

SYMPOSIUM ON INCIDENTAL JURISDICTION

BETWEEN CONSENT AND COHERENCE: INCIDENTAL QUESTIONS IN AN IMPERFECT WORLD

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International courts and tribunals must maintain a delicate balance between consent and coherence when they consider incidental questions as part of their dispute settlement function. There are compelling reasons, in the contemporary world of unprecedented complexity and interdependence, to instill coherence into dispute settlement procedures, so as to avoid the denial of justice. The exercise of jurisdiction over an “incidental question,” however, must not be forced to the point that it undermines the willingness of states to give their consent to such procedures.

This tension is reflected in the historical evolution of the international legal order from a piecemeal to a more complete system of judicial settlement. The first president of the Permanent Court of International Justice (PCIJ), Bernard Loder, had noted in 1922 that, if it was ever going to be worthy of its name, the newly established judicial organ would have to be a court of universal “compulsory jurisdiction.”¹ A century later, that observation applies with no less force. In a perfect world, all states would accept the compulsory jurisdiction of the International Court of Justice (ICJ) and establish a comprehensive system of peaceful dispute settlement. Even if specialized regimes would still serve a function in this legal utopia, they would operate in the context of a wider global jurisdiction, without the prospect of justice falling through the cracks of a fragmented system.

The reality remains, however, that few states have consented to the compulsory jurisdiction of the ICJ, and that there is no jurisdiction absent state consent.² Consequently, “the default position under public international law is the absence of a forum before which to present claims.”³ The closest approximation to universal compulsory jurisdiction remains the network of optional clause declarations under Article 36(2) of the ICJ Statute,⁴ which “establish a series of bilateral engagements with other States accepting the same obligation of compulsory jurisdiction.”⁵ Only seventy-three states have made such declarations, however,⁶ and the jurisdiction of the Court is

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¹ Bernard Loder, *The Permanent Court of International Justice and Compulsory Jurisdiction*, 2 BRIT. Y.B. INT'L L. 6,8 (1922).

² Gilbert Guillaume, *Transformation du droit international et jurisprudence de la Cour internationale de justice*, in [LES NOUVEAUX ASPECTS DU DROIT INTERNATIONAL](#) 175, 176 (Rafâa Ben Achour & Salîm Laghmânî eds., 1994).

³ *ICS v. Argentina*, PCA Case No. 2010–09, [Award on Jurisdiction](#), para. 280 (Feb. 10, 2012).

⁴ [Statute of the International Court of Justice](#), June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, [Jurisdiction and Admissibility, Judgment](#), 1984 ICJ Rep. 392, para. 60 (Nov. 26).

⁶ International Court of Justice, [Declarations Recognizing the Jurisdiction of the Court as Compulsory](#).

further weakened by states making reservations to those declarations. By its nature, international jurisdiction is “exceptional and fragile.”⁷

True, these deficiencies are compensated for by jurisdiction conferred upon the ICJ by multilateral conventions which provide for disputes regarding their interpretation or application to be referred to it.⁸ At times, however, facts that have little bearing on the subject-matter of a multilateral treaty are framed so as to bring them within the compromissory clause of the treaty—not infrequently in a manner that “begins to resemble the attempts to force an ungainly foot into Cinderella’s glass slipper.”⁹ That makes it challenging for an international court or tribunal to resolve the matter before it while remaining faithful both to the proper interpretation of the clause which confers jurisdiction on it and to the fundamental principle of consent as the basis for its jurisdiction.¹⁰

The multiple, parallel, and often fragmented jurisdictions that have emerged do not reflect a unified approach to a comprehensive system of judicial dispute settlement. Even if jurisdiction is based on consent, there is still a need for an overarching scheme to eliminate gaps; the possibility remains that justice is denied because tribunals decline to exercise jurisdiction.¹¹ The ICJ has observed that, when it defines its jurisdiction in relation to that of another tribunal, it should seek “to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice.”¹²

The Demands of Coherence

When the power to consider “incidental questions” first crystallized,¹³ it did so on the basis that the proper exercise of dispute settlement functions by a tribunal required some ability to consider questions ancillary to its primary jurisdiction.¹⁴ The impetus was a coherent system of dispute settlement, as between numerous norms of international law where the subject-matter of the primary instrument establishing jurisdiction is only one of many. The fact that the contemporary international legal system consists of multiple institutions with both gaps and overlaps in jurisdiction makes it all the more important to maintain coherence.¹⁵ This implicates “the essential consistency of international law,”¹⁶ which is necessary to ensure that the component parts of the legal system operate together as an integrated system,¹⁷ whether it is in respect of the harmonization of jurisprudence or the interrelationship of different jurisdictions.

In *Certain German Interests in Polish Upper Silesia*, the PCIJ observed that “the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as

⁷ ROBERT KOLB, [THE INTERNATIONAL COURT OF JUSTICE](#) 1201 (2013).

⁸ Christopher Greenwood, [Some Challenges of International Litigation](#), 1 *CAMBRIDGE J. INT’L & COMP. L.* 7, 16 (2012).

⁹ *European Media Ventures v. Czech Republic*, UNCITRAL, [Partial Award](#), para. 64 (July 8, 2009).

¹⁰ [Greenwood](#), *supra* note 8, at 16.

¹¹ Eirik Bjorge, [The Contribution of the European Court of Human Rights to General International Law](#), 79 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 1, 8 (2019).

¹² *Maritime Delimitation in the Indian Ocean (Som. v. Kenya)*, [Preliminary Objections, Judgment](#), 2017 ICJ Rep. 3, para. 132 (Feb. 2).

¹³ *See, e.g., Guano (Chili/France)*, [Judgment](#), 15 RIAA 77, 100 (1901) (in French); *Archiduc Frédéric de Habsbourg-Lorraine*, 7 *REC. T.A.M.* 128, 136–37 (Cedercrantz P, Szekács, Antoniadé, 1927) (in French).

¹⁴ Maarten Bos, [Les conditions du procès en droit international public](#), 36 *BIBLIOTHECA VISSERIANA* 1, 313 (1957).

¹⁵ JAMES CRAWFORD, [BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW](#) 369 (9th ed., 2019).

¹⁶ *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, [Judgment](#), 2010 ICJ Rep. 639, para. 66 (Nov. 30).

¹⁷ RONALD DWORKIN, [LAW’S EMPIRE](#) 176–224 (1986).

incidental to a decision on a point in regard to which it has jurisdiction.”¹⁸ By the same logic, the arbitral tribunal held in *Chemin de Fer d’Ogulin* that the principle also applies to factual matters.¹⁹

The underlying rationale—exercising jurisdiction over incidental questions so as to achieve coherence—is connected to the more general consideration that, while a tribunal must not exceed the jurisdiction conferred upon it through state consent, “it must also exercise that jurisdiction to its full extent.”²⁰ In this sense, incidental jurisdiction is, like primary jurisdiction, a jurisdiction that a regularly seised tribunal “must exercise.”²¹ It is not a question of discretion. When a tribunal decides on its jurisdiction, it is as much open to criticism for under-exercise of jurisdiction as for excess of jurisdiction; its decision will always affect the rights of both parties to the dispute.²²

But if consent is the point of departure, a jurisdiction seised of a dispute should not, as a logical matter, necessarily be empowered to settle all incidental questions arising before it. In early treaties relating to arbitration, the states parties would specify how such ancillary matters were to be dealt with. There was no assumption that a tribunal’s having primary jurisdiction meant that it also possessed jurisdiction over all incidental questions. The Greek–Turkish Treaty of Friendship, Neutrality, Conciliation and Arbitration of 1930 thus specified that whether or not a question concerned “the right of sovereignty” under the treaty (and would therefore not be covered by certain defined dispute settlement procedures) was an incidental question that was not to be settled by the arbitral tribunal, but would instead have to be referred to the PCIJ.²³ In general, when a treaty provides for specific procedures to determine incidental questions, it would not be for the tribunal to arrogate this function to itself. In this context, the consent of the parties operates to put a stop on the exercise of jurisdiction over incidental questions.

Where there is no specific exclusion, however, the power of tribunals to consider “incidental questions” derives from their inherent powers,²⁴ as judicial organs established by the consent of states,²⁵ which includes the competence “to provide for the orderly settlement of all matters in dispute.”²⁶ In that sense, consent militates in favor of—not against—a tribunal’s competence to consider incidental questions. On that basis it has been observed, in relation to the ICJ, that acceptance of the provisions of the Statute necessarily includes “acceptance of *any* incidental jurisdiction exercisable by the Court.”²⁷

This can have far-reaching implications, as can be seen from the case of *Tadić*.²⁸ In that case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) observed that, as international law lacks a centralized structure, it “does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals.”²⁹ In the interest of safeguarding coherence in this decentralized structure, tribunals must be empowered to solve incidental questions arising before them, to the extent necessary to exercise

¹⁸ Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), *Judgment*, 1925 (ser. A) No. 6, at 18 (Aug. 25).

¹⁹ *Chemin de Fer d’Ogulin*, 6 REC. T.A.M 505, 507 (Slooten P, Zoltan, Arandjelovitch, 1926) (in French).

²⁰ Continental Shelf (Libya/Malta), *Judgment*, 1985 ICJ Rep. 13, para. 19 (June 3).

²¹ Herbert Briggs, *The Incidental Jurisdiction of the International Court of Justice as Compulsory Jurisdiction*, in *VÖLKERRECHT UND RECHTLICHES WELTBILD: Festschrift für Alfred Verdross* 87, 95 (Friedrich August Freiherr von der Heydte, Ignaz Seidl-Hohenveldern & Karl Zemanek eds., 1960).

²² Campbell McLachlan, *The Assault on International Adjudication and the Limits of Withdrawal*, 68 INT’L & COMP. L. Q. 499, 516 (2019).

²³ *Greek–Turkish Treaty of Friendship, Neutrality, Conciliation and Arbitration of 1930*, Art. 4, Oct. 30, 1930, 125 UNTS 9.

²⁴ Ludwik Ehrlich, *L’interprétation des traités*, 24 RECUEIL DES COURS 84–86 (1928).

²⁵ Nuclear Tests (Austl. v. Fr.), *Judgment*, 1974 ICJ Rep. 253, para. 23 (Sept. 20).

²⁶ *Id.*

²⁷ *Report of the Committee of Experts Concerning the Conditions on Which Switzerland May Become a Party to the Statute of the International Court of Justice*, S/191, at 2 (Dec. 11, 1946) (italics added).

²⁸ Prosecutor v. Tadić, IT-94-1, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (Oct. 2, 1995).

²⁹ *Id.*, para. 11.

primary jurisdiction.³⁰ On this basis, the Appeals Chamber concluded that the ICTY could, “as a matter of incidental jurisdiction,” but “solely for the purpose of ascertaining its own ‘primary’ jurisdiction over the case before it,” examine the legality of its establishment by the United Nations Security Council.³¹

Given this need to achieve the coherent division of labor alluded to in *Tadić*, tribunals have been assertive in exercising incidental jurisdiction as between them. In *Enrica Lexie*,³² a case decided by a tribunal established under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS),³³ two Indian fishermen on an Indian vessel had died at the hands of Italian marines. To resolve the dispute under UNCLOS as to which state was entitled to exercise jurisdiction over the incident required a decision on the incidental question of whether the marines enjoyed immunity from criminal process before the courts of India.³⁴ The tribunal reasoned that it could not provide a complete answer to that question “without incidentally examining whether the Marines enjoy immunity.”³⁵ Therefore, its “competence extend[ed] to the determination of the issue of immunity of the Marines that necessarily arises as an incidental question.”³⁶ *Enrica Lexie* brings into sharp relief the question of the limitations imposed by state consent: there is a risk that tribunals end up going too far in considering incidental questions.

Limits of the Power to Consider Incidental Questions

Three issues arise in connection with the limits of the power of international tribunals to consider incidental questions. The first relates to the limits, in general, of the inherent powers of international tribunals. On the one hand, it is obvious that such tribunals have “certain inherent powers that empower them to exercise powers that may go beyond the express terms of their constitutive instruments.”³⁷ On the other hand, it follows from the principle of consent that inherent powers “cannot be inconsistent with the terms of the relevant constitutive instrument” of the international tribunal.³⁸ The early arbitration conventions, pursuant to which it would have been inconsistent with the specific terms of the treaty for the tribunal to settle certain incidental questions, are instructive in this regard.³⁹

Second, decisions on incidental questions include only decisions rendered with the *sole object* of adjudicating upon the parties’ claims.⁴⁰ That is an important limit on the power. The tribunal is empowered to make only such findings of fact or determinations of law that are *necessary* to resolving the dispute before it.⁴¹

³⁰ *Id.*, paras. 20–22.

³¹ *Id.*

³² The “Enrica Lexie” Incident (It. v. India), PCA Case No. 2015-28, [Award](#) (May 21, 2020).

³³ [United Nations Convention on the Law of the Sea](#), Dec. 10, 1982, 1833 UNTS 3.

³⁴ *Enrica Lexie*, *supra* note 32, para. 808.

³⁵ *Id.*

³⁶ *Id.*, para. 809.

³⁷ RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, [Decision on RSM Production Corporation’s Application for a Preliminary Ruling of 29 October 2009](#), para. 20 (Griffith, P., Abraham, McLachlan, Dec. 7, 2009).

³⁸ *Id.*

³⁹ See note 23 *supra* and accompanying text.

⁴⁰ Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory) (Ger. v. Pol.), Judgment, 1927 PCIJ (ser. A) No. 13, at 26 ([diss. op. Anzilotti, J.](#), Dec. 16).

⁴¹ Chagos Marine Protected Area (Mauritius v. UK), PCA Case No. 2011-03, [Award](#), para. 220 (Mar. 18, 2015) (our italics).

Third, and finally, the power to consider incidental questions exists only when the incidental question is just that—incidental.⁴² If the question brought before the tribunal as an incidental question is actually “the principal question,” the tribunal would not have jurisdiction over it.⁴³ The tribunal in *Chagos Marine Protection Area*—established under Annex VII of UNCLOS—made this point when it observed that, while it had jurisdiction to settle such incidental questions as were necessary to resolve the dispute before it, this was not, however, the case if “the real issue in the case” had wrongly been dressed up as an incidental question.⁴⁴ It held in respect of the territorial dispute between Mauritius and the United Kingdom over the Chagos Archipelago that:

to assume jurisdiction over matters of land sovereignty on the pretext that the Convention makes use of the term “coastal State” would do violence to the intent of the drafters of the Convention to craft a balanced text and to respect the manifest sensitivity of States to the compulsory settlement of disputes relating to sovereign rights and maritime territory. Such sensitivities arise to an even greater degree in relation to land territory.⁴⁵

Similarly, in the dispute between Ukraine and the Russian Federation in the Black Sea, Sea of Azov, and the Kerch Strait, the Russian Federation argued that whether Ukraine was the coastal state in Crimea—and therefore also the question of territorial sovereignty over Crimea—was not merely incidental to the law of the sea dispute before the Annex VII tribunal.⁴⁶ The tribunal in *Coastal State Rights* held that it would be unable to address a number of claims submitted by Ukraine under UNCLOS “without deciding which state is sovereign over Crimea and thus the ‘coastal State’ within the meaning of provisions of the Convention.”⁴⁷ That finding, which put a thumb on the scales in favor of consent rather than coherence, was no doubt influenced by the fact that, under UNCLOS, “the land dominates the sea.”⁴⁸ Absent a wider compulsory jurisdiction, the dispute between Ukraine and the Russian Federation regarding maritime entitlements arising from the annexation of Crimea fell through the cracks.

Conclusion

When they consider incidental questions as part of their dispute settlement function, international courts and tribunals must maintain a delicate balance between consent and coherence. On the one hand, a jurisdiction charged with applying a specific body of international law is, as Cassese observed, authorized to apply incidentally rules belonging to other bodies of international law, for the purpose of interpreting or applying a rule that is part of

⁴² CARLO SANTULLI, *DROIT DU CONTENTIEUX INTERNATIONAL*, 158 (2d ed. 2015).

⁴³ *Kunkeel*, 6 REC. T.A.M 974, 977 (Guex P., Scholz, Namitkiewicz, 1925) (in French).

⁴⁴ *Chagos*, *supra* note 41, para. 220.

⁴⁵ *Id.*, para. 219.

⁴⁶ Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), PCA Case No. 2017-06, [Award Concerning the Preliminary Objections of the Russian Federation](#), para. 192 (Feb. 21, 2020).

⁴⁷ *Id.*, para. 195. In *Delimitation of the Maritime Boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)*, No. 28, [Preliminary Objections, Judgment](#), para. 244 (ITLOS Spec. Ch. Jan. 28, 2021), where there was an ICJ Advisory Opinion on Mauritius’ territorial sovereignty over the Chagos Archipelago, the Special Chamber considered there to be “a difference between the present case and the *Coastal State Rights* case . . . [where] the Annex VII Tribunal did not have the benefit of prior authoritative determination of the main issues relating to sovereignty claims to Crimea by any judicial body.”

⁴⁸ North Sea Continental Shelf (Ger./Den; Ger./Neth.), [Judgment](#), 1969 ICJ Rep. 3, para. 96 (Feb. 20); Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nic. v. Hond.), [Judgment](#), 2007 ICJ Rep. 659, para. 113 (Oct. 8).

the legal rules on which it has primarily to pronounce.⁴⁹ On the other hand, the impetus of coherence is tempered by that of consent: when exercising such incidental jurisdiction, international tribunals must proceed with the utmost prudence.⁵⁰ If the incidence of international jurisdiction is exceptional and fragile,⁵¹ Cinderella's glass slipper, too, is fragile—and may shatter if an ungainly foot is shoehorned into it. Expansive interpretations by international courts and tribunals of their competence ultimately cannot compensate for the failure of states to establish a comprehensive system of judicial dispute settlement.

⁴⁹ Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L. L. 649, 662 (2007).

⁵⁰ *Id.*

⁵¹ [KOLB](#), *supra* note 7, at 1201.