doi:10.1017/aju.2022.27

SYMPOSIUM ON INCIDENTAL JURISDICTION

INCIDENTAL QUESTIONS AS A GATEKEEPING DOCTRINE

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The Gates: Defining Incidental Questions in the Context of Limited Jurisdiction

In this essay, I discuss whether and to what extent the framing of the main dispute and incidental questions can have a gatekeeping function in relation to the jurisdiction and applicable law of a dispute settlement body. Recent cases have attached critical importance to the identification of the "real" main object of the dispute, and the "characterization" of claims to then determine which issues are incidental to the dispute, rather than focusing on which issues are within the tribunal's *ratione materiae* jurisdiction. Through an examination of selected case law, I argue that this "characterization approach" could in effect elevate a subjective framing of the "main" dispute to a jurisdictional gatekeeper. This approach introduces unnecessary evaluative determinations while obscuring normative clarity regarding the limits of consent-based jurisdiction and its relationship to incidentally applicable law.

Framing Incidental Questions: Necessarily Arising and Ancillary in Nature

One of the earliest and most cited examples of incidental jurisdiction arose in the 1926 *Compagnie pour la Construction du Chemin de Fer d'Ogulin à la Frontière, S.A.* arbitration[1] where the tribunal had to decide whether a company incorporated in Hungary could request restitution or compensation for objects held by the State of Slovenes, Croats and Serbs. For the tribunal to have jurisdiction under the Trianon Treaty, the property had to belong to Hungary, a fact which was disputed by the respondent. Thus, the incidental question was one of ownership. The tribunal posited that the judge who has jurisdiction over the main dispute can decide incidental questions (*préjudicielles*) unless otherwise provided by the treaty.[2] This seemingly broad pronouncement thus arose in a very specific context. The implicit criteria were that resolving the incidental question was necessary for deciding the main question within the tribunal's jurisdiction, that the incidental question was ancillary to the main dispute, and that the incidental question was clearly linked to issues within the tribunal's jurisdiction.

The second case considered as an authority on jurisdiction in incidental questions is the Permanent Court of International Justice (PCIJ) case regarding *Certain German Interests in Polish Upper Silesia*.[3] In this case, the Court had to decide whether the expropriation of a nitrate factory by Poland, which Germany claimed was owned by a

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[1] *Compagnie pour la construction du chemin de fer d'Ogulin à la frontière, S. A. C. Etat Serbe-Croate-Slovène* (1926), 6 TAM 505.

[2] *Id.* at 507.

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

German national, violated the Geneva Treaty on Upper Silesia.[4] Poland, the respondent, argued that Germany did not validly own the factory. According to Poland, the ownership was regulated by the Treaty of Versailles and the Protocol of Spa, not the Geneva Treaty granting jurisdiction to the Court.[5] Consequently, the incidental question concerned whether the Court could examine the validity of rights that were granted under international instruments over which the Court had no jurisdiction.[6] It would not make sense for the Court to decline to consider Poland's arguments for lack of jurisdiction. The examination of other treaties was crucial to determine the Court's jurisdiction or lack thereof, and the other international instruments invoked were deemed inapplicable in the case.[7]

In these cases, there was no question of reframing the incidental questions as ones that were central to the dispute. The justifications propounded, even in a skeletal or implied sense, were based on the *effet utile* of the treaty providing jurisdiction, the efficiency of dispute settlement balanced against state consent, and more importantly on the connections between norms internal and external to the treaty granting jurisdiction. As I have argued previously, extraneous norms are either directly applicable and can be categorized as meta-norms (treaty law), constructive norms (procedural law and matters of state responsibility), and conflict resolution norms, or used for interpretative purposes.[8] This taxonomy needs further elaboration in the context of incidental questions regarding the relationship between limited jurisdiction and applicable law. In any case, courts and tribunals need to explicitly examine these connections.

Shifting Landscapes: Is It an Incidental Question or Is It Really the Main Issue?

As discussed above, the identification of an incidental question is a relational concept in that it arises only in connection with what is defined as the main subject of the dispute. Nevertheless, the vexing question is whether the subject matter of the dispute can or should be defined holistically or should instead be confined to the limitations of a jurisdictional clause. In this context, the recent approach toward characterizing a dispute seems to have tilted the balance toward the view that there is a center of gravity in each dispute which must be determined by the court.[9] This approach introduces a new jurisdictional gatekeeping doctrine by holistically viewing the dispute to ascertain the center of gravity, scrutinizing potential ulterior motives of the parties and defining in this way the "real" dispute.

The characterization approach was debuted as a conduit for assessing the motives of the parties in the *Chagos MPA* dispute[10] concerning the legality of the United Kingdom's (UK) proclamation of a Marine Protected Area (MPA). The tribunal's decision on lack of jurisdiction in this case hinged solely on the characterization of the dispute. Indeed, the framing of the dispute by the parties encouraged this approach. Mauritius's first submission argued that the MPA proclamation was illegal because the UK is not the coastal state.[11] The UK argued that the dispute was framed as based on United Nations Convention on the Law of the Sea (UNCLOS) while in

[4] Convention Germano-Polonaise Relative à la Haute Silésie faite à Genève le 15 mai 1922, Impr. A. Kundig (1922).

[5] *Certain German Interests*, *supra* note 3, at 15.

[6] *Id.* at 18.

[7] *Id.* at 17. *See also* German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 PCIJ (ser. A) No. 7, at 29–31 (May 25).

[8] Matina Papadaki, *Compromissory Clauses as the Gatekeepers of the Law to be "Used" in the ICJ and the PCIJ*, 5 J. Int'l Disp. Settlement 560 (2014).

[9] *See* Callista Harris, *Claims with an Ulterior Purpose: Characterising Disputes Concerning the "Interpretation or Application" of a Treaty*, 18 L. & Prac. Int'l Cts. & Tribs. 279 (2020).

[10] Chagos Marine Protected Area (Mauritius v. UK), Award, PCA Case No. 2011-03 (Mar. 18, 2015).

[11] *Id.*, para. 7.

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actuality it was about sovereignty.[12] The tribunal sided with the UK. It reasoned, based on an overall assessment of the dispute between the parties, that if the determination of the "coastal state" for the purposes of UNCLOS was a "pretext" to deciding issues of sovereignty, this would do "violence to the intent of the drafters."[13] Consequently, according to the tribunal, cases in which the incidental question is not "ancillary" but instead is the "real issue" do not fall within its jurisdiction.[14]

The same result could however have been attained without any characterization of the "real" dispute. The tribunal could have alternatively held that the "coastal state" determination required a finding on territorial sovereignty to which the parties had not consented, and which was outside its *ratione materiae* jurisdiction. The importance and longstanding nature of the overall territorial dispute could have been used to deny the ancillary nature of the issue under consideration. In other words, a question cannot logically be incidental when the answer to it will resolve a broader dispute than the one brought to the court. The characterization approach has since been used in the *South China Sea*,[15] *Coastal States Rights*,[16] and the *Enrica Lexie* cases.[17]

In these cases, the tribunals endorsing the characterization approach have quoted the International Court of Justice's (ICJ) and the PCIJ's case law. However, the cited cases do not lend support to the characterization approach as formulated by the tribunals. For example, in the *Nuclear Tests* cases the ICJ had to identify the "real issue"[18] to ascertain what kind of relief the parties sought (declaratory judgment or not) and, relatedly, to decide whether this dispute still existed in light of events subsequent to the application.[19] In the *Fisheries Jurisdiction* case between Canada and Spain, the determination of the dispute "on an objective basis"[20] concerned competing interpretations of the basis of Canada's actions in the high seas relating to fishing and whether they fell within its reservation to its optional clause declaration under Article 36(2) of the ICJ Statute, accepting the ICJ's compulsory jurisdiction. The Court asserted its inherent power to extract "the essence"[21] of the dispute by considering not only to the parties' application and submissions but also "diplomatic exchanges, public statements and other pertinent evidence" as well.[22] In these cases, the Court essentially asserted that it had inherent jurisdiction to cast a broader net when defining the dispute rather than relying solely on the framing by the applicant(s). Crucially, this examination did not involve an assessment of the parties' motives.

A more relevant ICJ case which was not cited by these tribunals despite containing the ICJ's standard approach regarding the interpretation and application of a treaty granting jurisdiction and incidental issues was the *Oil Platforms* case. In this case, the Court rejected the United States' argument that the dispute was about the use of force and not the 1955 Amity, Economic Relations and Consular Rights Treaty granting jurisdiction.[23]

[12] *Id.*, para. 11.

[13] *Id.*, para. 219.

[14] *Id.*, para. 220.

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

[16] Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v Russ.), Award Concerning the Preliminary Objections of the Russian Federation, PCA Case 2017-06 (Feb. 2020).

[17] The "Enrica Lexie" Incident (It. v. India), Award, PCA Case No. 2015-28 (May 2020).

[18] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 ICJ Rep. 253, para. 30 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 ICJ Rep. 457, para. 30 (Dec. 20).

[19] Nuclear Tests (Austl. v. Fr.), Judgment, *supra* note 18, paras. 31–41; Nuclear Tests (N.Z. v. Fr.), Judgment, *supra* note 18, paras. 31–41.

[20] Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 ICJ Rep. 432, para. 30 (Dec. 4).

[21] *Id.*, para. 35.

[22] *Id.* para. 31.

[23] Oil Platforms (Iran v. U.S.), Preliminary Objections Judgment, 1996 ICJ Rep. 803 (Dec. 12). A position reiterated in *Certain Iranian Assets (Iran v. U.S.)*, Judgment, 2019 ICJ Rep. 7 (Feb. 13), rejecting the U.S. argument that the dispute was an attempt "to embroil the Court in

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Instead, the Court sought to determine whether the dispute could be seen as falling under the treaty granting jurisdiction by framing the use of force as the medium through which the treaty violation occurred.[24]

Thus, the characterization approach provides a new tool for classifying issues as either central or incidental by evaluating the center of gravity of the submitted claims. However, this is not necessary as jurisdiction can instead be framed by reference to the treaty granting jurisdiction.

Selective Entrance: The Possibility of Severability

Another avenue for a court to assume jurisdiction is to dispense with the incidental questions by examining whether they can be severed from the dispute.[25] In the *Coastal State Rights* arbitration between Ukraine and Russia, the tribunal noted that in order to decide the questions posed by Ukraine, it would have to ascertain which is the coastal state within the meaning of UNCLOS. Nevertheless, a finding on the coastal state was tightly linked to a pronouncement on sovereignty. In order to determine its jurisdictional competence, the tribunal decided to first rule on the "characterization of the dispute" and then on whether there is a territorial dispute between the parties.[26] The tribunal concluded that the dispute was improperly characterized as one on the application and interpretation of UNCLOS,[27] and thus the issue of sovereignty, which could not be severed and set aside, was not ancillary or of minor importance.[28] However, the tribunal stated that the lengthy examination of the characterization did not affect all claims,[29] compounding the confusion regarding the doctrine's added value, as the same result could have been attained by holding that resolving a dispute on territorial sovereignty is not within its jurisdiction.[30]

The difficulties arising from using the characterization approach as the gatekeeper of jurisdiction are best exemplified in the *Enrica Lexie* case. In this case concerning the shooting and killing of Indian fishermen by Italian marines, Italy argued that the dispute was based on the interpretation and application of UNCLOS, and that it incidentally involved the immunity of the marines.[31] India's position was two-pronged: the dispute was not about the interpretation and application of UNCLOS but about the immunity of the marines, and in any case, immunity was outside the tribunal's jurisdiction.[32] The tribunal held that "at no point in their written pleadings . . . does either Party characterise the dispute between them as one primarily relating to immunity,"[33] despite having previously summarized India's position as referring to the issue of the immunity as the "real subject matter of the dispute."[34] This contradiction can only be explained by the tribunal's conclusion that India's arguments, viewed in their totality, focus on the center of gravity being the Indian ship Saint Anthony, and the killing of its fishermen.[35]

'a broader strategic dispute'" (para. 34) finding the examination of whether such a goal constituted abuse of process unnecessary (paras. 114–15).

[24] *Oil Platforms*, *supra* note 23, para. 21.

[25] I chose the word severable but for alternative formulations, see Lawrence Hill-Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68 Int'l & Comp. L. Q. 779, 779–80 n. 1 (2019).

[26] Dispute Concerning Coastal State Rights (Ukr. v Russ.), *supra* note 16, para. 154.

[27] *Id.*, para. 196.

[28] *Id.*, para. 195.

[29] *Id.*, para. 198.

[30] A similar approach was taken in *South China Sea (Phil. v. China)*, *supra* note 15, para. 153.

[31] *"Enrica Lexie" (It. v. India)*, *supra* note 17, paras. 224, 236–39, 807.

[32] *Id.*, paras. 226–27.

[33] *Id.*, para. 242.

[34] *Id.*, para. 226.

[35] *Id.*, paras. 228, 240–41.

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If we are to follow the characterization approach, we are left with two options: either this is a dispute primarily about the interpretation and application of UNCLOS or it is primarily about the Italian marines' immunity from jurisdiction. Three different outcomes may flow from these alternative characterizations. First, if the dispute is about the marines' immunity, its object is not the interpretation and application of UNCLOS,[36] and the tribunal thus lacks jurisdiction. Second, if the dispute is about the interpretation and application of UNCLOS, but there is a separate and severable legal issue of the marines' immunity, the latter does not fall within the jurisdiction of the tribunal.[37] Third, the dispute is about the interpretation and application of UNCLOS, but the issue of immunity necessarily arises in the course of the Convention's application as an exception to jurisdiction provided under it.

The tribunal's reasoning, however, was far from clear, thus furthering the problem of exercising jurisdiction on incidental questions and concomitant questions of the applicable law. The tribunal first characterized the dispute as one about the interpretation and application of UNCLOS,[38] and the issue of immunity as just one, albeit important, incidental issue arising in connection to the dispute.[39] The tribunal explicitly dispensed with the necessity of giving an answer to the question of immunity, while also hinting that it might have to answer the question in order to 'satisfactorily' fulfil its exercise of jurisdiction.[40] The tribunal then raised the argument identified in our third scenario above, namely that immunity operates as an exception to the application of the Convention, adding that without examining it, it cannot provide "a complete answer to the question as to which Party may exercise jurisdiction," and therefore it is a question incidental to the application of the Convention.[41]

Again, the same result could have been attained without the characterization of the dispute, by simply framing the facts in terms of the UNCLOS jurisdictional clause. The characterization became outcome-determinative when the tribunal cast the issue of immunity as *de facto* ancillary since it is not the center of gravity of the dispute. Doing so does not provide a principled answer as to why general international law on immunities is applicable, despite not being part of UNCLOS or referred to in the relevant provisions by way of *renvoi*. This approach clearly illustrates the gatekeeping function of the formulation of incidental questions since in this case the tribunal effectively decided that all external law is applicable provided that it is of minor importance to the main dispute.

The Mirage of Incidental Questions as Gatekeepers

The novel approach of characterization makes sense in light of two concerns: the artificial segmentation and reconfiguration of disputes to fit a jurisdictional instrument, and the filing of these disputes to pursue broader goals. The first is a question of litigation strategy flowing from the inherent difficulty of pursuing judicial resolution in a system without compulsory jurisdiction, while the second raises questions of admissibility due to abuse of process rather than lack of jurisdiction.

As the above analysis shows, applying the characterization approach means that determination of the main dispute affects the jurisdiction and applicable without addressing the thorny relationship between primarily and incidentally applicable norms. An assessment of the real dispute, especially in the context of a complex and longstanding controversy between the disputing parties, may lead to a slippery slope of judging parties' motives and ascertaining litigation goals. Consequently, a great degree of subjectivity is introduced in the adjudication process, which in turn accords immense power to a subjective framing of the facts and motives underlying an

[36] *Id.*, diss. op., Robinson, J., paras. 80–81.

[37] *Id.*, diss. op., Rao, J., paras. 57–59.

[38] *Id.*, para. 804.

[39] *Id.*, para. 806.

[40] *Id.*, para. 805.

[41] *Id.*, para. 808.

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application. Moreover, the lack of analytical clarity on the connections between the norms internal and external to the jurisdiction of the courts, may result in an overly *ad hoc* treatment of *ratione materiae* jurisdiction.

One path forward could be the development of a theory according to which norms external to those provided for in the jurisdictional instrument regulating the dispute could and should be let in. If we are to construct a gatekeeping doctrine, it is these connections between legal norms and their interplay with consent and *ratione materiae* jurisdiction that merits further exploration since it carries untapped potential to provide a more coherent framework of treating incidental questions.

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