Give a Court an Inch and It Will Take a Yard? The Exercise of Jurisdiction over Incidental Issues

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Abstract

This article seeks to clarify how international courts and tribunals should decide whether to exercise jurisdiction over incidental issues. It considers

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such issues incidental, which would fall outside the subject-matter jurisdiction of an international court or tribunal if submitted separately, but which courts rule upon to resolve disputes falling within their jurisdiction. International courts and tribunals have employed diverse approaches to decide whether to exercise jurisdiction over incidental issues. This contribution will assess their decisions to distil what criteria are best suited to ensure the effectiveness of the underlying treaty while taking into account the importance of state consent for judicial dispute settlement. It concludes that the necessity to exercise jurisdiction over the incidental issue and the nature of the issue should be the guiding criteria for international courts and tribunals, while the character of the jurisdictional basis may serve as supplementary criterion.

Keywords

incidental issues – incidental questions – jurisdiction of international courts and tribunals – consent – international dispute settlement

I. Of Inches, Yards and the Jurisdiction of International Courts

Give him an inch and he will take a yard. This idiom seems to describe a situation so common that it features in a number of European languages.[1] The idea behind the proverb is that someone, who has been handed a small amount of something, seizes the opportunity to try and get a lot more than is permissible.[2] Such brazen behaviour is what international courts[3] sometimes have been criticised for regarding the exercise of their jurisdiction over incidental issues: Instead of sticking to the points clearly within their jurisdiction, they decided to 'take the whole yard', by incidentally pronouncing on

1 Variations are in French 'on lui donne le doigt et il vous prend le bras'; in Spanish 'dale el dedo y te tomará la mano'; in German 'reichst du ihm den kleinen Finger, nimmt er gleich den ganzen Arm'.

2 Merriam Webster, <https://dictionary.cambridge.org/dictionary/english/give-someone-an-inch-and-they-ll-take-a-mile> (accessed 5 January 2021).

3 The term 'international courts' is used broadly throughout this text, comprising all international judicial and quasi-judicial bodies, including WTO panels and the WTO Appellate Body.

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contentious points arguably outside of their jurisdiction.[4] In this contribution I want to explore how international courts should decide whether to exercise such jurisdiction over incidental issues.

We shall start from the well-established fact that no obligation exists in the international realm to have disputes adjudicated by an international court. Rather, states have to provide their consent for any judicial dispute settlement. This consent serves as the prerequisite and the limit of the jurisdiction of international courts. A recurring problem concerns their jurisdiction to rule on incidental issues. For our purposes we shall consider such issues as incidental, which would fall outside the subject-matter jurisdiction of an international court if submitted separately, but which international courts rule upon, to resolve disputes within their jurisdiction. Incidental issues arise frequently, though not exclusively,[5] when the jurisdiction is based on compromissory clauses, which usually provide international courts with jurisdiction to decide disputes regarding 'the interpretation and application' of the treaty in which they are included.[6] International courts, therefore, often have to decide to what extent this provides them with jurisdiction to rule on issues beyond the treaty in question.

The problem of the jurisdiction over incidental issues is especially relevant because in international law, unlike in domestic law, there usually exists no other body to assert jurisdiction over the same matter, if it is declined in the first place. Recently, the jurisdiction over incidental issues rose to prominence as one of the decisive questions in the *Enrica Lexie* arbitration.[7] Despite its relevance,[8] and the fact that the problem can be traced to the

4 E.g. Stefan Talmon, 'The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals', ICLQ 65 (2016), 927-951 (950); PCA, *The Enrica Lexie Incident* (Italy v. India), dissenting opinion of Judge Robinson, award of 21 May 2020, PCA case no. 2015-28, paras 30-54.

5 See below III. 6. for the discussion of ICJ, *Aegean Sea Continental Shelf* (Greece v. Turkey), judgment of 19 December 1978, ICJ Reports 1978, 3, and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia/Singapore), judgment of 23 May 2008, ICJ Reports 2008, 12.

6 For a critical view on recent jurisprudence regarding incidental issues and their relationship to compromissory clauses, Callista Harris, 'Claims with an Ulterior Purpose: Characterising Disputes Concerning the "Interpretation or Application" of a Treaty', The Law and Practice of International Courts and Tribunals 18 (2019), 279-299.

7 Sparking a strong dissent by Judge Robinson, PCA, *Enrica Lexie* (n. 4) dissenting opinion of Judge Robinson.

8 Other rather recent decisions grappling with incidental issues include: PCA, *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom), award of 18 March 2015, PCA case no. 2011-03, paras 203-221; PCA, *South China Sea Arbitration* (The Philippines v. China), jurisdiction and admissibility, award of 29 October 2015, PCA case no. 2013-19, paras 148-153; PCA, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. Russia), preliminary objections, award of 21 February 2020, PCA

beginning of modern international dispute settlement,[9] international courts have struggled to find a coherent approach till date.

Looking at the problem via the lens of international courts' jurisdiction is only one way to tackle it. Scholars have addressed aspects of the question when discussing the fragmentation of international law,[10] the disaggregation of disputes,[11] the nature of compromissory clauses,[12] and the quest for a coherent approach to the law applicable to a dispute.[13] Yet only few have made contributions regarding the problem of jurisdiction over incidental issues as such.[14] In this contribution I will focus on the jurisdiction over incidental issues because of the practical relevance of the yardstick for the work of international courts. Also, I propose that while the issue has recently most frequently surfaced before United Nations Convention on the Law of the Sea (UNCLOS)[15] tribunals, it cuts across international dispute settlement regimes.

Throughout this article I will aim to suggest that looking at incidental issues as primarily a problem of the scope of consent and treaty effectiveness provides a way forward for international courts to deal with the matter. Our introductory idiom shall help us grasp this problem. To what extent are

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case no. 2017-06, paras 150-166, 191-197; the issue has also been raised with regards to the International Criminal Court, Dapo Akande and Antonios Tzanakopoulos, 'The Crime of Aggression in the ICC and State Responsibility', Harv. Int'l. L. J. Online 58 (2017), 33-36 (34-35).

9 PCIJ, *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v. Poland), preliminary objections, judgment of 25 August 1925, PCIJ (Series A) No. 6, 18.

10 Enzo Cannizzaro and Beatrice Bonafé, 'Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case', EJIL 16 (2005), 481-497 (484, 494-497).

11 Lawrence Hill-Cawthorne, 'International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study', ICLQ 68 (2019), 779-815.

12 Cf. Matina Papadaki, 'Compromissory Clauses as the Gatekeepers of the Law to be 'Used' in the ICJ and the PCIJ', Journal of International Dispute Settlement 5 (2014), 560-604 (569 et seq).

13 Lorand Bartels, 'Jurisdiction and Applicable Law Clauses in International Law: Where Does a Tribunal Find the Principal Norms Applicable to the Case Before It?', in: Yuval Shany and Tomer Broude (eds), *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart 2011), 115-141 (137-139).

14 Notable examples include Peter Tzeng, 'The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction', N. Y. U. J. Int'l L. & Pol. 50 (2018), 447-507; Ben Love, 'Jurisdiction over Incidental Questions in International Law', ASIL Proc. 111 (2017), 316-321; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons 1953), 266-267 and 350-356. These contributions, however, did not seek to develop how international courts should decide whether to exercise jurisdiction over incidental issues.

15 United Nations Convention on the Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3; for some of the cases see (n. 8).

international courts seizing more jurisdiction than states consented to? To set the scene I will begin by clarifying the terminology and scope of this article, providing an introduction to the characterisation of disputes and to the distinction between jurisdiction and applicable law (II.). Then I shall present and analyse the most important approaches that have developed in past jurisprudence for dealing with incidental issues and distil the most convincing criteria (III.) before concluding (IV.).

II. Setting the Scene

The problem of the exercise of jurisdiction over incidental issues is particularly challenging because of the number of complexities it is connected to. One is terminological uncertainty. Another hurdle is the overlap with rather complicated international legal concepts. In this introduction I will, therefore, introduce a terminology of incidental issues, present the concept of dispute characterisation, and briefly disentangle the notions of jurisdiction and applicable law.

1. Terminology and Scope

Scholarship and international courts have used a variety of terms when dealing with the problem of incidental issues in the past: incidental questions, implicated issues and incidental determinations being only three examples.[16] As of now, no general rule of international law appears to exist that would make one or the other of these expressions mandatory. For our purposes I shall employ the term 'incidental issues', which comprises both, questions which are determined as a *condition* to rule on a matter within the jurisdic-

16 Tzeng (n. 14) refers to implicated issues; speaking of incidental determinations, Loris Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', in: Angela Del Vecchio and Roberto Virzo (eds), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (Cham: Springer 2019), 383-406 (399); speaking of incidental questions, Fernando Bordin, 'Procedural Developments at the International Court of Justice', The Law & Practice of International Courts and Tribunals 11 (2012), 325-364 (341). Incidental jurisdiction is yet another matter, it describes jurisdiction over certain proceedings that may arise during the litigation of a case before an international court, see Christian Tomuschat, 'Article 36', in: Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice* (3rd edn, Oxford: Oxford University Press 2019), 713 (para. 33).

tion and such that are determined as a *consequence* of a matter within the jurisdiction.

Another issue begging preliminary clarification is what the incidental issues we are looking at are actually incidental *to.* This is because qualifying an issue as incidental is always relative: what may be incidental in one case may not be incidental in another.[17] I understand incidental issues here as those over which courts exercise jurisdiction to arrive at the conclusions in the operative part of the decision.

Lastly, we will only concentrate on incidental issues regarding matters of substantive, primary rules of international law.[18] For one, we require this qualification because the competence to make determinations on questions of domestic law may also be disputed.[19] However, domestic law is generally considered a question of fact following the dictum of the Permanent Court of International Justice (PCIJ).[20] When international courts assess whether domestic laws violate international law standards and have to appraise domestic laws in the process, they are not extending their jurisdiction into the domestic realm. By limiting ourselves, second, to substantive, primary rules we exclude the law of treaties and secondary rules, notably most of the law of state responsibility – with the exception of circumstances precluding wrongfulness – from the scope of the investigation.[21] Treaty law and the law of state responsibility have continuously been applied liberally by international courts and states accept this application due to their indispensability for deciding international cases.[22]

17 Bartels (n. 13), 120.

18 For the distinction between primary and secondary rules, Eric David, 'Primary and Secondary Rules', in: James Crawford, Alain Pellet, Simon Olleson and Kate Parlett (eds), *The Law of International Responsibility* (Oxford: Oxford University Press 2010), 27-34.

19 For an assessment of the competence of a NAFTA tribunal to consider questions of domestic law see PCA, *William Ralph Clayton, William Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, judgment of the Federal Court of Canada of 2 May 2018, PCA case no. 2009-04, paras 130-147; *GAMI Investments, Inc. v. The Government of the United Mexican States*, final award (15 November 2004), paras 90 et seq.

20 PCIJ, *Case Concerning Certain German Interests in Polish Upper Silesia* (Germany v. Poland), merits, judgment of 25 May 1926, PCIJ Series A, no. 7, 19.

21 For my purposes I consider circumstances precluding wrongfulness primary rules, cf. David (n. 18), 29; with regards to remedies it is accepted that the 'jurisdiction to determine a breach implies jurisdiction to award compensation', James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press 2013) 599; and PCIJ, *Case Concerning the Factory at Chorzów* (Germany v. Poland), merits, judgment of 13 September 1928, PCIJ Series A, no. 17, 61.

22 Papadaki (n. 12), 582; Marotti (n. 16), 385.

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2. Characterisation of the Dispute

The jurisdictional fate of an incidental issue depends to a large extent on how the underlying dispute is characterised by the claimant and the international court in question. A dispute, famously defined in *Mavrommatis* as a 'disagreement on a point of law or fact, a conflict of legal views or of interests between two persons',[23] can be framed in a myriad of ways, serving as an important tool for legal counsel. Depending on the angle chosen, the claimant may be able to achieve a positive decision of the court on its jurisdiction in borderline cases.[24] While the claimant's framing of the dispute does not bind the court, it can be influential and will frequently play an important role in the court's assessment.[25] Yet, as the International Court of Justice (ICJ) stated in *Nuclear Tests*, it is for the international court to 'isolate the real issue of the case and to identify the object of the claim'.[26] To do so, international courts will also take account of diplomatic exchanges, public statements and other pertinent evidence.[27] Such a comprehensive contextual analysis is necessary to grasp the often multidimensional legal, cultural and historical character of disputes. However, it also provides courts with considerable leeway in identifying the real issue in a case.[28]

For incidental issues, this means that claimants can attempt either to frame their submissions with the goal to induce the court to pronounce on the issue or to carve out contentious incidental issues from their submissions if they expect that the court would refuse to take a position on the matter.[29] An example of the latter is Ukraine's approach in the *Coastal State Rights* case before the Annex VII Tribunal. There, Ukraine repeatedly emphasised that it did not consider the dispute as one about the sovereignty over disputed

23 PCIJ, *Mavrommatis Palestine Concessions* (Greece v. Great Britain), objection to the jurisdiction of the Court, judgment of 30 August 1924, PCIJ Series A, no. 2, 11.

24 See e. g. Robert Volterra, Giorgio Mandelli and Álvaro Nistal, 'The Characterisation of the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov and Kerch Strait', IJMCL 33 (2018), 614-622 (621).

25 PCA, *Chagos Arbitration* (n. 8), para. 208.

26 ICJ, *Nuclear Tests* (New Zealand v. France), judgment of 20 December 1974, ICJ Reports 1974, 466, para. 30; see also ICJ, *Fisheries Jurisdiction* (Spain v. Canada), jurisdiction, judgment of 4 December 1998, ICJ Reports 1998, 448, paras 30-31.

27 ICJ, *Nuclear Tests* (n. 26), para. 30.

28 Critical with regards to this 'inherently subjective exercise', Talmon (n. 4) 934; more positively, emphasising the flexibility this grants to tribunals, Irina Buga, Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals, IJMCL 27 (2012), 59-95 (89-90).

29 Tzeng has considered the characterisation of a dispute in itself a specific approach to deal with incidental questions in itself, see Tzeng (n. 14), 460; for Mauritius strategy in *Chagos* see, *Talmon* (n. 4), 929.

territory, correctly anticipating that the Tribunal would be unwilling to make any determinations in this regard.[30]

A phenomenon related to both, the characterisation of disputes and incidental issues, is sometimes described as the 'compartmentalisation'[31] and 'disaggregation'[32] of disputes. The terms are understood here as describing how only limited aspects of broader disputes can be adjudicated before international courts, as states hardly ever submit to plenary jurisdiction. As a consequence, claimant states characterise their disputes so as to have at least parts of broader conflicts adjudicated under compromissory clauses.[33] In this scenario, international courts are not simply enjoined from ruling on a dispute which falls within their jurisdiction just because it is only one aspect of a broader conflict, as the ICJ emphasised in the *Tehran Hostage Case*.[34]

Incidental issues can but do not have to emerge in relation to this phenomenon. The two sometimes seem to be discussed together[35] because of their frequent coincidence and because they originate in the same feature of the international legal order, namely the absence of compulsory and comprehensive jurisdiction. However, if a state simply submits legal arguments with regards to parts of a broader dispute that fall outside of the jurisdictional scope of the compromissory clause, this does not constitute an 'incidental issue' but simply a question outside of the court's jurisdiction.[36]

30 PCA, *Coastal State Rights* (n. 8), for Ukraine's arguments see paras 61, 143, for the Tribunal's decision, para. 197.

31 Cannizzaro and Bonafé (n. 10).

32 Hill-Cawthorne (n. 11).

33 Prime examples in this regard are some cases brought under the Convention on the Elimination of Racial Discrimination (CERD) (concluded 21 December 1965, entered into force 4 January 1969), e. g. ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), provisional measures, order of 23 July 2018, ICJ Reports 2018, 406; ICJ, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), preliminary objections, judgment of 1 April 2011, ICJ Reports 2011, 70.

34 ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), judgment of 24 May 1980, ICJ Reports 1980, 3, para. 36; see also ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2007, ICJ Reports 2007, 43, para. 147.

35 E.g. Marotti (n. 16), 392.

36 E.g. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), judgment of 3 February 2015, ICJ Reports 2015, 3, para. 85; ICJ, *Jadhav Case* (India v. Pakistan), merits, judgment of 17 July 2019, ICJ Reports 2019, 418, paras 17, 36.

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3. Jurisdiction and Applicable Law

The term jurisdiction for our purposes denotes the power of an international court to hear a case and render a binding decision.[37] To do so, international courts generally apply rules of international law.[38] The applicable law designates the legal rules an international court may apply to decide the legal issue before it. Determining jurisdiction and determining the applicable law are two 'logically and chronologically' distinct concepts.[39] Only after an international court has found itself competent may it consider the applicable law to resolve the dispute. Also, the applicable law must not be used to expand the jurisdiction.[40] International decisions have often emphasised this principle.[41]

Distinct as they may be, however, for the purposes of jurisdiction over incidental issues both are linked to the same problem. When states consent to the jurisdiction of international courts, they may also limit the law the court may apply. If an international court applies the wrong law, it also oversteps its jurisdiction.[42] Accordingly, if an international court wants to rule on a dispute within its jurisdiction but this dispute would require it to incidentally apply law that the parties did not expressly provide their consent for, this falls squarely within the scope of the problem I discuss here.

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37 Shabtai Rosenne, 'International Courts and Tribunals, Jurisdiction and Admissibility of Inter-State Applications', in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2006), para. 2.

38 If they are not ruling *ex aequo et bono*, see ICJ Statute Article 38(2).

39 Marotti (n. 16), 385 (parenthesis omitted); with regards to investment law Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration', McGill Journal of Dispute Resolution 1 (2014), 1-25 (24-25).

40 PCA, *The Arctic Sunrise Arbitration* (Netherlands v. Russia), merits, award of 14 August 2015, PCA case no. 2014-02, paras 188-192; nonetheless this seems to have been what the Tribunals did *de facto* in some cases, e. g. ITLOS, *M/V "SAIGA" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), judgment of 1 July 1999, ITLOS Reports 1999, 10, paras 155-156; PCA, *Guyana v. Suriname* (Guyana v. Suriname), award of 17 September 2007, PCA case no. 2004-04, paras 406, 488; on this issue in the UNCLOS context Peter Tzeng, 'Applicable Law and Jurisdiction under UNCLOS', Yale L. J. 126 (2016), 242-260 (248-251).

41 PCA, *Mox Plant Case* (Ireland v. United Kingdom), suspension of proceedings on jurisdiction and merits and request for further provisional measures, order no. 3 of 24 June 2003, PCA case no. 2002-01, para. 19, 'cardinal distinction'; PCA, *Eurotunnel* (Channel Tunnel Group and France-Manche v. UK and France), partial award of 30 January 2007, PCA case no. 2003-06, para. 151.

42 See e. g. ICSID, *Amco Asia Corporation and others v. Republic of Indonesia*, *ad hoc* committee decision on the application for annulment of 16 May 1986, ICSID Case No. ARB/81/1, para. 23; cf. Andrew Mitchell and David Heaton, 'The Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function', Mich. J. Int'l L. (2010), 559-620 (562).

III. Distilling Criteria

There have been numerous instances when international courts have had to tackle the question to what extent they may exercise jurisdiction over incidental issues. In this part, I will extrapolate and evaluate the most important approaches international courts have adopted in the past. Before I can do so, we need to establish what principles international courts need to give weight to when deciding on the exercise of their jurisdiction over incidental issues.

1. State Consent and Treaty Effectiveness

As fundamental premise we should first call to mind the 'truism'[43] that all international judicial dispute settlement is based on consent. Explorations of the jurisdictional limits of international courts are thus explorations of the limits of consent of the parties to the dispute. However, the limits of the consent regarding incidental issues are usually not laid down expressly. Accordingly, the question of jurisdiction over incidental issues is in fact one of interpreting the 'implied consent of the parties'.[44] By answering this question international courts also determine their own competence, which is a well-established aspect of their power (so-called Kompetenz-Kompetenz).[45]

Generally, the customary rules of treaty interpretation apply to the interpretation of clauses submitting to jurisdiction of international courts.[46] At a higher level of abstraction, international courts face the challenge of respecting the boundaries of the consent provided by states and at the same time giving effective meaning to the terms of the underlying treaty.[47] These two aspects, the effectiveness of the treaty and state consent are the two most important values which a general approach to the exercise of jurisdiction over incidental issues has to accommodate. However, it would be inappropriate to consider this interpretative exercise a sort of proportionality analysis between

43 Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. I (Oxford: Oxford University Press 2013), 691.

44 Cf. *Enrica Lexie* (n. 4) dissenting opinion of Judge Robinson, para. 52.

45 Cheng (n. 14), 275-278; Georges Berlia, 'Jurisprudence des tribunaux en ce qui concerne leur compétence', RdC 88 (1955), 105-157.

46 E.g. ICJ, *Dispute regarding Navigational and Related Rights Case* (Costa Rica v. Nicaragua), judgment of 13 July 2009, ICJ Reports 2009, 213, para. 48.

47 Similarly, Marotti (n. 16), 390; the same is true for the interpretation of special agreements providing jurisdiction.

effectiveness and consent.[48] While undoubtedly international courts should seek to dispense their duties effectively, the goal of effectively settling a dispute cannot 'outweigh' the consent of the parties. Taken to an extreme, international courts could otherwise rule on disputes *proprio motu*.

Practically, the values of treaty effectiveness and state consent can roughly be translated into interpretative principles. The first is the principle of effective interpretation (sometimes also called *effet utile*), a teleological approach, which seeks to give the most effect to the terms of the treaty in light of its purpose.[49] This does not necessarily mean expansive interpretation.[50] However, for our purposes one might contend that the judicial dispute resolution under the treaty would be most effectively realised if courts could simply rule on all incidental issues to resolve the dispute arising under the treaty.

The interpretative principle arguably giving most protection to state consent, once called the 'opposite' of effective interpretation, is the *in dubio mitius* (in case of doubt, more lenient) principle, also referred to as the principle of restrictive interpretation.[51] It suggests that when the meaning is unclear one shall choose the interpretation which constitutes less of a limitation to state sovereignty. With the entry into force of the 1969 Vienna Convention on the Law of Treaties (VCLT),[52] which did not mention *in dubio mitius*, the status of the principle was called into doubt. Today, most courts and scholars reject principle of restrictive interpretation, both generally and regarding clauses submitting to jurisdiction.[53] However, the principle is still regularly invoked and even accepted on rare occasions.[54] In the context

48 Even though this seems to be the approach suggested by Marotti (n. 16), 404.

49 Robert Kolb, *The Law of Treaties: An Introduction* (Cheltenham: Elgar 2016), 154-155. Another understanding is that if two interpretations are possible, one should give preference to the one which does not deprive the treaty of its meaning, *ibid*.

50 Kolb (n. 49), 146.

51 Speaking of the 'opposite' Matthias Herdegen, 'Interpretation in International Law', in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2013), para. 30; generally, Robert Jennings and Arthur Watts, *Oppenheim's International Law,* Vol. I (9th edn, London: Longman 1992), 1278; Ulf Linderfalk, *On the Interpretation of Treaties* (Dordrecht: Springer 2007), 280-284.

52 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

53 Luigi Crema, 'In Dubio Mitius', in: Hélène Ruiz Fabri (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2019), para. 3; e. g. Tomuschat (n. 16), para. 35; ICJ, *Navigational Rights* (n. 46), para. 48; PCA, *ICS Inspection and Control Services Limited v. Argentina*, jurisdiction, award of 10 February 2012, PCA case no. 2010-9, para. 282.

54 WTO, Appellate Body, *EC – Measures Concerning Meat and Meat Products (Hormones)*, report of 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 165; see the invocation by China, WTO, Panel, *China – Measures Affecting the Import of Automobile Parts*, report of 18 June 2008, WT/DS339/R, WT/DS340/R, WT/DS342/R, paras 4.174-4.176; ICSID, *SGS Société*

of the jurisdiction of international courts over incidental issues, this approach would suggest not to exercise jurisdiction in cases of doubt.

As we will see, international courts have in almost none of the cases that we will assess applied one or the other of these two interpretative principles exclusively. Rather they have relied on a range of criteria to support their position. However, these criteria are not equally convincing. I will seek to demonstrate that some of these criteria are suited better than others to serve as basis of a general approach to incidental issues that accounts for the effectiveness of the treaty while being conscious of the limits to jurisdiction set by the parties' consent.

Bearing in mind this delicate balance we shall now step into the courtroom and look at some of the most relevant cases where courts had to grapple with incidental issues.

2. No Jurisdiction over Incidental Issues: *Mexico – Soft Drinks*

Our starting point is one end of the spectrum, namely the approach that international courts do not have jurisdiction to rule on incidental issues. This was championed by the World Trade Organization (WTO) Appellate Body in an *obiter dictum* in its 2006 *Mexico – Soft Drinks* report.[55] The dispute arose out of a disagreement about the allocation of sugar quotas under the now terminated North Atlantic Free Trade Agreement (NAFTA)[56] Chapter XX. Mexico brought a claim against the United States (US) under the NAFTA dispute settlement mechanism to enforce what it argued to be its quota rights. Then, according to Mexico, the US refused to appoint an arbitrator.[57] In response Mexico introduced taxes on US soft drinks. Considering this a violation of Mexico's obligations under the 1994 General Agreement on Tariffs and Trade (GATT),[58] the US brought proceedings under the WTO dispute settlement mechanism.

Générale de Surveillance S. A. v. Islamic Republic of Pakistan, jurisdiction, decision of 6 August 2003, ICSID Case No. ARB/01/13, para. 171 and note 178.

55 WTO, Appellate Body, *Mexico – Soft Drinks*, report of 6 March 2006, WT/DS308/AB/R.

56 North American Free Trade Agreement between Canada, The United States and Mexico (signed 17 December 1992, entered into force 1 January 1994), ILM 32 (1993), 289 and 32 (1993), 605.

57 WTO, Panel, *Mexico – Soft Drinks*, report of 7 October 2005, WT/DS308/R, para. 4.92.

58 Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, General Agreement on Tariffs and Trade 1994 (concluded 15 April 1994, entered into force 1 January 1995), 1867 United Nations Treaty Series 187.

What prompted the Appellate Body's engagement with its jurisdiction regarding incidental issues, was that Mexico attempted to invoke a passage from *Chorzów Factory*.[59] On this basis Mexico argued that a party cannot rely on a violation of international law by another party, if the former party prevented the latter from fulfilling the obligation in question or having recourse to an international court.[60] The Appellate Body rejected the application of this principle to the dispute by stating that

> 'Mexico's arguments, as well as its reliance on the ruling in Factory at Chorzów, is misplaced. Even assuming, arguendo, that the legal principle reflected in the passage referred to by Mexico is applicable within the WTO dispute settlement system, we note that this would entail a determination whether the United States acted consistently or inconsistently with its NAFTA obligations. We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes. Article 3.2 of the DSU states that the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements". Accepting Mexico's interpretation would imply that the WTO dispute settlement system could be used to determine rights and obligations outside the covered agreements.'[61]

Had the Appellate Body accepted Mexico's arguments it would have had to make determinations on the US' compliance with NAFTA – generally falling outside its jurisdiction – to rule on Mexico's compliance with the WTO Agreements. The Appellate Body brushed this possibility aside by simply stating that it does not 'adjudicate non-WTO disputes'. Relying on the wording of the WTO Dispute Settlement Understanding, the Appellate Body apparently ruled out the possibility of making any determinations on the lawfulness of states' behaviour outside of the boundaries of the WTO Agreements.[62] On a more abstract level, this can be summarised as the refusal to establish jurisdiction over incidental issues.

The argument to do so appears straight-forward: If an issue does not fall within the jurisdictional limits by its own merit should it not simply also fall outside of the international court's competence when surfacing as an incidental issue? However, this oversimplifies the problem. Frequently, it is impossible to foresee what disputes will arise under a certain treaty. To assume that

59 PCIJ, *Case Concerning the Factory at Chorzów* (Germany v. Poland), jurisdiction, judgment of 26 July 1927, PCIJ Series A, no. 9, 31.

60 WTO, Appellate Body, *Soft Drinks* (n. 55), para. 53 and corresponding note 114.

61 WTO, Appellate Body, *Soft Drinks* (n. 55), para. 56, (emphases and references by the Appellate Body omitted).

62 It is noteworthy that Mexico did not rely on NAFTA's fork-in-the-road provision, Article 2005.6.

states wanted to categorically exclude the exercise of jurisdiction over issues that have not expressly been anticipated appears to be a rather extreme example of restrictive interpretation. To grant courts some leeway to secure the effectiveness of the treaty framework, it is rather convincing to assume that the consent originally provided involves some kind of agreement that enables rulings beyond the immediate limits of the instrument in question.[63] As opposed to the holding in *Mexico – Soft Drinks* we should, therefore, not reject the exercise of jurisdiction over incidental issues on a wholesale basis.

3. Necessity to Rule on the Incidental Issue

Almost juxtaposed to the Appellate Body's restrictive approach, another line of cases set out a broad competence of international courts to exercise jurisdiction over incidental issues, as long as it was necessary for resolving the dispute.

a) The Permanent Court of International Justice: *Certain German Interests*

The PCIJ made its most important contribution regarding the exercise of jurisdiction over incidental issues in its *Certain German Interests* decision.[64] Germany had brought a claim against Poland based on Article 23(1) Upper Silesia Convention, a compromissory clause which provided the PCIJ with jurisdiction over disputes regarding the 'interpretation and application' of the treaty.[65] Germany argued that Poland had violated Article 6 of the treaty, which generally prohibited the expropriation of property owned by German nationals, by expropriating a nitrate factory owned by a German national. To

63 This is supported by ICJ, *Appeal Relating to the Jurisdiction of the ICAO Council* (India v. Pakistan), judgment of 18 August 1972, ICJ Reports 1972, 46, para. 27, and ICJ, *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 of 14 July 2020, para. 49, where the ICJ stated that the jurisdiction of the ICAO Council cannot 'be deprived of jurisdiction merely because considerations that are claimed to lie outside the Treaties may be involved' and 'the fact that a defence on the merits is cast in a particular form, cannot affect the competence of the tribunal or other organ concerned'. This seems to indicate that at least in some cases the exercise of jurisdiction over incidental issues is appropriate.

64 PCIJ, *German Interests in Polish Upper Silesia*, preliminary objections (n. 9).

65 Translation by the author. For the authentic German and French text, Deutsches Reichsgesetzblatt, 1922 Teil 2, Nr. 10, 251.

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defend its actions Poland sought to rely on Article 256 of the Treaty of Versailles[66] as well as the Armistice Convention[67] and the Protocol of Spa.[68] Poland claimed that Germany had transferred the property of the factory to its national in violation of these agreements and therefore, Poland had simply 'annull[ed]' acts contrary to the treaties.[69] The PCIJ now had to decide how to address this defence, which would require it to rule on violations of treaties that arguably fell outside of the jurisdiction *ratione materiae* under the compromissory clause of the Upper Silesia Convention.

In a famous passage the PCIJ held that it had jurisdiction to make determinations regarding the three treaties in question:

> 'It is true that the application of the [Upper Silesia Convention] is hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and the other international stipulations cited by Poland. But these matters then constitute merely questions preliminary or incidental to the application of the [Upper Silesia Convention]. *Now the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction*.'[70] (emphasis added)

With this ruling the PCIJ set the precedent to what other authors have called the 'inherent power' of international courts to exercise jurisdiction over incidental issues.[71] On first sight the PCIJ's holding seems to have been circular: The jurisdiction may be extended over an incidental (or 'preliminary') issue, if the issue is 'incidental'. However, the conditional sentence structure ('if') indicates, that the PCIJ intended to introduce a requirement. This suggests that the Court actually employed a definition of 'incidental' which only considers such issues incidental, over which it would be necessary to exercise jurisdiction, to resolve the dispute in question.

Poland's argument seems to have been that the Upper Silesia Convention was 'not applicable' and therefore appears to have related to the question of

66 Article 256 reads *inter alia* 'Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire […]', see Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) United Kingdom Treaty Series no. 4 (1919), Command Paper 153.

67 Armistice of 11 November 1918, AJIL 13 (1919), 97.

68 PCIJ, *German Interests in Polish Upper Silesia*, merits (n. 20), 25.

69 PCIJ, *German Interests in Polish Upper Silesia*, preliminary objections (n. 9), 15.

70 PCIJ, *German Interests in Polish Upper Silesia*, preliminary objections (n. 9), 18; see also PCIJ, *German Interests in Polish Upper Silesia*, merits (n. 20), 25.

71 Marotti (n. 16), 390; similarly, Ibrahim Shihata, *The Power of the International Court to Determine its Own Jurisdiction* (The Hague: Martinus Nijhoff 1965), 194-195, who considers it a matter of interpretation 'by necessary implication'.

applicable law.[72] However, as discussed above, applying the wrong law can also entail a lack of jurisdiction. On the face of it, the Court itself spoke only of its competence to 'interpret' the other international agreements in question. However, the circumstances of the case fall squarely within our conception of exercising jurisdiction over incidental issues, as the Court had to incidentally decide whether the Treaty of Versailles had been violated on the merits.[73]

With this assessment the PCIJ established the 'necessity' yardstick to the exercise of jurisdiction over incidental issues.

b) The *Enrica Lexie Arbitration*

Fast forward some 90 years and permit a change of scenery from Central Europe to the Indian Ocean, where the UNCLOS dispute *Enrica Lexie* arose. The dispute concerned an incident in 2012 when two Italian marines, who were serving on the Italian tanker *Enrica Lexie*, shot two Indian fishermen on an Indian flagged fishing vessel 20 nautical miles off the Indian coast. Following the incident, Indian authorities ordered the *Enrica Lexie* to the shore and launched criminal proceedings against the two Italian marines. In response Italy brought a case under UNCLOS claiming that India lacked jurisdiction to conduct the criminal proceedings and violated the Convention, *inter alia* because the marines enjoyed immunity from criminal jurisdiction.[74] Even though UNCLOS contains no express rules on the immunity of individuals, Italy argued that the dispute concerned the interpretation and application of Articles 2(3), 56(2) and 58(2) UNCLOS. These Articles, which refer to 'other rules of international law' (Article 2(3) UNCLOS), 'due regard' (Article 56(2) UNCLOS), and 'other pertinent rules of international law' (Art 58(2) UNCLOS) were supposed to 'import immunity by *renvoi*' to the jurisdictional ambit of UNCLOS.[75]

India responded that Italy was attempting to 'blur the fundamental distinction between jurisdiction and applicable law' by trying to have the Tribunal make a 'determination that certain rules of customary international law […] have been violated' without these rules being a 'source of jurisdiction of the tribunal'.[76]

72 PCIJ, *German Interests in Polish Upper Silesia*, preliminary objections (n. 9), 17.

73 PCIJ, *German Interests in Polish Upper Silesia*, merits (n. 20), 29 et seq. Regarding the other treaties the Court established that Poland was not a party to either and therefore the treaties were inapplicable, ibid. 27 et seq.

74 PCA, *Enrica Lexie* (n. 4), paras 813-829.

75 PCA, *Enrica Lexie* (n. 4), para. 734.

76 PCA, *Enrica Lexie* (n. 4), para. 748-749.

In its determination the Tribunal did not address these points on the applicable law in any detail.[77] While it considered the Articles of UNCLOS invoked by Italy 'not pertinent and applicable in the present case'[78] it still decided to exercise its jurisdiction over the incidental issue. It based its determinations on the fact that immunity from jurisdiction can be considered an exception to the right to exercise criminal jurisdiction. Because the question of immunity 'forms an integral part of the Arbitral Tribunal's task to determine which party may exercise jurisdiction over the marines', it held that it could not answer the latter question without 'incidentally examining whether the marines enjoy immunity'.[79] Based on this it went on to say that the question was one 'necessarily' presenting itself and relied on the *Certain German Interests* standard to bolster its position.

This makes the *Enrica Lexie* case another representative of the exclusive 'necessity' approach.[80]

c) Assessment: Necessity as Indispensable Condition

In substance this necessity-formula seems as simple as it seems risky. Making necessity a part of the assessment is persuasive, as the limitation serves to distinguish pronouncements on incidental issues from simple *obiter dicta*. However, if we let necessity by itself suffice to exercise jurisdiction, any incidental issue necessary to resolve the dispute may be pronounced upon by an international court.[81] From another perspective: while arguably being effective in settling the legal dispute, state consent would not be adequately taken into account. This would make the threat perceived by Judge Koroma in his separate opinion in *Georgia v. Russia* quite realistic, wherein he warned that without the need of a special 'link', 'States could use the compromissory clause as a vehicle for forcing an unrelated dispute with another State before the Court'.[82]

If we believe, as expounded on above, that states impliedly consented to the exercise of some jurisdiction over incidental issues, this cannot entail that all issues smartly framed as 'incidental' should be adjudicated. Necessity

77 PCA, *Enrica Lexie* (n. 4), paras 257-258, however the Tribunal never comes back to the point in its analysis.

78 PCA, *Enrica Lexie* (n. 4), para. 798.

79 PCA, *Enrica Lexie* (n. 4), para. 808.

80 The ICAO decisions mentioned in (n. 63) could be read in a similar fashion, however the ICJ's wording does not permit to cogently draw a conclusion as to the yardstick.

81 This view seems to be espoused in a more nuanced version by Crawford (n. 21), 607.

82 *Georgia v. Russia* (n. 33), separate opinion of Judge Koroma, ICJ Reports 2011, 183, para. 7.

therefore should be an indispensable but not in and of itself a sufficient factor to assume jurisdiction over incidental issues. Rather, we will need to supplement it with other qualifications.

4. Nature of the Incidental Issue

Other international courts have adopted a more nuanced method. While also employing the necessity criterion, the characterisation of the dispute, discussed above, plays a more central role. This in itself is not new, as courts always had to deal with the framing of disputes. More important for our purposes is the focus which the approach lays on what could be described as the nature of the incidental issue, meaning what kind of an issue the court exercises jurisdiction over.

a) The *Chagos Arbitration*

A defining case for this approach is the *Chagos Marine Protected Area Arbitration*.[83] Mauritius and with it the Chagos Archipelago were under British colonial rule until the 1960s. Before Mauritius gained independence, the United Kingdom administratively severed the Archipelago from the rest of Mauritius and the Archipelago has remained under British rule since then. Mauritius has claimed sovereignty over the Archipelago since at least the 1980s. In the proceedings under UNCLOS, Mauritius filed a claim against the United Kingdom based on violations of a number of provisions of the Convention. In one of its submissions Mauritius claimed that the United Kingdom had been in no position to establish a Marine Protected Area (MPA) because only a 'coastal state' under UNCLOS could lawfully do so, which the United Kingdom was not.[84] The United Kingdom argued that deciding this issue would fall outside the Tribunal's jurisdiction, because it would have to establish whether the United Kingdom legally exercised territorial sovereignty over the Archipelago.[85] Mauritius contended that it was merely asking the Tribunal to interpret a term of UNCLOS – 'coastal state' – which was well within its jurisdiction under Article 288(1) UNCLOS.

83 PCA, *Chagos Arbitration* (n. 8).
84 PCA, *Chagos Arbitration* (n. 8), para. 163.
85 PCA, *Chagos Arbitration* (n. 8), paras 170-174.

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The Tribunal sided with the United Kingdom on the matter and declined to exercise its jurisdiction over the 'coastal state' issue. However, while doing so, it established a yardstick to what extent it would have been proper to exercise its jurisdiction. The Tribunal began by characterising the dispute and held that the history of the difference between the parties related to the territorial sovereignty over the Archipelago.[86] It then established that such disputes over land are generally not covered by the dispute settlement under UNCLOS.[87] In an often-cited passage the Tribunal subsequently concluded that

> '[…] where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a court or tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it. Where the "real issue in the case" and the "object of the claim" do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).'[88]

It further stated that it 'does not categorically exclude that in some instances a *minor* issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention'.[89] In sum, exercising jurisdiction must be necessary to resolve the dispute (1) but beyond this notion, which we also discerned in *Certain German Interests* and *Enrica Lexie*, the jurisdiction must concern a 'minor issue' (2).[90] As an example, the Tribunal mentions a minor issue of territorial sovereignty. Lastly, the 'object of the claim' must relate to the treaty within the international court's jurisdiction (3). This last qualification appears to be a question of the characterisation of the dispute.

b) *Dispute Concerning Coastal State Rights*

The *Chagos* approach was espoused by the Tribunal in the *Dispute Concerning Coastal State Rights*,[91] which forms part of the multifaceted dispute

86 PCA, *Chagos Arbitration* (n. 8), paras 207-212.
87 PCA, *Chagos Arbitration* (n. 8), para. 215.
88 PCA, *Chagos Arbitration* (n. 8), para. 220 (references omitted).
89 PCA, *Chagos Arbitration* (n. 8), para. 221 (emphasis added).
90 PCA, *Chagos Arbitration* (n. 8), paras 220, 221. Judges Wolfrum and Kateka dissented and espoused a more expansive view of UNCLOS Tribunals' jurisdiction, *ibid.* Dissenting and Concurring Opinion, Judge James Kateka and Judge Rüdiger Wolfrum, para. 22.
91 PCA, *Coastal State Rights* (n. 8).

between Ukraine and Russia that developed in the aftermath of Russia's annexation of Crimea and the armed conflict in Eastern Ukraine.[92] Most of Ukraine's submissions requested the Annex VII Tribunal to declare Russia to have violated Ukraine's rights as a coastal state, for example regarding Ukraine's exclusive rights to exploit natural resources.[93] Russia objected to the jurisdiction of the Tribunal and claimed that the real dispute was actually one regarding sovereignty over land territory, because Ukraine's submissions would require the Tribunal to first decide, 'which State is in fact sovereign in the relevant maritime zones', which 'depends entirely on whether or not Ukraine is sovereign over the land territory of Crimea'.[94] Accordingly, we can identify parallels to the *Chagos Arbitration*.

On a general level the Tribunal emphasised that a land sovereignty dispute 'may not be regarded a dispute concerning the interpretation or application of the Convention'.[95] Regarding many of Ukraine's claims the Tribunal sided with Russia. It adopted the *Chagos* standard deciding that minor disputes over land territory may under certain circumstances be decided incidentally.[96] This, it held it to be an issue of characterisation of the dispute.[97] Further, the Tribunal considered the question of territorial sovereignty over Crimea not only ancillary but in fact determinative of the very character of the dispute.[98] Accordingly, it declined to exercise its jurisdiction over all claims which would necessarily require it to rule expressly or impliedly on the sovereignty of either party over Crimea.[99] By doing so, it basically adopted the *Chagos* test, especially regarding the required minor nature of an issue for it to be adjudicated incidentally.

c) Assessment: Nature of the Issue as Interpretative Aid to Determine Consent

While giving weight to the nature of incidental issues when holding that they may fall within their jurisdiction, if they are minor in character, the

92 For an overview of the complex landscape of this dispute see Hill-Cawthorne (n. 11).
93 PCA, *Coastal State Rights* (n. 8), para. 17.
94 PCA, *Coastal State Rights* (n. 8), para. 47.
95 PCA, *Coastal State Rights* (n. 8), para. 156.
96 The Tribunal mostly used the term 'ancillary', see PCA, *Coastal State Rights* (n. 8), paras 157, 194. However, it did so in the same sense the Tribunal in *Chagos* used 'minor', see especially PCA, *Coastal State Rights* (n. 8), para. 195.
97 PCA, *Coastal State Rights* (n. 8), para. 194.
98 PCA, *Coastal State Rights* (n. 8), para. 194.
99 PCA, *Coastal State Rights* (n. 8), paras 196-197.

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Chagos and *Coastal State Rights* Tribunals did not further elaborate on what it means substantively, for an issue to be minor. The difficulty of assessing the nature of incidental issues was addressed by Christopher Greenwood in *Guyana v. Suriname* when stating as counsel

> '[T]here is also the question of what is exactly meant by an incidental jurisdiction or perhaps what are the limits of an incidental jurisdiction. You have to determine a maritime boundary, one little island with just a couple of palm trees, how about two islands? What about a whole archipelago? Does it matter whether they are inhabited or uninhabited?'[100]

What Christopher Greenwood argues with regards to boundary delimitation one can apply to incidental issues more generally: Any kind of quantitative approach looking at the 'amount' of territory in question or the number of rules a court is to exercise jurisdiction over, is misplaced. For the *Chagos* criterion, requiring the issue to be 'minor', this can only mean that the corresponding assessment must reveal that the incidental issue is qualitatively, not quantitatively, ancillary to the dispute between the parties.

The nature of the incidental issue especially provides the opportunity to give appropriate weight to the consent of the parties. While the necessity criterion ensures that the court exercises its jurisdiction effectively, the nature of an issue should limit this exercise by focussing on the consent of the parties. This does not mean, taking a generally 'restrictive' approach. But the fundamental meaning of consent requires us to assess as comprehensively as possible whether the nature of the issue can provide us with indications how far the state parties wanted to impliedly extend their dispute settlement obligations. Similar to the identification of the character of the dispute, this assessment has to be contextual and take into account legal, cultural and historical considerations. It also has to be conducted from the subjective perspective of the affected states: For example, the status of a small area of barren land, worthless to any third party, can lead to protracted conflict and be an issue of major national concern making states unwilling to submit to any kind of third-party dispute settlement. As a rule of thumb, the more contentious the issue, the less likely it appears that states *implicitly* consented to an international court ruling on the matter. Conversely, if the issue is actually only remotely related to the dispute between the parties and has not generated any attention in the past, assuming implied consent seems more likely.

100 *Guyana v. Suriname* (n. 40), Hearing Day 5, 13 December 2006, 798, lines 22-25 and p. 799, lines 1-2.

In sum, the nature of the incidental issue should complement the necessity of ruling on the issue to resolve the dispute, as second decisive factor in the determination of the court.

5. Distinguishing between Conditions and Consequences – the *South China Sea Arbitration*

While accepting parts of the *Chagos* standard, the *South China Sea Arbitration* is particular in that it seems to have introduced a distinction between issues which are determined as a *condition* to rule on a matter within the jurisdiction and such that are determined as a *consequence* of a matter within the jurisdiction

In the case the Philippines had brought a claim against China in 2013 under UNCLOS and asked an Annex VII Tribunal to rule on aspects of a long-standing dispute with China in the South China Sea. In its submissions the Philippines wanted the Tribunal to *inter alia* determine the legal status of a number of maritime features in the region and to specify the maritime entitlements they create.[101] The territorial sovereignty over these maritime features was also disputed between the parties.

As questions of territorial sovereignty are generally not considered to fall within the jurisdictional competence of UNCLOS Tribunals, the Philippines were careful to state that it did not seek any such determination. Nonetheless, in China's view 'without first having determined China's territorial sovereignty over the maritime features in the South China Sea' the Tribunal would neither be in a position to determine the extent of China's rights nor whether China is exceeding these rights'.[102] The incidental issue in the case therefore resulted from the fact that if the Tribunal wanted to rule on the status of the features or the entitlements it arguably would as a consequence determine the sovereignty over some of the maritime features at the same time. That is because under the law of the sea, some maritime features do not allow for sovereign appropriation, which means no territorial sovereignty over them can be established. Ruling on the legal status or entitlements of a feature therefore incidentally determines the sovereign rights of a party under UNCLOS.

While being aware of the ongoing dispute between the parties concerning sovereignty over the maritime features, the Tribunal held that ruling on the Philippines' claims did not require ruling on the sovereignty question. The

101 PCA, *South China Sea* (n. 8), para. 147.

102 PCA, *South China Sea* (n. 8), para. 135, see also the argument in para. 134.

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'negative test' which the Tribunal established in order to do so encompassed two prongs which must not be fulfilled for a tribunal to exercise jurisdiction. First, the resolution of the Philippines' claims must not require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; and second, the actual objective of the Philippines' claims must not be to advance its position in the dispute over sovereignty.[103] The Annex VII Tribunal held neither of these conditions to be fulfilled and therefore considered itself competent to adjudicate the matter. It even expressly held that no implicit determination of sovereignty over the maritime features was required.[104] By considering it decisive whether the incidental issue is decided 'first' or flows as a consequence from the linked holding, the Tribunal seems to distinguish between issues determined as a condition and such determined as a consequence. According to the *South China Sea* Tribunal, exercising jurisdiction over the latter is less problematic than the former.

This distinction would only make sense if there were a reasonable difference in the relationship of the two scenarios to the jurisdiction of a tribunal. Yet, it is unconvincing that a tribunal should not be competent to rule on an issue which is a condition to resolve the dispute, but at the same time competent to rule on a matter that necessarily determines an issue outside of its competence as a consequence. The two scenarios should be dealt with in the same way, because their effect and the underlying problem are two sides of the same coin. The limitation imposed on international courts' jurisdiction by states' consent impacts both settings in the same way. If the analysis of the nature of an issue reveals that it falls outside the scope of judicial dispute settlement it is irrelevant whether an international court rules on the matter as a condition or as a consequence of another issue deemed to be within its jurisdiction. In both cases the court would be acting outside of its jurisdiction. The distinction established in *South China Sea*, therefore, is unconvincing.

In addition, the *South China Sea* Tribunal referred to the 'actual objective' of the claimant as a factor in its assessment. Similar to the determination of the nature of the issue, the only possible way to inch towards a proper assessment can lie in a comprehensive analysis of all the relevant factors. Yet, we have to ask whether the 'actual objective' in fact constitutes a helpful criterion to assess the limits of jurisdiction. As the consent has already been provided beforehand in the jurisdictional instrument, it is unclear how the objective of a state when submitting a certain claim could influence the jurisdiction over incidental issues. If a claim is being brought for evidently

103 PCA, *South China Sea* (n. 8), para. 153.
104 PCA, *South China Sea* (n. 8), para. 153.

abusive ends, the possibility of considering it an abuse of process is open to a court.[105] However, beyond these narrow bounds the reasons of a claimant state to bring a claim – be they strategic, idealistic or obscure in nature – do not appear relevant.

6. Character of the Jurisdictional Basis – The International Court of Justice

The ICJ dealt with incidental issues on at least two occasions, notably in the 1978 *Aegean Sea* and the 2008 *Malaysia/Singapore* decision.[106] Both are noteworthy because they could imply a role of the character of the jurisdictional basis for the question of jurisdiction over incidental issues.

In the *Aegean Sea* case Greece brought proceedings against Turkey based on the 1928 General Act for the Pacific Settlement of Disputes[107] and asked the ICJ in one of its submissions to delimit the continental shelf between the two states.[108] However, Greece had made a reservation when joining the General Act, which excluded all 'disputes relating to the territorial status of Greece' from its consent to jurisdiction.[109] The ICJ established that 'relating to the territorial status' encompassed issues concerning continental shelf entitlements of Greek islands. The incidental issue arose because the ICJ would have had to rule on such entitlements falling outside its jurisdiction, before it could delimit the continental shelf as a 'secondary question'.[110] The ICJ held that the dispute related to the territorial status of Greece and refused to exercise its jurisdiction over the incidental issue because of Greece's reservation.[111] Notably, the incidental issue did not arise due to a compromissory clause that limited jurisdiction but rather because an issue – disputes relating to the territorial status of Greece – was carved out by means of a reservation from the plenary jurisdiction under the General Act.

In *Malaysia/Singapore* the ICJ was tasked with determining the sovereignty over a number of maritime features, including the low-tide elevation

105 On the requirements, ICJ, *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), preliminary objections, judgment of 6 June 2018, ICJ Reports 2018, 292, paras 150-151.

106 The ICAO cases (n. 63) could also be considered examples, however they concerned the jurisdiction of the ICAO Council and not of the ICJ itself in the relevant parts.

107 General Act for the Pacific Settlement of International Disputes (concluded 26 September 1928, entered into force 16 August 1929), 93 League of Nations Treaty Series, 344.

108 ICJ, *Aegean Sea* (n. 5), para. 12.

109 Translation by the ICJ, see *Aegean Sea* (n. 5), para. 48.

110 ICJ, *Aegean Sea* (n. 5), para. 83.

111 ICJ, *Aegean Sea* (n. 5), paras 86, 90.

South Ledge.[112] According to the ICJ's dictum in *Qatar v. Bahrain* 'a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself […]'.[113] Therefore, determining the sovereignty over South Ledge would have required the ICJ to establish the territorial sea of which state South Ledge was situated in. This was, however, unclear and the jurisdiction of the ICJ in *Malaysia/Singapore* only encompassed ruling on the sovereignty over the maritime features but did not extend to delimiting the contentious boundaries of the territorial sea.[114] The Court did not provide an answer to the incidental issue, but merely stated that 'sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located'.[115] This unusual outcome, coming close to a *non liquet*, has raised the eyebrows of observers.[116] With this holding the ICJ avoided having to tackle the jurisdictional issue explicitly. Implicitly, it seems to have assumed that it did not have the competence to rule on the incidental issue.

On a more general level, the basis of the jurisdiction again seems to be of interest. In *Malaysia/Singapore* it was not a compromissory clause but a special agreement, which laid down the limits of the Court's jurisdiction. Viewed together with *Aegean Sea*, the ICJ case law therefore hints at a more restrictive approach international courts may take when the jurisdictional basis is not a compromissory clause.

On its face this may be persuasive: The more expressly states have determined the limits of their consent regarding one particular set of facts the less leeway international courts possess to consider this consent to impliedly comprise incidental issues. While there is no hierarchy between the different means of interpretation, this preference for the expressly stated will is in line with the ICJ's general approach.[117] This, however, should be deemed more of a complementary factor in jurisdictional assessments than a clearly drawn line. Accordingly, while *Aegean Sea* and *Malaysia/Singapore* are too anecdotal and specific to serve as the bases of a general 'trend', the judicial basis as

112 On low-tide elevations, see Article 13 UNCLOS.

113 ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), merits, judgment of 16 March 2001, ICJ Reports 2001, 40, para. 204.

114 ICJ, *Malaysia/Singapore* (n. 5), para. 298.

115 ICJ, *Malaysia/Singapore* (n. 5), para. 299.

116 Marcelo Kohen, 'La relation titres/effectivités dans la jurisprudence récente de la Cour Internationale de Justice', in: Denis Alland, Vincent Chetail, Olivier de Frouville and Jorge E. Viñuales (eds), *Unité et diversité du droit international* (Leiden: Brill/Nijhoff 2014), 599-614 (605, note 22).

117 'If the relevant words […] make sense in their context, this is an end of the matter', *Competence of the General Assembly for the Admission of a State to the United Nations*, advisory opinion, ICJ Reports 1950, 4, 8.

expression of the consent of states to adjudication should be borne in mind as a possible source to tip the balance in one direction or the other when deciding on the exercise of jurisdiction over incidental issues.

7. Treaty-Contained Interpretation – The Crimea Investment Arbitration Tribunals

Another take on incidental issues was recently showcased by investment arbitration tribunals dealing with disputes arising out of the territorial dispute between Ukraine and Russia.[118] Ukrainian investors filed a number of investment claims against Russia after the latter's annexation of Crimea in 2014.[119] Subsequently, the tribunals' jurisdiction was hotly debated because the Ukrainian-Russian Bilateral Investment Treaty (BIT)[120] only provided jurisdiction for claims by Ukrainian investors if they had invested in the 'territory' of Russia.[121] Accordingly, some argued that tribunals faced an incidental issue problem, because they would have to rule on the disputed territorial status of Crimea under the general rules of international law, which was arguably beyond the boundaries of the BIT.[122]

Nonetheless several tribunals accepted their jurisdiction and still managed to dodge the incidental issue of sovereignty.[123] Importantly, Ukraine itself argued in the proceedings that it considered the disputed areas Russian

118 Several cases have been registered with the PCA, see e. g. PCA, *NJSC Naftogaz of Ukraine (Ukraine) et al v. The Russian Federation*, PCA Case no 2017-16; PCA, *Everest Estate LLC et al. v. The Russian Federation*, PCA Case no. 2015-36; recently, see Jarrod Hepburn, Ukrainian Energy Firm Ukrenergo is latest to file a Crimea-related Arbitration Claim against Russia, Investment Arbitration Reporter (5 August 2019) <https://www.iareporter.com> (accessed 5 January 2020); for a more comprehensive list, Hill-Cawthorne (n. 11), 789-790.

119 On the annexation, Christian Marxsen, 'The Crimea Crisis – An International Law Perspective', HJIL 74 (2014), 367-391.

120 Agreement on the Encouragement and Mutual Protection of Investments (signed 27 November 1998, entered into force 27 January 2000).

121 Article 1(4) of the BIT reads: 'The term "territory" means the territory of the Russian Federation or the territory of Ukraine as well as their respective exclusive economic zone and the continental shelf, defined in accordance with international law'; Odysseas Repousis, 'Why Russian Investment Treaties Could Apply to Crimea and What This Would Mean for the Ongoing Russo-Ukrainian Territorial Conflict', Arbitration International 32 (2016), 459-481; Patrick Dumberry, 'Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian under the Ukraine–Russia BIT', Journal of International Dispute Settlement 9 (2018), 506-533.

122 E.g. Hill-Cawthorne (n. 11), 789-790.

123 Critical of tribunals assuming jurisdiction over Crimea because of the duty of non-recognition and the *jus cogens* character of the prohibition of the use of force, Dumberry (n. 121), 532-533.

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'territory' for the purposes of the BIT. Some tribunals seem to have accepted this point and ruled that for the purposes of the BIT investments had been made in Russian 'territory',[124] thereby limiting the scope of this determination to the meaning of the BIT.[125] Substantively, confirming the jurisdiction seems to have been achieved by holding that *de facto* control over territory sufficed to fulfil the 'territory' requirements under the BIT[126] or holding that Russia did not explicitly object to the application of the treaty.[127] Employing what we could call a method of 'treaty-contained interpretation' the tribunals arguably did not need to apply disputed bodies of law, which would have been beyond their competence, or make substantive determinations going beyond their jurisdiction *ratione materiae*.

The decisive question is whether this approach could and should be emulated by other international courts facing incidental issues. Can determinations simply be limited to the meaning of terms in one treaty to avoid jurisdictional controversy?

This appears doubtful. First, international rules do not exist in a vacuum[128] and while the same term can have different meanings in different treaty bodies, judicial interpretation has to consider the law applicable in relations between the parties.[129] Second, the fact that Ukraine itself argued in favour of the treaty-contained interpretation of 'territory' puts the arbitrations in a different light compared to the controversial discussion of the status of territory in other cases, for example *Chagos*, where a party strongly disputed the international court's competence over incidental issues.[130]

Beyond that, the key argument against the treaty-contained approach is that limits of state consent cannot be circumvented by charging treaty terms

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124 Regarding *PJSC Ukranafta v. Russia* and *Stabil LLC and others v. Russia*, see Jarrod Hepburn and Ridhi Kabra, Investigation: Further Russia Investment Treaty Decisions uncovered, offering broader window into Arbitrators' Approaches to Crimea Controversy, Investment Arbitration Reporter (17 November 2017) <https://www.iareporter.com> (accessed 5 January 2021).

125 Similarly, speaking of a 'self-contained' view of the BIT, Hill-Cawthorne (n. 11), 799.

126 Cf. Swiss Federal Court of Justice, 4A_398/2017, judgment of 16 October 2018, para 4.2 (in German).

127 See e. g. *Everest Estate LLC et al. v. The Russian Federation*, Jarrod Hepburn, Investigation: Full Jurisdictional reasoning comes to light in Crimea-related BIT Arbitration vs Russia, Investment Arbitration Reporter (9 November 2017) <https://www.iareporter.com> (accessed 5 January 2021).

128 ICJ, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion of 20 December 1980, ICJ Reports 1980, 73, para. 10.

129 See Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', ICLQ 54 (2005), 279-320.

130 This seems especially relevant with regards to the reasoning by some tribunals that jurisdiction could be exercised because no party explicitly objected to it, see (n. 127).

with meaning that sits awkwardly with the purpose of the treaty. Doing otherwise invites comparisons to the criticised approach of the ICJ in *Oil Platforms* where the Court interpreted individual terms in a treaty so intensively in light of external bodies of law, that the jurisdictional boundaries were arguably transgressed.[131] Assessing the limits of jurisdiction, primarily requires courts to determine what areas of law the parties to a treaty wanted to make available to international judicial dispute settlement. One cannot transgress these limits by applying external law and simply framing this as part of an interpretative act limited to the terms of the treaty. The approach also cannot be said to further the effectiveness of the treaty, at least if one considers it one function of international dispute settlement clauses to stabilise normative expectations.[132]

In sum, these factors speak against a general possibility of international courts to simply limit their holdings to the terms of the specific treaty with the goal of avoiding incidental issues.

8. Synthesis: A Two-Pronged Test

Our assessment of the engagement of international courts with incidental issues leaves us with two main criteria which should guide courts' analyses when ruling on their jurisdiction over incidental issues.

First, they should consider the necessity to rule on the issue to resolve the dispute. The exercise of jurisdiction over incidental issues is based on the implied consent of the parties. While the effectivity of international treaties and special agreements demands not to decline all such exercises by default, the respect for the consent of the parties obliges us to only take this step when it is required to resolve the legal dispute before the court. This means, there should be no *obiter dicta* on incidental issues.[133]

Second, the nature of the incidental issue should form the decisive factor to give due weight to the consent of the parties. By means of a contextual analysis of the nature, and the rule of thumb that the more contentious the

131 ICJ, *Case concerning Oil Platforms* (Islamic Republic of Iran v. United States of America), merits, judgment of 6 November 2003, ICJ Reports 2003, 161; in her separate opinion Judge Higgins claimed that the Court 'invoked the concept of treaty interpretation to displace the applicable law', see ICJ Reports 2003, 225, para. 49; James Green, 'The Oil Platforms Case: An Error in Judgment?', Journal of Conflict & Security Law 9 (2004), 357.

132 Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, (Oxford: Oxford University Press 2014), 10-12.

133 That is why the necessity requirement should have stopped the Appellate Body from pronouncing on the incidental question in WTO, Appellate Body, *Soft Drinks* (n. 55), should it not have considered itself incompetent anyway.

issue is, the less likely states implicitly consented to an international court ruling on the matter the nature of the issue provides a way to transparently engage with the incidental issues problem.

These main criteria can be supplemented in specific cases with an inquiry into the character of the jurisdictional bases. If states, for example, have expressly limited their consent to the resolution of one dispute by means of special agreement, this can indicate that no further issues shall be ruled upon in cases of doubt.

In combination, the criteria allow international courts to interpret the underlying instrument effectively while honouring the limits provided by the consent of the parties to the dispute.

IV. Conclusion

The introductory proverb, 'give him an inch and he will take a yard' only partially captures the complex problem of incidental issues. First, as the analysis has shown, international courts do not assume jurisdiction over incidental issues whenever presented with the opportunity. Second, the image suggests a unilateral 'grab' of jurisdiction by international courts after the 'inch' of initial consent has been extended by states. In reality, more 'pushing' than 'grabbing' may be happening. International courts find themselves in a tricky situation, as the claimant frequently argues to accept a more liberal approach regarding incidental issues emphasising the effectiveness of the treaty[134] whereas the respondent calls for restraint.[135]

In this piece, I have only tackled one specific but crucial question regarding incidental issues, namely the jurisdiction of international courts to adjudicate on the matter. Other problems, such as the legal effect of incidental determinations and the extent to which they are subject to the *res judicata* principle will obliges further research in the future.[136]

In the final analysis, international courts are right not to always decline jurisdiction as soon as incidental issues surface, to allow for the effectiveness of the underlying treaty framework. Yet, jurisdiction over incidental issues must also not be assumed in a wholesale fashion, but rather after carefully applying the criteria set out above to preserve the consent of the parties. While we should not put consent on a pedestal, it remains the most fundamental principle governing the jurisdiction of international courts.

134 E.g. PCA, *Chagos Arbitration* (n. 8), para. 201.
135 E.g. PCA, *Enrica Lexie* (n. 4), para. 744.
136 See already Cheng (n. 14), 350-356; recently Marotti (n. 16), 399-403.

Therefore, the introductory proverb should probably best serve as advice to heed caution rather than an analysis in its own right: In the 'murky waters'[137] of jurisdiction over incidental issues, international courts should tread carefully and use the necessity to rule on the issue to resolve the dispute and the nature of the incidental issue as the main guidelines for their assessment.

137 PCA, *Enrica Lexie* (n. 4), dissenting opinion of Judge Robinson, para. 33.

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