatar had brought its claims against (the Quartet) argued that the ICAO Council should have characterised the disputes between the parties when determining whether it had jurisdiction.[22] The Quartet invoked precedents including the award in the *Chagos* proceedings and argued that the disputes between the parties were properly characterised as concerning external issues: Qatar's non-compliance with obligations relating to terrorism and non-intervention in the internal affairs of other States.[23] Contrary to the Quartet's submission, however, the Court did not characterise the disputes between the parties. Rather, in finding that there were disputes concerning the interpretation or application of the two treaties, the Court pointed to the claims made by Qatar, which were claims that the Quartet had breached obligations under the treaties.[24]

More recently, in *Alleged Violations of the 1955 Treaty*—proceedings brought by Iran against the United States under the compromissory clause in the Treaty of Amity, Economic Relations and Consular Rights between the two States (the 1955 Treaty)—the United States argued that the dispute between the States exclusively concerns a different instrument, the Joint Comprehensive Plan of Action.[25] In rejecting this argument, and finding that there is a dispute concerning the interpretation or application of the 1955 Treaty, the Court did not characterise the dispute, but rather looked at the claims made by Iran. The Court reasoned as follows: Iran seeks a declaration

[20] *South China Sea* (Jurisdiction and Admissibility) (n 3) [150]–[153]; *Coastal State Rights* (n 3) [151]–[166], [191]–[197]; *Enrica Lexie* (n 5) [231]–[244].

[21] Harris (n 10) 286–98.

[22] *Chicago Convention Appeal* (n 7) [43]; *IASTA Appeal* (n 7) [43].

[23] See eg *Chicago Convention Appeal*, Memorial of the Quartet, 27 December 2018, [5.56]–[5.83]; Reply of the Quartet, 27 May 2019, [4.14]–[4.18].

[24] *Chicago Convention Appeal* (n 7) [47]–[48]; *IASTA Appeal* (n 7) [47]–[48]. While the ICAO Council is not a 'judicial institution in the proper sense of that term', differences between the ICAO Council and international courts and tribunals are not relevant for the purposes of this article. See *Chicago Convention Appeal* (n 7) [60].

[25] See eg *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v United States)*, Preliminary Objections, Judgment, 3 February 2021, [51].

that the United States is in breach of obligations under the 1955 Treaty; the United States contests that it is in violation of the Treaty; '[h]ence there exists an opposition of views which amounts to a dispute relating to the Treaty'.[26] The Court further stated that, to the extent that the United States' measures 'might constitute breaches of certain obligations under the [1955 Treaty], those measures relate to the interpretation or application of that Treaty'.[27]

The key point is that subject-matter jurisdiction—the question of whether there is a dispute concerning the interpretation or application of a treaty—is assessed at the level of the claims made by an applicant. Is there a claim that, for example, an obligation under the relevant treaty has been breached, which is opposed by another State? Assessing jurisdiction at the level of the claims made is consistent with the well-known jurisprudence regarding the meaning of 'dispute'. As the Permanent Court of International Justice (the PCIJ or Court) stated in the *Mavrommatis* proceedings—proceedings brought under a compromissory clause—a 'dispute is a disagreement on a *point* of law or fact, a conflict of legal views or of interests'.[28] As the ICJ stated in the *South West Africa* cases—also brought under a compromissory clause—to establish the existence of a dispute '[i]t must be shown that the *claim* of one party is positively opposed by the other'.[29] Opposing *claims* on a particular *point* of law, such as whether an obligation has or has not been breached, constitute a dispute.[30]

In sum, when exercising jurisdiction pursuant to a compromissory clause, a court or tribunal has subject-matter jurisdiction over claims that obligations under the relevant treaty have been breached, even if those claims raise issues under external rules. This is not to say that the court or tribunal will necessarily be able to determine the external issues raised by the claim. It may not be able to do so. But that is not because the court or tribunal has no jurisdiction over the claim. It is because of two other matters: (i) abuse of process, discussed in Section V; and (ii) applicable law, discussed next.

B. The Distinction between Jurisdiction and Applicable Law

While subject-matter jurisdiction concerns the claims that a court or tribunal can adjudicate, applicable law concerns the law that the court or tribunal can apply

[26] ibid [54].

[27] ibid [56]. In some proceedings, the Court has determined the 'subject-matter' of the dispute brought before it. This is different from the characterisation process used by Annex VII tribunals. For example, in *Qatar v UAE*, to determine the 'subject-matter' of the dispute, the Court simply identified the various claims on which the parties disagreed. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)*, Preliminary Objections, Judgment, 4 February 2021, [56]–[70].

[28] *Mavrommatis Palestine Concessions* PCIJ Rep Series A No 2, 11 (emphasis added).

[29] *South West Africa* (n 13) 328 (emphasis added).

[30] See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Provisional Measures, Order, 23 January 2020, [20]; *Interpretation of Peace Treaties* (Advisory Opinion) [1950] ICJ Rep 65, 75.

in making its adjudication.[31] For example, in the case of a claim that an obligation under a treaty has been breached, the applicable law is the law that the court or tribunal can apply when determining that claim of breach.

In disputes before the ICJ, and disputes under UNCLOS, the applicable law is potentially broad in scope. In the case of disputes under UNCLOS, Article 293(1) of UNCLOS provides that UNCLOS tribunals 'shall apply this Convention *and other rules of international law not incompatible with this Convention*' (emphasis added). In the case of the ICJ, Article 38(1) of the Statute of the Court provides that, in deciding disputes, the Court 'shall apply' treaty law, customary international law and general principles of law. Thus, to resolve a dispute over which it has jurisdiction, such as a claim that an obligation under a treaty has been breached, the ICJ and UNCLOS tribunals are not limited to applying the provisions of that particular treaty. They are also able to apply rules within the broad collection of external rules referred to in Articles 38(1) and 293(1), respectively. However, the ICJ and UNCLOS tribunals cannot simply apply *any* rule referred to in Articles 38(1) and 293(1). They cannot apply any and every external rule that a party may raise in proceedings. There are limits. But before going on to discuss which of the rules in Articles 38(1) and 293(1) the Court or an UNCLOS tribunal can apply in any particular case, and which thus form part of the applicable law for that case, it is necessary to clarify four key points regarding the respective remits of jurisdiction and applicable law.

First, a court or tribunal exercising jurisdiction under a compromissory clause does not have jurisdiction to rule on claims that external rules have been breached. A classic example where a tribunal impermissibly ruled on breaches of external rules is *Guyana v Suriname*. In those proceedings, the Annex VII tribunal held that, by virtue of the broad applicable law clause in UNCLOS, the tribunal could not only rule on breaches of obligations under UNCLOS, but could also rule on breaches of external rules.[32] In the *dispositif* of its award, the tribunal ruled that conduct by Suriname 'constituted a threat of the use of force in breach of the Convention, *the UN Charter, and general international law*'.[33] It is now widely accepted that courts and tribunals exercising jurisdiction under compromissory clauses do not have jurisdiction to rule on claims that external rules have been breached. This has been recognised by subsequent UNCLOS tribunals,[34] and also by the ICJ.[35]

[31] See also *The Eurotunnel Arbitration*, PCA Case 2003-06, Partial Award, 30 January 2007, [152] ('This distinction between the scope of the *rights and obligations which an international tribunal has jurisdiction to enforce* and the *law which it will have to apply in doing so* is a familiar one') (emphasis added); M Wood, 'The International Tribunal for the Law of the Sea and General International Law' (2007) 22(3) IJMCL 351, 356.

[32] *Guyana v Suriname*, PCA Case 2004-04, Award, 17 September 2007, [405]–[406].

[33] ibid [488(2)] (emphasis added). See also *The M/V 'SAIGA' (No 2) Case (Saint Vincent and the Grenadines v Guinea)*, ITLOS Case 2, Judgment, 1 July 1999, [155], [159], [183(9)].

[34] See eg *Duzgit Integrity* (n 4) [207]. cf *Enrica Lexie* (n 5) [1094(B)(2)].

[35] See eg *Jadhav* (n 7) 430 [36]. See also 454–455 [135].

Second, notwithstanding the above, in the course of disposing of a claim that *is* within its jurisdiction under a compromissory clause (such as a claim that an obligation under the relevant treaty has been breached), a court or tribunal may be able to determine whether external rules have been breached. The ICJ stated as much in *Croatia v Serbia*, proceedings brought under the compromissory clause in the Genocide Convention. There the Court stated that it 'has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide'.[36] But the Court continued: 'That does not prevent the Court from considering, in its reasoning, whether a violation of international humanitarian law or international human rights law has occurred to the extent that this is relevant for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention'.[37] That is, when courts and tribunals are disposing of claims within their jurisdiction under compromissory clauses—in this case, claims that obligations under the Genocide Convention had been breached—they can, at least in some circumstances, determine whether external rules have been breached.

Third, when a court or tribunal is deciding a claim within its jurisdiction under a compromissory clause, whether it can apply a particular external rule —including for the purpose of determining whether the rule has been breached—is a question of applicable law, not of jurisdiction. The question is whether the particular external rule forms part of the applicable law for the claim. The Court sometimes makes statements that could be interpreted as suggesting that whether it can deal with a particular external issue is a question of jurisdiction; for example, in the *Certain Iranian Assets* proceedings, in which the external issue of State immunities was raised, the Court stated that 'in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities, the Court does not have *jurisdiction* to consider them'.[38] But that is not how such statements should be interpreted.

Certain Iranian Assets provides a helpful illustration of this point. The proceedings were brought by Iran against the United States under the compromissory clause in the 1955 Treaty. Iran claimed (among other things) that the United States had breached its obligation under Article IV(2) of the Treaty, which requires the United States to accord Iranian companies 'the most constant protection and security …, in no case less than that required by international law', because the United States had breached immunities enjoyed by the relevant companies under customary international law.[39] To determine whether it had subject-matter jurisdiction over Iran's claims, the Court, as is its

[36] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) [2015] ICJ Rep 3, 45 [85], quoting *Bosnian Genocide* (n 17) 104 [147].
[37] *Croatia v Serbia* (n 36) 45–46 [85]. See also 68 [153].
[38] *Certain Iranian Assets* (n 7) 35 [80] (emphasis added).
[39] ibid 27 [53]–[54].

usual practice, assessed whether the acts complained of by Iran 'fall within' the provisions of the 1955 Treaty.[40] The Court found that the rules of 'international law' referred to in Article IV(2) are not rules regarding immunities.[41] That is, the Court found that Iran's claim was not well-founded in law: even if the United States had breached immunities enjoyed by the relevant companies, the United States would not have breached its obligation under Article IV(2). The Court consequently did not have jurisdiction over the *claim*.[42] The question was not whether the Court had jurisdiction over *issues of immunities*.[43] The Court clearly does not have jurisdiction over issues of immunities under the 1955 Treaty. The question was whether rules regarding immunities formed part of the law that the Court could apply when deciding Iran's claim under Article IV(2)—whether the rules formed part of the applicable law. They did not, as they are not referred to in Article IV(2).

Fourth, in circumstances where a court or tribunal exercising jurisdiction under a compromissory clause can and does make a determination under an external rule—such as a determination that an external rule has been breached—that determination cannot be included in the *dispositif* of the judgment or award rendered by the court or tribunal. This is because, in a *dispositif*, a court or tribunal can only rule on matters within its jurisdiction. As Judge Abraham has explained, 'each and every part of the operative clause must fall strictly within the scope of the Court's jurisdiction'.[44]

In disputes under compromissory clauses regarding whether or not an obligation contained in the relevant treaty has been breached, it is *that claim of breach* that the court or tribunal has jurisdiction over and that it can rule on in the *dispositif*.[45] In contrast, determinations made by the court or tribunal under external rules, in the course of disposing of that claim of breach, are not within the court or tribunal's jurisdiction. They are determinations made under rules forming part of the applicable law and cannot be ruled on in the *dispositif*. The distinction between ruling on a

[40] See eg ibid 23 [36]. See also eg *Oil Platforms (Iran v United States)* (Preliminary Objection) [1996] ICJ Rep 803, 810 [16]; *Immunities and Criminal Proceedings* (Preliminary Objections) (n 7) 308 [46]; *Ukraine v Russia* (n 7) 584 [57]; *Alleged Violations* (n 25) [75]. When the Court determines whether acts complained of 'fall within' the provisions of a treaty, it may definitively determine disputed questions of treaty interpretation. See eg V Heiskanen, 'Oil Platforms: Lessons of Dissensus' (2005) 74(2) NordicJIL 179, 183; C Tomuschat, 'Article 36' in A Zimmermann *et al*. (eds), *Statute of the International Court of Justice* (3rd edn, Oxford University Press 2019) 712, 757–8 [66]–[67]. See also *Alleged Violations* (n 25), Declaration of Judge Tomka.

[41] *Certain Iranian Assets* (n 7) 28 [57].

[42] ibid 35 [80].

[43] cf Iran's argument that the jurisdiction conferred on the Court under the compromissory clause in the 1955 Treaty 'includes *jurisdiction* to determine and apply the immunities at issue'. See ibid 26 [50] (emphasis added).

[44] *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning* Avena and Other Mexican Nationals (Mexico v United States) *(Mexico v United States)* (Judgment) [2009] ICJ Rep 3, Declaration of Judge Abraham, 28.

[45] Indeed, in the *dispositifs* of the judgments that the ICJ renders under compromissory clauses, the Court typically rules that a State has or has not breached an obligation under the relevant treaty. See eg *Belgium v Senegal* (n 16) 463 [122(5)].

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breach of an external rule in a *dispositif* (which is impermissible) and determining that an external rule has been breached in the course of disposing of a claim (which may be permissible) is highlighted in *Croatia v Serbia*. As discussed above, the Court was clear that it did not have the 'power' to 'rule' on breaches of external rules. However, at the same time, the Court stated that in the course of determining whether an obligation under the Genocide Convention had been breached—a matter within the Court's jurisdiction—the Court could consider 'in its *reasoning*' whether external rules had been violated (emphasis added).

III. UNCONTROVERSIAL USES OF APPLICABLE LAW AND THEIR LIMITS

In sum, at least in some circumstances, an international court or tribunal exercising jurisdiction over a claim under a compromissory clause can apply and make determinations under external rules in its reasoning. What are the circumstances, then, in which courts and tribunals can legitimately apply external rules? Which of the broad collection of rules referred to in Article 38(1) of the Statute of the Court and Article 293(1) of UNCLOS can the Court or an UNCLOS tribunal apply in any particular case?

This section discusses three situations in which courts and tribunals exercising jurisdiction under compromissory clauses can legitimately resort to external rules. Courts and tribunals: (i) can apply secondary rules of international law (subsection A); (ii) can apply external rules when the treaty in question refers to those rules (subsection B); and (iii) can apply external rules to interpret provisions of the treaty in question (subsection C). It should be relatively uncontroversial that courts and tribunals can apply external rules in these three situations. However, as this section highlights, these situations are relatively limited in scope.

A. Secondary Rules of International Law

It should be uncontroversial that courts and tribunals exercising jurisdiction under compromissory clauses can apply secondary rules of international law, such as rules forming part of the law of treaties, the law of State responsibility and the law of diplomatic protection. As the Annex VII tribunal in the *Arctic Sunrise* proceedings stated, to properly apply provisions of UNCLOS, it may be necessary for an UNCLOS tribunal to 'resort to foundational or secondary rules of general international law such as the law of treaties or the rules of State responsibility'.[46] Similarly, in the *Bosnian Genocide* proceedings, the Court stated that, in order to determine whether an obligation under the Genocide Convention had been breached, 'the Court will

[46] *Arctic Sunrise* (n 4) [190], applied at [372], [392]–[393]. See also eg *Duzgit Integrity* (n 4) [208]; Wood (n 31) 359.

have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts'.[47]

In many proceedings in which external rules are raised, a court or tribunal will be being asked to apply more than just secondary rules of international law, however. The *ICAO Qatar Appeals* illustrate this. In the underlying proceedings before the ICAO Council, the Quartet contend that the wrongfulness of their actions is precluded because their actions constitute lawful countermeasures.[48] The rule that the wrongfulness of conduct is precluded to the extent that it constitutes a lawful countermeasure is a secondary rule forming part of the law of State responsibility.[49] The ICAO Council could therefore apply that secondary rule when exercising jurisdiction under the compromissory clauses in the Chicago Convention and the IASTA. However, the Quartet's argument that their actions constitute lawful countermeasures is in turn based on an argument that Qatar breached certain obligations found outside of those two treaties, including obligations under the Riyadh Agreements.[50] That is, to determine if the circumstance precluding wrongfulness is made out, the ICAO Council would have to apply those external *primary* rules as well. When, then, can courts and tribunals exercising jurisdiction under compromissory clauses apply external primary rules?

B. External Rules to Which a Treaty Refers

One situation in which courts and tribunals can apply external primary rules is when the treaty in question makes reference to such rules. A treaty can do this by referring to specific rules of international law or by more generally referring to 'rules of international law', and by using a variety of language, such as language referring to 'obligations', 'rights', 'agreements' or 'principles' found outside of the treaty in question.[51]

This situation is most commonly discussed in connection with UNCLOS—a treaty that contains a large number of provisions referring to external rules.[52] It is widely accepted that UNCLOS tribunals can apply external rules referred to in provisions of UNCLOS.[53] This occurred, for example, in the

[47] *Bosnian Genocide* (n 17) 105 [149], applied at eg 202–215 [385]–[415]. See also eg *Immunities and Criminal Proceedings* (Judgment) (n 15) [61]; *Jadhav* (n 7) 437–438 [71].

[48] *Chicago Convention Appeal* (n 7) [41].

[49] Articles on Responsibility of States for Internationally Wrongful Acts, art 22 in *Yearbook of the ILC* (2001) vol II, Pt Two, 26.

[50] *Chicago Convention Appeal* (n 7) [41].

[51] See eg UNCLOS, arts 2(3), 56(2); Mandate for Palestine, art 11; Statute of the River Uruguay, art 41(a); United Nations Convention against Transnational Organized Crime, art 4(1). See further below the references in fns 54 and 59, and the text to fns 70–75.

[52] Forteau states that there are almost 100 such provisions. See M Forteau, 'Regulating the Competition between International Courts and Tribunals' (2016) 15(2) LPICT 190, 195.

[53] See eg Wood (n 31) 358; Forteau (n 52) 195.

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South China Sea proceedings.[54] There the Philippines argued that China had breached its obligation under Article 94 of UNCLOS to take measures necessary to ensure safety at sea, in conformity with 'generally accepted international regulations', because China had taken measures in breach of a particular set of regulations, the International Regulations for Preventing Collisions at Sea (the COLREGS).[55] The tribunal accepted that the COLREGS are 'generally accepted international regulations' referred to in Article 94 and stated that, to determine the Philippines' claim, it 'must interpret and apply the COLREGS'.[56] The tribunal determined that China had violated the COLREGS and, consequently, that it had breached Article 94.[57]

This second situation in which courts and tribunals can apply external rules is relatively limited. While in this situation courts and tribunals can apply external *primary* rules, they can only apply those primary rules *referred to* in the relevant treaty. In many cases, treaties refer to few external rules. This is highlighted by recent proceedings before the ICJ in which applicant States have unsuccessfully claimed that particular external rules are referred to in certain treaties. In both *Immunities and Criminal Proceedings* and *Certain Iranian Assets*, the Court found that the particular external rules invoked by the applicants were not referred to in the treaties in question. As discussed already, in *Certain Iranian Assets*, the Court rejected Iran's argument that language in Article IV(2) of the 1955 Treaty referring to 'international law' could be interpreted as referring to customary international law rules on immunities.[58] Similarly, in *Immunities and Criminal Proceedings*, the Court rejected Equatorial Guinea's argument that language in the United Nations Convention against Transnational Organized Crime (the Palermo Convention) referring to 'the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States' could be interpreted as referring to customary international law rules on immunities.[59]

C. External Rules Relevant to Interpreting a Treaty

Beyond the situation discussed in the preceding subsection, courts and tribunals exercising jurisdiction under compromissory clauses can also use external

[54] See also eg *Chagos* (n 3) [459], [514]–[517], [520], [534]–[536]. In the jurisprudence of the Court, see *Mavrommatis Palestine Concessions* (n 28) 17, 26; *Mavrommatis Jerusalem Concessions* PCIJ Rep Series A No 5, 38–40; *Pulp Mills* (n 18) 42–46 [53]–[63], 99–100 [260]–[262].

[55] Memorial of the Philippines, 30 March 2014, [6.114], [6.128]–[6.130], [6.147]; UNCLOS, art 94(3)(c), (5).

[56] *The South China Sea Arbitration (The Philippines v China)*, PCA Case 2013–19, Award, 12 July 2016, [1083], [1090].

[57] ibid [1083], [1092], [1105], [1109]. In the *dispositif* of its award, the tribunal ruled that China had violated the COLREGS. See [1203(B)(15)]. For the reasons discussed at Section II.B above, this finding should not have been reflected in the *dispositif*.

[58] See Section II.B.

[59] *Immunities and Criminal Proceedings* (Preliminary Objections) (n 7) 318 [78], 320 [90], 321–323 [93]–[102].

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primary rules to interpret the treaty in question. The justification for applying external rules in this situation is the rule reflected in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (the VCLT). As is well known, Article 31 of the VCLT sets out the 'general rule of interpretation' for treaties, and Article 31(3)(c) provides that '[a]ny relevant rules of international law applicable in the relations between the parties' 'shall be taken into account' in interpreting a treaty.

There are various examples of cases in which courts and tribunals have used external primary rules to interpret the treaty in question. As one example, in the *South China Sea* arbitration, when interpreting Article 194(5) of UNCLOS, which refers to measures necessary to protect and preserve 'rare or fragile ecosystems', the Annex VII tribunal referred to the definition of 'ecosystem' in the Convention on Biological Diversity (the CBD). The tribunal stated that, although the word 'ecosystem' is not defined in UNCLOS, 'internationally accepted definitions include that in Article 2 of the CBD, which defines ecosystem to mean "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit"'.[60] Applying Article 194(5) as thus interpreted, the tribunal decided that the marine environments in issue were 'rare or fragile ecosystems'.[61]

This third situation in which courts and tribunals can apply external rules is also relatively limited. Pursuant to the rule reflected in Article 31(3)(c), courts and tribunals can apply external rules for a specific purpose: to *interpret* the treaty in question.[62] Article 31(3)(c) provides the interpreter—for present purposes, a court or tribunal—with a basis on which it can use external rules to interpret, or determine the meaning of, a provision in the treaty over which it has jurisdiction. Once the provision's meaning has been determined through interpretation, the court or tribunal can then apply *that* provision in the treaty over which it has jurisdiction to the facts of the case, as occurred in the example from the *South China Sea* arbitration discussed above. Article 31(3)(c) provides a court or tribunal with a basis for applying external rules *to interpret the treaty over which it has jurisdiction*. It does not provide a basis for applying external rules more broadly. In particular, it does not provide a basis for *directly applying external rules themselves to the facts of a case*.

In some cases where courts and tribunals have invoked Article 31(3)(c) as a basis for applying external rules, they have not used the external rules to interpret the treaty in question or they have directly applied the external rules to the facts of the case. One case which provides an example of this is *Oil Platforms*. In those proceedings, the ICJ exercised jurisdiction pursuant to the compromissory clause

[60] *South China Sea* (Award) (n 56) [945].
[61] ibid.
[62] See also *South China Sea* (Jurisdiction and Admissibility) (n 3) [176], [282]. See also eg *Jadhav* (n 7) 455 [135].

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in the 1955 Treaty. The Court considered whether, in response to Iran's claims, the United States had a defence under Article XX(1)(d) of the Treaty, on the basis that the United States' actions were 'measures … necessary to protect its essential security interests'.[63] The Court took the view that this defence could not be successfully invoked if the United States' actions amounted to an unlawful use of force.[64] The Court considered that it was therefore competent to determine whether the actions in question were an unlawful use of force 'by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law', and it proceeded to determine that the United States' actions 'constituted recourse to armed force not qualifying, under international law on the question, as acts of self-defence'.[65]

In support of its view that the Article XX(1)(d) defence could not be invoked if the United States' actions were an unlawful use of force, the Court referred to Article 31(3)(c) of the VCLT. However, the Court did not explain how international law on the use of force was relevant to interpreting Article XX(1)(d) ('measures … necessary to protect its essential security interests').[66] It is questionable whether these external rules were relevant to interpreting Article XX(1)(d).[67] Indeed, as Judge Higgins stated, 'the actual provisions of Article XX, paragraph 1*(d)*, are put to one side and not in fact interpreted at all'.[68] But, even if international law on the use of force were relevant to interpreting Article XX(1)(d), the Court used those external rules in a way that cannot be defended by reference to Article 31(3)(c): the Court directly applied external rules on the use of force to the facts of the case.

IV. AN ADDITIONAL USE OF APPLICABLE LAW: INCIDENTAL DETERMINATIONS

The three situations identified in the previous section are the only ones in which it is well accepted that international courts and tribunals exercising jurisdiction under compromissory clauses can apply external rules. However, as explained above, these three situations are relatively limited in scope. They recognise courts and tribunals as being competent: (*i*) to apply *secondary* rules of international law; (*ii*) to apply external rules *if* they are referred to in the relevant treaty; and (*iii*) to use external rules to *interpret* provisions of the relevant treaty.

[63] *Oil Platforms* (Judgment) (n 18) 178–179 [32]–[33].
[64] ibid 182 [41].
[65] ibid 182–199 [42]–[78].
[66] See ibid 182 [41].
[67] Judge Kooijmans appears to have been of the view that international law on the use of force was relevant to interpreting the word 'necessary' in art XX(1)(d). See ibid, Separate Opinion of Judge Kooijmans, 253 [23]. However, see eg Separate Opinion of Judge Owada, 317–318 [35]. The Court also invoked art I of the 1955 Treaty in support of its view (at 182 [41]). However, see eg Separate Opinion of Judge Buergenthal, 280 [25]. See also generally J Kammerhofer, 'Oil's Well that Ends Well?: Critical Comments on the Merits Judgement in the *Oil Platforms* Case' (2004) 17(4) LJIL 695, 701–6.
[68] *Oil Platforms* (Judgment) (n 18), Separate Opinion of Judge Higgins, 238 [49]. See also Separate Opinion of Judge Kooijmans, 259 [42]–[43]; Kammerhofer (n 67) 702–3.

An argument can be made that courts and tribunals exercising jurisdiction under compromissory clauses can also legitimately apply external rules in a fourth situation. Indeed, in practice, courts and tribunals apply external rules in circumstances that go beyond the three situations discussed above (subsection A). It can be argued that courts and tribunals can also apply external rules, and decide external issues, when the issue in question is one which the court or tribunal must determine for it to be able to rule on a claim within its jurisdiction ('incidental issues' and 'incidental determinations') (subsection B). Indeed, two recent decisions of the ICJ—the 2019 judgment on preliminary objections in the *Certain Iranian Assets* proceedings and the 2020 judgments in the *ICAO Qatar Appeals*—can be seen as consistent with the view that courts and tribunals can apply external rules in this fourth situation (subsection C).

A. Unexplained Uses of Applicable Law

In practice, courts and tribunals exercising jurisdiction under compromissory clauses apply external rules in circumstances that go beyond the situations identified in the previous section. The *Chagos* proceedings provide an example of such an 'unexplained' use of external rules.[69]

In *Chagos*, the Annex VII tribunal upheld its jurisdiction with respect to Mauritius' fourth submission. In that submission, Mauritius claimed that the Marine Protected Area declared by the United Kingdom was incompatible with the United Kingdom's obligation under Article 56(2) of UNCLOS, among other provisions.[70] Article 56(2) requires a coastal State to have 'due regard' for the 'rights' of other States when the coastal State is exercising its UNCLOS rights in its exclusive economic zone. To determine whether the United Kingdom had breached its obligation to have due regard for Mauritius' rights, the tribunal first had to determine whether the so-called 'Lancaster House Undertakings' created rights for Mauritius, which was disputed between the two States.[71] It stated that it would 'establish the nature and scope of the United Kingdom's undertakings'.[72] The tribunal ultimately determined that the United Kingdom was estopped from denying the binding effect of the commitments that it had made in the Lancaster House Undertakings, and the tribunal stated that it would treat the commitments 'as binding'.[73] The tribunal proceeded to find that the United Kingdom had

[69] See also the discussion of *Oil Platforms* at Section III.C above. Even if one accepts that international law on the use of force were relevant to interpreting art XX(1)(d) of the 1955 Treaty, the Court's direct application of those external rules to the facts of the case, and determination that the United States' actions constituted recourse to armed force not qualifying as self-defence, is such an 'unexplained' use of applicable law.

[70] *Chagos* (n 3) [387], [457].

[71] See eg ibid [391].

[72] ibid [419].

[73] ibid [448]. For the reasons discussed at Section II.B, this finding should not have been reflected in the *dispositif*. See [547(B)].

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not had due regard to Mauritius' 'rights arising from the Lancaster House Undertakings' and that the United Kingdom had breached Article 56(2).[74]

The *Chagos* tribunal used external rules in a way that goes beyond the situations discussed in the previous section. Article 56(2) refers to external 'rights' and so can be seen as an example of a provision that refers to external rules (the second situation discussed in the previous section). However, the *Chagos* tribunal did not merely apply external rules or rights referred to in a provision of UNCLOS. It also dealt with an antecedent issue. The tribunal determined whether the external rights invoked by the applicant *existed*. It did not explain on what basis it was competent to determine the existence (or not) of rights said to be found outside of UNCLOS.[75]

B. An Argument for the Making of Incidental Determinations

Decisions such as the above can be explained on the basis that courts and tribunals exercising jurisdiction under compromissory clauses are competent to apply external rules in a fourth situation and to make what are referred to in this article as 'incidental determinations'.

Recently, three UNCLOS tribunals have made statements to the effect that they are competent to determine 'incidental' or 'ancillary' issues. When dealing with a different submission made by Mauritius, the *Chagos* tribunal stated that the jurisdiction of an UNCLOS tribunal 'extends to making such … *ancillary determinations of law as are necessary to resolve the dispute presented to it*'.[76] In *Coastal State Rights*, the tribunal recalled this statement and applied it, finding that the external issue in question in those proceedings —sovereignty over territory—was not a 'minor issue ancillary to the dispute concerning the interpretation or application of the Convention'.[77] The tribunal explained that this was not an ancillary issue because, '[o]n the contrary, the question of sovereignty is a *prerequisite* to the Arbitral Tribunal's decision on a number of claims submitted by Ukraine'.[78] In the *Enrica Lexie* proceedings, the tribunal held that the external issue raised in those proceedings—the immunity of certain marines—was a question 'preliminary or incidental' to the application of UNCLOS.[79] The tribunal explained that it '*could not provide a complete answer* [to the parties' dispute] without incidentally examining whether the Marines enjoy immunity'.[80]

[74] ibid [534]–[536].

[75] See also S Talmon, 'The *Chagos Marine Protected Area Arbitration*: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals' (2016) 65(4) ICLQ 927, 948: 'Few would have predicted in 1982 that a Part XV court or tribunal would … find that a colonial era undertaking created binding legal obligations under international law'.

[76] *Chagos* (n 3) [220] (emphasis added).

[77] *Coastal State Rights* (n 3) [158], [193], [195].

[78] ibid [195] (emphasis added).

[79] *Enrica Lexie* (n 5) [808].

[80] ibid (emphasis added).

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Two key questions are raised by these awards. The first is: what exactly do these tribunals mean when they refer to 'incidental' and 'ancillary' issues? It is not entirely clear, including because the statements made by the different tribunals are not consistent. The *Chagos* tribunal stated that an ancillary determination is one 'necessary to resolve the dispute presented' to the tribunal; that is, it is a determination that is a prerequisite for the tribunal's decision. The *Coastal State Rights* tribunal stated the opposite. It found that the external issue in those proceedings was not an ancillary issue precisely because its determination *was* a 'prerequisite' to ruling on claims under UNCLOS.

In this article, an external issue is said to arise 'incidentally' where: (*i*) the court or tribunal in question has jurisdiction over a claim under the relevant compromissory clause (such as a claim that an obligation under the relevant treaty has been breached); and (*ii*) the claim cannot be disposed of unless the court or tribunal decides the particular external issue. In short, an incidental issue is an issue that a court or tribunal has to decide for it to be able to rule on a claim within its jurisdiction. This article argues that courts and tribunals exercising jurisdiction under compromissory clauses can determine incidental issues so defined.

This fourth situation in which it is suggested that courts and tribunals can apply external rules is in fact an overarching situation, which encompasses the first and second situations discussed in the previous section. For example, the first situation discussed above recognises courts and tribunals as being competent to determine one subset of incidental issues: it recognises courts and tribunals as being competent to determine external issues under *secondary* rules that they have to decide to be able to rule on a claim within their jurisdiction. Indeed, in practice, when courts and tribunals apply secondary rules they often highlight that they are doing so for the purpose of resolving a claim within their jurisdiction. In the *Bosnian Genocide* proceedings, for example, the Court stated that it would have recourse to secondary rules '[i]n order to determine whether the Respondent breached its obligation under the [Genocide] Convention'.[81] The suggested fourth situation in which courts and tribunals can apply external rules is broader and covers incidental determinations in general, not only incidental determinations under secondary rules or incidental determinations under rules referred to in the relevant treaty (the second situation discussed above).[82]

The second question raised by the three UNCLOS awards mentioned above is: why are courts and tribunals competent to make incidental determinations?

[81] *Bosnian Genocide* (n 17) 105 [149].

[82] This fourth situation does not encompass the third situation discussed above. The third situation does not recognise courts and tribunals as being competent to determine a subset of incidental issues. Rather, as discussed above, it recognises that, pursuant to the rule reflected in art 31(3)(c) of the VCLT, a court or tribunal can use external rules to determine the meaning of the treaty over which it has jurisdiction. The court or tribunal cannot decide issues under those rules.

None of the three tribunals explains *why* UNCLOS tribunals can determine what they refer to as 'incidental' or 'ancillary' issues. In support of their statements to the effect that UNCLOS tribunals are competent to determine such issues, the three tribunals simply cite a passage from the PCIJ's judgment on preliminary objections in the *Certain German Interests* proceedings,[83] proceedings brought by Germany against Poland under the compromissory clause in the 1922 German–Polish Convention relating to Upper Silesia (the Geneva Convention). The passage cited provides as follows:

> application of the Geneva 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 Geneva 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.[84]

In their awards, none of the three UNCLOS tribunals went beyond citing this passage. In the *Enrica Lexie* proceedings, two of the arbitrators dissented—Judge Robinson and Dr Rao—and, in their opinions, those arbitrators did enter into a discussion of the *Certain German Interests* proceedings. But the dissenting arbitrators only discussed the PCIJ's use of Article 256 of the Treaty of Versailles, mentioned in the passage quoted above.[85] The PCIJ's use of that provision does not provide support for the existence of a *general* competence to make incidental determinations. In its judgment on the merits in *Certain German Interests*, the PCIJ did interpret and apply Article 256. However, the Geneva Convention—the treaty on which the Court's jurisdiction was based—explicitly referred to Article 256.[86] That is, the Court's use of Article 256 in the *Certain German Interests* proceedings is an example of an incidental determination being made under an external rule

[83] *Chagos* (n 3) [220]; *Enrica Lexie* (n 5) [808] (fn 1454); *Coastal State Rights* (n 3) [158], [193]. In *Coastal State Rights*, the tribunal did not cite the PCIJ's judgment in *Certain German Interests* directly, but a passage from the *Chagos* award in which the *Chagos* tribunal relied on that judgment. The *Enrica Lexie* tribunal also cited two texts. Those texts assert that tribunals are competent to determine 'incidental' or 'auxiliary' questions, but neither explains the theoretical basis for this competence. See B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Grotius 1987) 266–7; CT Kotuby and LA Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017) 159–60.

[84] *Certain German Interests in Polish Upper Silesia* (Preliminary Objections) PCIJ Rep Series A No 6, 18. See also *Certain German Interests in Polish Upper Silesia* (Merits) PCIJ Rep Series A No 7, 25. See also fn 91 below.

[85] *Enrica Lexie* (n 5), Concurring and Dissenting Opinion of Arbitrator Rao, [34]–[36]; Dissenting Opinion of Judge Robinson, [44]–[45], [52].

[86] Geneva Convention, art 4(1). For the text of the provision, see *Certain German Interests in Polish Upper Silesia* (Preliminary Objections) (Documents) PCIJ Rep Series C No 9-1, 154.

referred to in the relevant treaty (the second situation discussed in the previous section).[87]

Notwithstanding this, the PCIJ's use of other external rules in the *Certain German Interests* proceedings does provide some support for the existence of a general competence to make incidental determinations. In the proceedings, Germany claimed that, in introducing a domestic law, Poland had acted in a manner contrary to the Geneva Convention.[88] Poland responded that the law in question gave effect of its rights under other treaties, including the Armistice Convention and the Protocol of Spa.[89] In the course of considering, and rejecting, Poland's argument, the Court interpreted and applied those two other treaties, neither of which is referred to in the Geneva Convention. The Court determined that Poland was not a contracting party to either treaty, that there was no subsequent 'tacit adherence or accession' by Poland to the treaties and that the treaties created no rights in favour of Poland.[90] The Court ultimately concluded that 'no title of international law has been cited by Poland which enables [the Polish law] to be regarded as the exercise of a right overriding her obligations under … the Geneva Convention'.[91] In short, the Court made determinations under external primary rules that were not referred to in the relevant treaty; the Court applied external primary rules in circumstances going beyond the situations discussed in the previous section.

While the *Certain German Interests* proceedings therefore do provide some support for the existence of a broader competence to determine external issues, the PCIJ's judgments in those proceedings do not explain the theoretical basis for this competence. A competence to determine incidental issues (as that term is used in this article) could potentially be justified on a number of bases, such as on the basis that the competence is an inherent power,[92] on the basis that it is an implied power,[93] or on the basis of the principle of effectiveness in treaty interpretation.[94] However, the soundest basis for the competence appears to be the doctrine of implied powers.[95]

[87] See *Certain German Interests* (Merits) (n 84) 29–30.

[88] See eg ibid 16.

[89] ibid 25.

[90] ibid 27–29. Lord Finlay considered that Poland was entitled to benefit from the Armistice Convention. See Observations of Lord Finlay, 84.

[91] ibid 31. As Judge Robinson noted in the *Enrica Lexie* proceedings, in the passage from *Certain German Interests* quoted above, the Court merely stated that the 'interpretation' of the relevant external rules was within its competence. See *Enrica Lexie* (n 5), Dissenting Opinion of Judge Robinson, [45]. Notwithstanding this, the Court did apply the Armistice Convention and the Protocol of Spa, as described above.

[92] See eg J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press 2003), 448; D Shelton, 'Form, Function, and the Powers of International Courts' (2009) 9(2) ChiJIntlL 537, 545.

[93] See eg I Buga, 'Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals' (2012) 27(1) IJMCL 59, 77–9.

[94] See eg P Tzeng, 'Supplemental Jurisdiction under UNCLOS' (2016) 38(2) HousJIntlL 499, 557–61.

[95] Given space constraints, it is not possible here to go into the details of, and difficulties with, an argument based on inherent powers or the principle of effectiveness in treaty interpretation. Inherent

The doctrine of implied powers is applied primarily in relation to international organisations.[96] But there does not appear to be any reason why the doctrine could not also be applied to international courts and tribunals. The rationale for implied powers is that it is not possible to spell out in a constituent instrument of an international organisation every specific power that the organisation will need to perform its functions, including because it is not possible to foresee what specific powers will be needed in an uncertain future.[97] This rationale is equally applicable to the constitutive instruments of international courts and tribunals. Indeed, others have taken the view that the doctrine of implied powers can also be applied to international courts and tribunals or, at least, that an equivalent doctrine can be applied to them. For example, Elihu Lauterpacht stated that 'the implication of powers for the International Court is comparable in legal justification and method to the implication of powers for any other international organ operating on the basis of a constitutive instrument'.[98]

There are two views regarding the scope of the doctrine of implied powers.[99] The narrower view sees an international organisation as possessing the implied powers necessary or essential for the exercise of its express powers.[100] The broader view sees an international organisation as possessing the implied powers necessary or essential for the achievement of the functions of the organisation.[101] An implied power to make incidental determinations could be justified in line with either view.

Regarding the narrower view (implied powers are those necessary for the exercise of express powers), courts and tribunals exercising jurisdiction under compromissory clauses are expressly granted jurisdiction over disputes

powers are powers that derive from a court or tribunal's nature as a judicial body. They are 'permanent' and exist 'irrespective of limitations placed on the court's jurisdiction'. See C Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76(1) BYBIL 195, 205; Shelton (n 92) 539. Thus, one difficulty with attempting to justify the competence to determine incidental issues as an inherent power is that, in contrast to inherent powers, the competence to determine incidental issues (or certain external issues) can be excluded in the constitutive instrument of a particular court or tribunal. See eg fn 106 below and the text.

[96] Brown (n 95) 226.

[97] HG Schermers and NM Blokker, *International Institutional Law* (6th revd edn, Brill 2018) 194 [232]; NM Blokker, 'International Organizations or Institutions, Implied Powers', MPEPIL (online edition), April 2009, [5]–[6]; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 79 [25].

[98] E Lauterpacht, '"Partial" Judgments and the Inherent Jurisdiction of the International Court of Justice' in V Lowe and M Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996) 465, 477. For further support for the view that the doctrine of implied powers can be applied to courts and tribunals, see Buga (n 93) 78; Brown (n 95) 227; Shelton (n 92) 571.

[99] See generally Schermers and Blokker (n 97) 195 [233]; Blokker (n 97) [10]–[12]; J Klabbers, *An Introduction to International Organizations Law* (3rd edn, Cambridge University Press 2015) 56–60.

[100] See especially eg *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, Dissenting Opinion of Judge Hackworth, 198.

[101] See especially eg ibid 180–184.

concerning the interpretation or application of a particular treaty.[102] That is, they have the express power to rule on disputes concerning the interpretation or application of a particular treaty, such as claims that an obligation under the treaty has been breached. To be able to exercise that express power and rule on such claims, it is necessary for the court or tribunal to also have the power—an implied power—to determine the issues that must be determined before ruling on the claims. That is, it is necessary for there to be an implied power to make incidental determinations.

Regarding the broader view (implied powers are those necessary for the achievement of a court or tribunal's functions), courts and tribunals can be seen as having multiple functions.[103] One of those functions, and the one most relevant when exercising jurisdiction under a compromissory clause, is the function of dispute settlement:[104] specifically, the settlement of disputes referred to the court or tribunal and within its jurisdiction, such as claims that an obligation under the relevant treaty has been breached. Again, for a court or tribunal to be able to fulfil its function of settling such disputes, it is necessary for it to have an implied power to make incidental determinations.

The implied power to make incidental determinations could of course be limited.[105] For example, as noted already, the applicable law clause in UNCLOS states that UNCLOS tribunals shall apply 'other rules of international law *not incompatible with this Convention*'.[106] An UNCLOS tribunal could not make an incidental determination that required some rule 'incompatible' with UNCLOS to be applied.

C. Incidental Determinations and Recent Decisions of the ICJ

Two recent decisions of the ICJ—the 2019 judgment on preliminary objections in the *Certain Iranian Assets* proceedings and the 2020 judgments in the *ICAO Qatar Appeals*—can be seen as consistent with the view that courts and tribunals exercising jurisdiction under compromissory clauses are competent to make incidental determinations.

[102] Regarding UNCLOS tribunals, this express power is conferred by art 288(1) of UNCLOS. Regarding the Court, this express power is conferred by art 36(1) of the Statute of the Court, combined with the compromissory clause applicable in the relevant case. Express powers may be given to an international organisation subsequent to the conclusion and entry into force of its constituent instrument by a separate legal instrument. See Blokker (n 97) [2].

[103] See Brown (n 95) 229–37; Shelton (n 92) 557–71.

[104] Regarding the Court, see Statute of the Court, art 38(1); *LaGrand (Germany v United States)* (Judgment) [2001] ICJ Rep 466, 502 [102]. Regarding UNCLOS tribunals, see UNCLOS, art 287(1). See generally Brown (n 95) 229–30; Shelton (n 92) 557–63.

[105] See Cheng (n 83) 266 ('Where a tribunal has jurisdiction in a particular matter, it is also competent with regard to all relevant incidental questions, *subject to express provision to the contrary*') (emphasis added); Blokker (n 97) [18] ('It would seem difficult to accept that by using implied powers international organizations could bypass, or even act against, what is covered by explicit powers').

[106] UNCLOS, art 293(1) (emphasis added).

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In *Certain Iranian Assets*, another claim made by Iran was that the United States had violated Article III(2) of the 1955 Treaty, which grants Iranian companies a right of 'freedom of access' to US courts.[107] Iran argued (among other things) that, by abrogating in proceedings before the US courts the immunities that certain Iranian companies are entitled to under customary international law, the United States had violated the companies' right of freedom of access to the US courts.[108] Iran's claim would have required the Court to determine whether the companies are entitled to immunities under customary international law and whether those immunities had been abrogated. In substance, Iran argued that these were incidental determinations that the Court could make when exercising jurisdiction under the compromissory clause in the 1955 Treaty.[109] As the Court stated in relation to this claim and other claims made by Iran:

> [Iran] maintains that consideration of the immunities conferred on States and certain State entities by general international law is *a necessary condition for the Court to adjudicate in full on Iran's claims relating to the violation of various provisions of the [1955 Treaty]*. Consequently, in Iran's view, the jurisdiction conferred on the Court by [the compromissory clause] of the Treaty includes jurisdiction to determine and apply the immunities at issue *to the full extent necessary in order to decide whether the provisions invoked by Iran have been breached* by the United States.[110] (Emphasis added.)

The Court ultimately held that it had no jurisdiction over Iran's claim. The Court did not accept the link between Article III(2) and immunities suggested by Iran, finding nothing which suggested that the obligation to grant Iranian companies freedom of access to US courts entails an obligation to uphold any applicable immunities.[111] Nonetheless, the Court appears to have accepted that, in principle, it can make incidental determinations. At the outset of its consideration of Iran's claim, the Court stated:

> the Court must now ascertain whether the alleged breach of the immunities …, should that breach be established, *would constitute a violation of the right* to have 'freedom of access to the courts' guaranteed by that provision. It is only if the answer to this question is in the affirmative that *it could be concluded that the application of Article III, paragraph 2, requires the Court to examine the question of sovereign immunities*, and that such an examination thus falls, to that extent, within its jurisdiction as defined by the compromissory clause of the [1955 Treaty].
>
> …
>
> It is true that the mere fact that Article III, paragraph 2, *makes no mention of sovereign immunities, and that it also contains no* renvoi *to the rules of general*

[107] *Certain Iranian Assets* (n 7) 22 [33], 30 [66].
[108] Memorial of Iran, 1 February 2017, [5.5]–[5.6], [5.9]–[5.13].
[109] See also CR 2018/33, 25–27 [2]–[8].
[110] *Certain Iranian Assets* (n 7) 26 [50]. See also 26 [51].
[111] ibid 32 [70].

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> *international law*, does not suffice to exclude the question of immunities from the scope *ratione materiae* of the provision at issue. However, for that question to be relevant, the breach of international law on immunities would have to be capable of having some impact on compliance with the right guaranteed by Article III, paragraph 2.[112] (Emphasis added.)

The Court clearly stated that, even though Article III(2) does not refer to external rules regarding immunities (the second situation discussed in the previous section), that is not the end of the matter. The Court contemplates some other situation in which it can make determinations under external primary rules (in this case, rules regarding immunities). Indeed, the Court suggests that, if Iran had been correct, and a breach of immunities 'would constitute a violation' of the obligation under Article III(2), then the Court could have 'examine[d] the question of sovereign immunities'. In other words, if the issue of immunities had been incidental to Iran's claim that the obligation under Article III(2) had been violated, then the Court could have determined that issue.

Regarding the *ICAO Qatar Appeals*, as discussed above,[113] in relation to the substance of Qatar's claims, the Quartet contend that the wrongfulness of their actions is precluded because their actions constitute lawful countermeasures. This contention is in turn based on an argument that Qatar breached certain primary rules found outside of the two treaties in question. In the appeals before the Court concerning the ICAO Council's jurisdiction, the Quartet argued that Qatar's claims before the ICAO Council are inadmissible on grounds of judicial propriety. Specifically, the Quartet argued that Qatar's claims are inadmissible because their resolution 'would necessarily require the ICAO Council to take a view on whether the airspace restrictions can properly be justified as lawful countermeasures, which in turn would involve the ICAO Council adjudicating on … whether Qatar has breached its international obligations in relation to matters outside the scope of the Chicago Convention'.[114]

In its July 2020 judgments, the Court rejected this argument. As noted above,[115] the Court effectively held that Qatar's claims are within the jurisdiction of the ICAO Council because they are claims that obligations under the relevant treaties have been breached. In rejecting the Quartet's argument regarding judicial propriety, the Court appears to have recognised that the ICAO Council can determine external issues for the purpose of disposing of Qatar's claims of breach. The Court stated:

> In any event, the integrity of the Council's dispute settlement function would not be affected if the Council *examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction* under

[112] ibid 31–32 [69]–[70].
[113] See Section III.A above.
[114] *Chicago Convention Appeal*, Memorial of the Quartet, 27 December 2018, [5.122].
[115] See Section II.A above.

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> [the compromissory clause] of the Chicago Convention. Therefore, a possible need for the ICAO Council to *consider issues falling outside the scope of the Chicago Convention solely in order to settle a disagreement relating to the interpretation or application of the Chicago Convention* would not render the application submitting that disagreement to it inadmissible.[116] (Emphasis added.)

That is, the Court appears to have recognised that the ICAO Council can make incidental determinations.

V. LIMITATIONS: *RES JUDICATA*, ABUSE OF PROCESS AND ABUSE OF RIGHT

Thus, an argument can be made that international courts and tribunals exercising jurisdiction under compromissory clauses are competent to make incidental determinations. Courts and tribunals make such determinations in practice (as in the *Chagos* and *Certain German Interests* proceedings), such a competence can be explained on the basis that it is an implied power, and recent judgments of the ICJ appear to recognise such a competence (those in *Certain Iranian Assets* and the *ICAO Qatar Appeals*).[117]

As highlighted by the Court's judgment on preliminary objections in the *Certain Iranian Assets* proceedings, the competence to determine incidental issues is not an unlimited one to decide *any* external issue that a party may raise in proceedings. The external issue raised in *Certain Iranian Assets* (immunities) did not have a bearing on whether the obligation under Article III(2) of the 1955 Treaty had been breached and so could not be determined.[118] In the exercise of its competence to make incidental determinations, a court or tribunal can only determine those external issues that it needs to determine to be able to rule on claims within its jurisdiction. This section discusses two further limitations regarding incidental determinations. First, incidental determinations have no *res judicata* effect (subsection A). Second, a claim brought under a compromissory clause for the purpose of obtaining an incidental determination may be inadmissible (subsection B).

A. Res Judicata

In the *ICAO Qatar Appeals*, the Quartet argued that, if the ICAO Council were to have jurisdiction over Qatar's claims, in the course of determining those

[116] *Chicago Convention Appeal* (n 7) [61]. The Court speaks in terms of the ICAO Council 'examin[ing]' and 'consider[ing]' external issues. This is reminiscent of the language used by the Court in *Croatia v Serbia*, where the Court stated that, when determining whether there had been a breach of an obligation under the Genocide Convention, the Court was not prevented from '*considering*, in its reasoning, whether a *violation* of international humanitarian law or international human rights law has occurred' (emphasis added). See further Section II.B above.

[117] See also *Croatia v Serbia* (n 36) 45–46 [85].

[118] See also *Enrica Lexie* (n 5), Concurring and Dissenting Opinion of Arbitrator Rao, [36]. cf *Enrica Lexie* (n 5) [795]–[802].

claims, the ICAO Council would decide the external issues relating to terrorism and non-intervention with *res judicata* effect. The Quartet stated that the ICAO Council would 'issue a decision which either side might claim—in any and all fora—is final and binding in respect of matters concerning terrorism and interference in the affairs of other States'.[119]

Such concerns are misplaced. A good argument can be made that incidental determinations do not have *res judicata* effect, because *res judicata* only attaches to rulings made by a court or tribunal in the *dispositif* of any judgment or award that it renders. As stated by Judge Anzilotti when discussing the *res judicata* effect of two judgments rendered by the PCIJ under a compromissory clause, 'binding effect attaches only to the operative part of the judgment and not to the statement of reasons'.[120] More recently, in *Delimitation beyond 200 Nautical Miles*, Judge Greenwood stated that 'it is only the *dispositif* of a judgment which can have the force of *res judicata*'.[121] As discussed above,[122] in a *dispositif*, a court or tribunal can only rule on matters within its jurisdiction. In the context of proceedings brought under compromissory clauses, this includes claims that obligations under the treaty in question have been breached. It does not include incidental determinations made under external rules forming part of the applicable law. Incidental determinations cannot be included in a *dispositif* and do not have *res judicata* effect.

To be sure, there is conflicting authority to the effect that *res judicata* attaches not only to a *dispositif*, but also to findings made in the body of a judgment or an award.[123] However, the better view is that *res judicata* only attaches to a *dispositif*. There is a lack of clarity regarding what methodology is to be used for deducing the existence and content of general principles of law,[124] such as *res judicata*.[125] But it is clear that: (*i*) general principles of law are, as their name suggests, *general principles* found in domestic systems, as opposed to specific

[119] CR 2019/13, 75 [22]. See also CR 2019/15, 25 [12]: 'Dr. Petrochilos expressed concern that the [Quartet] might end up with a decision from the Council concerning terrorism and interference in the affairs of other States which either side might claim—in any and all fora—is final and binding: *res judicata*'.

[120] *Interpretation of Judgments Nos 7 and 8 (Factory at Chorzów)* PCIJ Rep Series A No 13, Dissenting Opinion of Judge Anzilotti, 24.

[121] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) [2016] ICJ Rep 100, Separate Opinion of Judge Greenwood, 180 [7].

[122] See Section II.B above.

[123] See eg *Delimitation beyond 200 Nautical Miles* (n 121), Joint Dissenting Opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge ad hoc Brower, 143 [6].

[124] See eg R Yotova, 'Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations": The Approach of the International Court' (2017) 3(1) CJCCL 269, 277.

[125] '15th Meeting', 3 July 1920, in PCIJ Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (Van Langenhuysen 1920) 331, 335; *Delimitation beyond 200 Nautical Miles* (n 121) 125 [58].

rules; and (*ii*) to be a general principle of law, a general principle found in domestic systems must be transposable, and transposed, to the international level.[126] Regarding the first of these points, in some domestic legal systems there is a specific rule under the umbrella of *res judicata* that recognises findings made by courts and tribunals in their reasons as having *res judicata* effect (common law issue estoppel).[127] But the *general principle* of *res judicata* that is recognised across domestic legal systems is reflected in the two maxims *interest reipublicae ut sit finis litium* (it is in the public interest that there should be an end of litigation) and *nemo debet bis vexari pro una et eadem causa* (no one should be proceeded against twice for the same cause).[128] It is this general principle which must be transposed to the international level.

Regarding the second of the above points, when this general principle is transposed to the international level, it is transposed into a legal system in which dispute settlement is based on consent. In the context of a system based on consent, the general principle of *res judicata* should only attach to determinations that States have consented to courts and tribunals ruling on. In the case of compromissory clauses, States have consented to the adjudication of, and courts and tribunals have jurisdiction to rule on, claims relating to the interpretation or application of the relevant treaty, such as claims that an obligation under the treaty has been breached. It is the rulings on such claims, which can be reflected in the *dispositif*, that *res judicata* should attach to.

In any event, even if one takes the view that *res judicata* does attach to findings made in the reasons supporting a judgment or an award, such as incidental determinations, incidental determinations would at most have *res judicata* effect in relation to the particular dispute or case in the context of which the determination was made. This follows from the constitutive instruments of the Court and UNCLOS tribunals. Regarding UNCLOS tribunals, Article 296(2) of UNCLOS provides that any decision rendered by an UNCLOS tribunal 'shall have no binding force except between the parties and *in respect of that particular dispute*' concerning the interpretation or application of UNCLOS (emphasis added). Regarding the Court, Article 59 of the Statute of the Court provides that the 'decision of the Court has no

[126] A Pellet and D Müller, 'Article 38' in A Zimmermann *et al.* (eds), *Statute of the International Court of Justice* (3rd edn, Oxford University Press 2019) 819, 924 [255], 927–8 [263]–[264], 931 [270]. See also Cheng (n 83) 24; *International Status of South-West Africa* (Advisory Opinion) [1950] ICJ Rep 128, Separate Opinion of Judge Sir Arnold McNair, 148; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, Separate Opinion of Judge Sir Gerald Fitzmaurice, 66 [5].

[127] F De Ly and A Sheppard, 'ILA Interim Report on *Res Judicata* and Arbitration' (2009) 25(1) ArbIntl 35, 42. Issue estoppel is generally not recognised in civil law systems. See ibid 50; N Ridi, 'Precarious Finality? Reflections on *Res Judicata* and the *Question of the Delimitation of the Continental Shelf* Case' (2018) 31(2) LJIL 383, 385.

[128] De Ly and Sheppard (n 127) 36. See also A Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3(1) LPICT 37, 43.

binding force except between the parties and *in respect of that particular case*' (emphasis added). In short, even if one were to take the view that *res judicata* attaches to findings made in the reasons supporting a judgment or an award, an incidental determination would be, at most, a final and binding determination of the relevant external issue *for the purpose of the dispute or case adjudicated upon*. An incidental determination cannot be invoked in other contexts, or 'in any and all fora', as a final and binding determination of the particular issue.

B. Abuse of Process and Abuse of Right

The *Chagos* tribunal appears to have had concerns regarding the purpose for which Mauritius brought some of its claims in those proceedings. The tribunal considered that the true object of Mauritius' second submission was 'to bolster Mauritius' claim to sovereignty over the Chagos Archipelago'.[129] It is understandable that there would be concerns if States were to bring claims under compromissory clauses for the purpose of obtaining incidental determinations; that is, if, for the purpose of circumventing a lack of consent to settle disputes relating to some particular issue, a State manufactured a claim under a compromissory clause that would require the relevant court or tribunal to determine that issue as an incidental matter. However, to address such concerns it is not necessary to invent new analytical approaches, such as the 'characterisation' approach adopted by the *Chagos* tribunal. Concerns about States bringing claims under compromissory clauses for the purpose of obtaining incidental determinations can be addressed by applying the prohibitions of abuse of process and abuse of right.

Abuse of process is a special application of abuse of right.[130] An abuse of right can occur when a State exercises a right 'for an end different from that for which the right was created'.[131] Abuse of process more specifically concerns the abuse of a procedural right by a party to a dispute.[132]

The Court and UNCLOS tribunals appear to have accepted that the right to submit a dispute to judicial settlement under a compromissory clause could be exercised in such a way as to amount to an abuse of process or an abuse of right. Regarding the Court, to date the Court has not found any particular exercise of

[129] *Chagos* (n 3) [230]. See also [224].

[130] R Kolb, 'General Principles of Procedural Law' in A Zimmermann *et al*. (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) 963, 998 [49]. See also *Immunities and Criminal Proceedings* (Preliminary Objections) (n 7) 335 [146].

[131] A Kiss, 'Abuse of Rights', MPEPIL (online edition), December 2006, [1]. See also BO Iluyomade, 'The Scope and Content of a Complaint of Abuse of Right in International Law' (1975) 16(1) HarvIntlLJ 47, 61; Cheng (n 83) 131–2.

[132] AD Mitchell and T Malone, 'Abuse of Process in Inter-State Dispute Resolution', MPEPIL (online edition), December 2018, [8]; Kolb (n 130) 998 [49]; E de Brabandere, '"Good Faith", "Abuse of Process" and the Initiation of Investment Treaty Claims' (2012) 3(3) JIDS 609, 619–20.

the right to seek judicial settlement of a dispute to be abusive.[133] However, in a number of proceedings, the Court appears to have accepted that, in principle, the exercise of the right to submit a dispute to judicial settlement under a compromissory clause could amount to an abuse of process.

In *Immunities and Criminal Proceedings*, for example, France argued that Equatorial Guinea's seisin of the Court constituted an abuse of process.[134] The Court seems to have accepted that claims could be inadmissible on this basis, but rejected France's argument on the facts.[135] Similarly, UNCLOS tribunals seem to have accepted that, in principle, the exercise of the right to submit a dispute to judicial settlement under the compromissory clause in UNCLOS could amount to an abuse of process or an abuse of right. For example, in the *South China Sea* arbitration, the tribunal considered whether the Philippines' initiation of the arbitration was an abuse of right contrary to Article 300 of UNCLOS,[136] noting that the allegedly abusive conduct in question—the fact that the arbitration was initiated *unilaterally*—did not itself constitute an abuse of right.[137] In *Mauritius/Maldives*, the Special Chamber of ITLOS considered the Maldives' argument that Mauritius' claims were an abuse of process, but rejected that argument on the facts.[138]

While the Court and UNCLOS tribunals appear to have accepted that the right to submit a dispute to judicial settlement under a compromissory clause could be exercised in such a way as to amount to an abuse of process or an abuse of right, neither the Court nor any UNCLOS tribunal has considered more specifically whether exercising this right for the purpose of obtaining an incidental determination would be abusive.[139] Nonetheless, a credible argument could be

[133] Such claims have been upheld by investment tribunals. See eg *Philip Morris Asia Limited v Australia*, PCA Case 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, [585].

[134] *Immunities and Criminal Proceedings* (Preliminary Objections) (n 7) 334 [141].

[135] ibid 335 [145], 336 [150]. See also *Certain Iranian Assets* (n 7) 40 [100], 42–43 [113]–[115]; *Alleged Violations* (n 25) [92]–[96]. The Court's judgment on preliminary objections in *Immunities and Criminal Proceedings* has been interpreted as suggesting that a claim of abuse of right can only be made at the merits stage. See eg *Immunities and Criminal Proceedings* (Preliminary Objections) (n 7), Dissenting Opinion of Judge Donoghue, 382 [4]; *Certain Iranian Assets*, CR 2018/28, 58 [90]. That is not what the Court stated in *Immunities and Criminal Proceedings*. The Court stated that 'abuse of rights cannot be invoked as a ground of inadmissibility *when the establishment of the right in question* is properly a matter for the merits'. See *Immunities and Criminal Proceedings* (Preliminary Objections) (n 7) 336–337 [150]–[151] (emphasis added). Where the right that has allegedly been abused is the right to seek judicial settlement of a dispute, that is not a right which is to be established at the merits phase.

[136] Paulsson argues that abuse of right is not a general principle of law. See J Paulsson, *The Unruly Notion of Abuse of Rights* (Cambridge University Press 2020) x. Whether or not that is correct, abuse of right is applicable in the UNCLOS context by virtue of art 300.

[137] *South China Sea* (Jurisdiction and Admissibility) (n 3) [124]–[126]. See also *Barbados v Trinidad and Tobago*, PCA Case 2004-02, Award, 11 April 2006, [208].

[138] *Mauritius/Maldives* (n 3) [337]–[350].

[139] An argument along similar lines appears to have been made by the Maldives in *Mauritius/Maldives*. See Written Observations of the Maldives, 15 April 2020, [137]–[140]. The Special Chamber of ITLOS did not have to address this particular argument, however, because the Special Chamber considered that it did not have to determine the incidental issue in question (sovereignty over territory), as it could be 'inferred' from the ICJ's *Chagos* Advisory Opinion

made that claims brought in such circumstances are abusive. If a State were to exercise its right to refer a dispute to judicial settlement under a compromissory clause, not for the purpose of obtaining rulings on the claims brought themselves, but for the purpose of obtaining an incidental determination, so as to further its position in respect of another dispute that the opposing State has not consented to settle, it could be said that the right to refer the dispute to judicial settlement has been exercised 'for an end different from that for which the right was created'.[140] Indeed, Lowe has stated that abuse of process 'might, for instance, be deployed to defeat attempts by states to manufacture entirely artificial disputes in order to avail themselves of the jurisdiction of a convenient tribunal, to which the respondent happens to have submitted'.[141]

The threshold for establishing an abuse of process or abuse of right is high. As the Court stated in *Immunities and Criminal Proceedings*, where a State has established a valid title of jurisdiction, it is only in 'exceptional circumstances' that the Court should reject a claim on the ground of abuse of process, and the Court should only do so with 'clear evidence' of abuse of process.[142] Notwithstanding that the threshold is high, an attempt to circumvent a lack of consent to dispute settlement could be an 'exceptional circumstance' in which a court or tribunal would find an abuse of process or abuse of right, provided of course that there was 'clear evidence' that the relevant claims had been brought for the purpose of circumventing a lack of consent and obtaining an incidental determination.[143] Alternatively, claims brought in these circumstances might not be considered to meet the threshold for an abuse of process or abuse of right. But, if they do not meet the threshold, then the claims are not abusive and should be allowed to proceed.

VI. CONCLUSION

States that have objected to the competence of international courts and tribunals to make incidental determinations have stressed that dispute settlement is

that Mauritius has sovereignty over the territory in question. See *Mauritius/Maldives* (n 3) [110], [246], [250], [342]–[343], [348]–[349].

[140] Some definitions of abuse of process or abuse of right include the obtaining of an 'illegitimate advantage' or the causing of injury or harm. See Kiss (n 131) [5]; Iluyomade (n 131) 61; Kolb (n 130) 998 [49]. In the circumstances under consideration, the illegitimate advantage would be the applicant State obtaining an incidental determination—albeit a non-binding incidental determination—on a dispute that the opposing State has not consented to settle.

[141] V Lowe, 'Overlapping Jurisdiction in International Tribunals' (1999) 20 AustYBIL 191, 204.

[142] *Immunities and Criminal Proceedings* (Preliminary Objections) (n 7) 336 [150]. See also *Alleged Violations* (n 25) [93].

[143] See eg the statements of Ukraine in connection with the *Coastal State Rights* proceedings. See Preliminary Objections of Russia, 19 May 2018, [32], [34]. The Court has stated that it cannot concern itself with the 'political motivation' which may lead a State to initiate proceedings. See *Alleged Violations* (n 25) [95]. A distinction can be drawn between situations in which a State has a broader political motivation for initiating proceedings and situations in which the motivation of an applicant State is to circumvent a lack of consent to dispute settlement. The latter is a legitimate concern for an international court or tribunal.

consensual.[144] Dispute settlement is indeed consensual. However, that does not assist States who object to the making of incidental determinations. It cannot credibly be contended that courts and tribunals exercising jurisdiction under compromissory clauses lack subject-matter jurisdiction over claims that an obligation under the relevant treaty has been breached. Under compromissory clauses, States have consented to the adjudication of such claims. It should also be uncontroversial that, at least in some circumstances, courts and tribunals adjudicating on such claims of breach can apply external rules and determine external issues when those issues must be determined in order for the court or tribunal to be able to rule on the relevant claims. That is, it should be uncontroversial that, at least in some circumstances, courts and tribunals can make incidental determinations. This should be uncontroversial where the particular external issue is an issue under secondary rules of international law or where the external rules in question are referred to in the relevant treaty. But it can be argued that, beyond this, courts and tribunals exercising jurisdiction under compromissory clauses have a *general* competence to make incidental determinations.

The fact that, when becoming parties to a particular treaty containing a compromissory clause, States did not contemplate that the relevant court or tribunal would be able to determine particular external issues, is beside the point. There is a lack of clarity regarding whether or not courts and tribunals can determine external issues precisely because, at the time of drafting these treaties, States did not consider, one way or the other, whether the relevant courts and tribunals would be able to determine external issues.[145] At the same time, on another point, the intention of States is clear. States that include compromissory clauses in treaties intend that the named court or tribunal will rule on disputes concerning the interpretation or application of the particular treaty, including on claims that an obligation under the treaty has been breached.[146] To be able to rule on such claims, these courts and tribunals must have an implied power to make incidental determinations: an implied power to determine those issues under external rules that they must determine in order for them to be able to rule on the relevant claims.

[144] See eg *Chicago Convention Appeal*, Memorial of the Quartet, 27 December 2018, [1.4], [4.12]–[4.17], [5.2(b)]; Reply of the Quartet, 27 May 2019, [4.27]–[4.28]. See also *Certain Iranian Assets*, Preliminary Objections of the United States, 1 May 2017, [1.5], [5.5], [10.2].

[145] For example, the *travaux préparatoires* of the Chicago Convention and the IASTA do not shed any light on the meaning or scope of the compromissory clauses in those treaties. See *Proceedings of the International Civil Aviation Conference* (US Government Printing Office 1948).

[146] For example, the *travaux préparatoires* of the Geneva Convention indicate that the drafters envisaged that, when exercising jurisdiction under the compromissory clause in that Convention, the Court would be competent to determine whether obligations under the Convention had been breached. See 'Hundred and Third Meeting', 12 November 1948, UN Doc A/C.6/SR.103, 435–6 (Netherlands); 'Hundred and Fourth Meeting', 13 November 1948, UN Doc A/C.6/SR.104, 444 (United Kingdom).

Specific concerns regarding the making of incidental determinations have been raised in recent proceedings before the Court and UNCLOS tribunals. Those concerns should be seen for what they are. Some are concerns that are unfounded, such as the concern that incidental determinations can be invoked as final and binding determinations 'in any and all fora'. Others are concerns that can be addressed through existing rules and analytical approaches to assessing jurisdiction. Concerns about claims being brought under compromissory clauses for the purpose of obtaining incidental determinations can be addressed by applying the prohibitions of abuse of process and abuse of right. Concerns that external issues raised by an applicant State do not in fact need to be determined for the purpose of disposing of a claim under the relevant treaty can be addressed by assessing, at the preliminary objections stage, whether the claims of the applicant 'fall within' the provisions of the relevant treaty. These concerns do not need to be dealt with by developing new analytical approaches, such as the approach of 'characterising' the disputes between parties. Nor do such concerns need to be dealt with by denying the general competence of courts and tribunals to make incidental determinations.