EXPLORING INTERNATIONAL COURTS' EXERCISE OF INCIDENTAL JURISDICTION: TOWARDS COHERENT APPROACHES THROUGH *RES JUDICATA*

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Abstract

This article is devoted to the study of the exercise of incidental jurisdiction by international courts and tribunals. It may be concluded from the existing case law where international courts and tribunals have exercised incidental jurisdiction that there are no consistent and coherent approaches to the exercise of incidental jurisdiction now. The article also analyses alternative techniques that may be used to avoid the necessity to exercise incidental jurisdiction. It is noted that international courts and tribunals may "escape" the exercise of incidental jurisdiction due to legitimacy concerns since making determinations on incidental issues may lead to the violation of the parties' consent to the dispute settlement procedure. The article concludes that the existence of different approaches to the issue of the exercise of incidental jurisdiction could itself result in judicial fragmentation, which, in turn, reduces the legitimacy of international courts and tribunals. In this regard, it is concluded that it is necessary to develop a coherent approach to the exercise of incidental jurisdiction by international courts and tribunals. The author concludes that a consistent approach can be developed by applying the concept of *res judicata*, whereby the decision of an international court or tribunal is not binding except on the parties to a case within the framework of a particular dispute. It is also concluded that decisions on incidental issues lack the force of *res judicata*. Therefore, it is also resumed that international courts and tribunals can exercise incidental jurisdiction without overstepping states' consent to dispute settlement. However, *res judicata* may not serve as a sufficient ground for the exercise of incidental jurisdiction on its own since the role of *res judicata* is limited in that regard.

Key words

incidental jurisdiction, *res judicata*, international dispute settlement, international courts and tribunals, legitimacy of international courts and tribunals

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Introduction

According to the classic positivistic view, international law is a consent-based system of rules governing international relations, which is the result of the coordinated wills of sovereigns. In this view, the concept of consent is key in understanding international law in general.[1] However, there is much more to the understanding of international law than legal positivism. For instance, the proponents of global constitutionalism argue that sovereignty cannot be a "first principle" of international law, and that the role of states' consent in international law-making should be diminished.[2] Notwithstanding this view, even the representatives of this school of thought agree that "consent to be bound" is a starting point in international law-making.[3]

Therefore, despite a difference of opinion on what international law is and how it should be perceived, one can hardly deny that international law is to a great extent shaped by states' consent. The same is true for international dispute settlement. Consent is necessary not only to establish any dispute settlement mechanisms, including international courts and tribunals (hereinafter — ICTs), but also to submit a particular dispute to a dispute settlement procedure. Therefore, disputes involving sovereign states can be settled by pacific means only subject to their consent thereto.[4]

The problem that ensues is that it is not always possible to answer a legal question submitted to an ICT without considering an incidental issue. In such a scenario the determination of the former hinges upon the determination of the latter, which is outside this ICT's jurisdiction. In particular, this may well be the case with so-called "mixed" disputes under the United Nations Convention on the Law of the Sea (hereinafter —

[1] Orakhelashvili A. *The Interpretation of Acts and Rules in Public International Law*. Oxford Monographs in International Law. Oxford : Oxford University Press, 2008. P. 53.
[2] Peters A. *The Merits of Global Constitutionalism* // Indiana Journal of Global Legal Studies. 2009. Vol. 16. № 2. P. 398–399.
[3] Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford ; New York : Oxford University Press, 2009. P. 39.
[4] PCIJ. *Status of Eastern Carelia*. Advisory Opinion of 23 July 1923. P. 27.

UNCLOS) involving both maritime and land boundary issues, the latter falling outside the scope of the UNCLOS, but being indispensable for the resolution of a dispute.[5]

ICTs' power to consider incidental issues is known as "incidental jurisdiction".[6] However, the exercise of incidental jurisdiction may be treated by states as overstepping their consent to dispute settlement, which may in turn result in decrease in these ICTs' legitimacy. In order to avoid such legitimacy concerns, ICTs develop their own approaches to incidental jurisdiction. So far, ICTs have failed to create a single approach to whether they have incidental jurisdiction, and, if the answer is in the affirmative, where its limits lie. Moreover, some ICTs have avoided the consideration of incidental issues at all. Such incoherence of the approaches to incidental jurisdiction is a consequence of the "proliferation" of ICTs, which results in the phenomenon discussed in legal scholarship and commonly referred to as the fragmentation of international law.

This article therefore attempts to find a common ground for the coherent execution of incidental jurisdiction by ICTs. To that end, it explores the effects of judgements and arbitral awards and puts forward the hypothesis that since incidental determinations do not have binding and preclusive force for future cases, the doctrine of *res judicata* may serve as an argument in favour of exercising incidental jurisdiction. The goal of this article is not to suggest the correct approach in terms of specific criteria to be applied in dealing with incidental issues. Rather, it attempts to identify a potential justification that may be used to address incidental issues where they seemingly arise.

Given these observations, this article scrutinises existing theoretical achievements and case law where ICTs have exercised incidental jurisdiction. It then examines cases where ICTs failed to exercise incidental jurisdiction. Lastly, it makes an outline of *res judicata* doctrine as it is used in international dispute settlement and discusses the application of the doctrine to the problem of incidental jurisdiction.

While the article's title mentions only international courts, it appears desirable for the quality of the analysis to assess international arbitral tribunals as well. Thus, ICTs include the dispute settlement mechanisms established and deciding contentious inter-state cases as well as disputes between states, on the one hand, and private parties, on the other. The latter category of disputes includes primarily investor-state dispute settlement and human rights litigation (European Court of Human Rights, in particular). International criminal tribunals are thus beyond the scope of this paper.

1. Incidental jurisdiction in theory and case law

1.1. Theoretical framework

Generally, when the term "jurisdiction" is used in relation to an ICT, it refers to the legal authority of an ICT to adjudicate a dispute brought before it.[7] As the Permanent Court of International Justice (hereinafter — PCIJ) puts it, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[8] Thus, an ICT's power to adjudicate a dispute submitted to it is ICT's jurisdiction.

Four elements (dimensions) of jurisdiction are traditionally distinguished: material (jurisdiction *ratione materiae*), personal (jurisdiction *ratione personae*), temporal (jurisdiction *ratione temporis*), and territorial (jurisdiction *ratione loci*).[9] Together, they constitute four dimensions of "primary" jurisdiction of an ICT.[10] In effect, these four elements are limitations on ICTs' adjudicatory power: if one of these elements is outside their competence, they have no power to adjudicate on the dispute.[11]

Importantly, the four jurisdictional elements of an ICT stem directly from states' consent that such an ICT should adjudicate on a dispute.[12] Therefore, with regard to *ratione materiae*, it is the matters submitted to an

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[5] Herdt S. W. de. *Mixed Disputes* // The International Journal of Marine and Coastal Law. 2022. Vol. 37. № 2. P. 359.

[6] In the context of ICTs, the term "incidental jurisdiction" is used in two meanings. See Tzeng P. *Incidental Jurisdiction* // Max Planck Encyclopedia of International Procedural Law. URL: https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1631.013.1631/law-mpeipro-e1631 (accessed: 17.07.2024): one meaning implies the jurisdiction of an ICT to conduct incidental proceedings, such as on interim measures and preliminary objections, while the other one — the jurisdiction *ratione materiae* of an ICT to adjudicate an incidental issue ordinarily outside of the ICT's jurisdiction but brought within it because the issue is incidental to another issue within the ICT's jurisdiction. This article employs the term in the latter meaning.

[7] Shany Y. *Jurisdiction and Admissibility* // *The Oxford Handbook of International Adjudication* / ed. by C. P. R. Romano, K. J. Alter, Y. Shany. Oxford : Oxford University Press, 2014. P. 782.

[8] PCIJ. *Mavrommatis Palestine Concessi*ons. Judgment of 30 August 1924. P. 11.

[9] Salles L. E. *Jurisdiction* // *Research Handbook on International Courts and Tribunals* / ed. by W. A. Schabas, S. Murphy. Cheltenham ; Northampton : Edward Elgar Publishing, 2017. P. 256.

[10] Ibid.

[11] Gulati R. *Judicial Independence at International Courts and Tribunals* // *International Procedure in Interstate Litigation and Arbitration: A Comparative Approach* / ed. by E. de Brabandere. Cambridge ; New York : Cambridge University Press, 2021. P. 61.

[12] Shany Y. *Op. cit*. P. 794.

ICT specifically by the parties that it has jurisdiction to adjudicate on. Thus, for instance, Article 36(1) of the Statute of the International Court of Justice (hereinafter — ICJ or Court) reflects the consensual basis of the ICJ jurisdiction which “comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force”.[13]

As noted by the ICJ with respect to its Statute, “one of the fundamental principles of [the Court’s] Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction”.[14] Indeed, an ICT’s jurisdiction rests on states’ consent to a specific dispute settlement procedure with regard to a particular dispute or category of disputes.[15] Therefore, if a dispute falls outside the ICT’s jurisdiction *ratione materiae*, which is “a legal nexus between the Parties such that each had consented to the jurisdiction of the Court to settle its dispute with the other”,[16] the ICT cannot consider such a dispute.

States’ consent, which may be expressed in a variety of forms,[17] is frequently limited to a particular dispute or type of dispute. If, for example, the ICT’s jurisdiction is based on a compromissory clause contained in a treaty, such a clause would typically grant the ICT the jurisdiction to hear “‘disputes’ concerning the ‘interpretation or application’ of the treaty containing the clause”.[18] In this case, it may be problematic to determine the limits of the “interpretation or application” of treaty provisions.

One might argue, however, that even if some issue does not directly concern interpretation or application of a particular treaty, it may still be within the competence of an ICT as an “ancillary” matter, which is “necessary” to decide in order to adjudicate the issue that is within the principal *ratione materiae* jurisdiction of an ICT.[19] In other words, that an ICT has incidental jurisdiction to consider such an issue.

The problem of incidental jurisdiction forms part of a broader implicated issue problem. As P. Tzeng summarised it, “the implicated issue problem arises when an international court or tribunal has jurisdiction *ratione materiae* over an issue (i.e., the ‘inside issue’), but the exercise of such jurisdiction would implicate the exercise of jurisdiction over an issue outside the court or tribunal’s jurisdiction *ratione materiae* (i.e. the ‘outside issue’)”.[20] It is necessary to stress that the word “implicate” in the context of the implicated issue problem denotes “to involve as a consequence, corollary, or natural inference”.[21] Therefore, the essence of the implicated issue problem is whether an ICT may consider an “inside” issue where the “outside” issue, which falls outside this ICT’s jurisdictional boundaries set by states’ consent, is implicated by the exercise of jurisdiction over the “inside” issue, to which states agreed. In other words, the crux of the matter is whether the exercise of jurisdiction over an “inside” issue hinges upon the exercise of jurisdiction over an “outside” issue.

The implication of “outside” issues may well be the consequence of the limited scope of jurisdiction *ratione materiae*, as illustrated above in case of disputes under compromissory clauses. In such cases, whether “inside” and “outside” issues can be adjudicated on or not depends on whether the consideration of an “outside” issue is necessary to adjudicate on an “inside” issue.[22] Therefore, where the exercise of jurisdiction over an “inside” issue depends on the exercise of jurisdiction over an “outside” issue, the latter issue is termed “indispensable issue”.[23] On the other hand, where it is not necessary to consider the “outside” issue to adjudicate upon the “inside” issue, the former is termed “incidental issue”.[24]

For instance, an apparent “outside” issue before the tribunal may arise in mixed disputes before the UNCLOS tribunals. In such disputes, the determination of maritime entitlements (“inside” issue) can only be made after the determination on land entitlements (“outside” issue). The disputes over land entitlements are “outside” the UNCLOS tribunals’ jurisdiction under Article 288 of the UNCLOS, and therefore they may not

[13] Shaw M. N. *The Expression of Consent* // *Rosenne’s Law and Practice of the International Court: 1920–2015*. URL: https://referenceworks.brillonline.com/browse/Rosenne-s-law-and-practice-of-the-international-court-1920-2015 (accessed: 17.07.2024).
[14] ICJ. *Case Concerning East Timor* (Portugal v. Australia). Judgment of 30 June 1995. § 26.
[15] ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia). Judgment of 18 November 2008. § 77, 120.
[16] Ibid.,§ 77.
[17] Although consent is usually expressed in a written instrument, it may also stem from the conduct of the parties to a dispute: see ICJ. *Haya de la Torre Case* (Colombia v. Peru). Judgment of 13 June 1951. P. 78. See also Quintana J. J. *Litigation at the International Court of Justice: Practice and Procedure*. Leiden ; Boston : Brill Nijhoff, 2015. P. 111–113.
[18] Harris C. *Incidental Determinations in Proceedings under Compromissory Clauses* // International and Comparative Law Quarterly. 2021. Vol. 70. № 2. P. 417.
[19] An arbitral tribunal constituted under Annex VII of the UNCLOS. *Chagos Marine Protected Area Arbitration* (Mauritius v. United Kingdom). Award of 18 March 2015. § 220.
[20] Tzeng P. *The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction* // New York University Journal of International Law and Politics. 2018. Vol. 50. № 2. P. 490–491.
[21] Merriam-Webster, *“implicate”, meaning (2)*. URL: https://www.merriam-webster.com/dictionary/implicated (accessed: 17.07.2024).
[22] See, e.g. Tzeng P. *Incidental Jurisdiction…* § 9.
[23] Ibid., § 8.
[24] Ibid.

rule on them.[25] However, without a respective ruling it is impossible to rule on maritime entitlements. Therefore, the implicated issue problem arises.[26]

Bearing in mind the distinction between "incidental issue" and "indispensable issue", the conclusion can be drawn that the implicated issue problem arises when an ICT decides "whether an outside issue is 'incidental', 'indispensable', or neither".[27] The problem is thus twofold. Overall, the implicated issue question asks "whether an international court or tribunal may exercise jurisdiction over a dispute if doing so implicates an outside issue over which the court or tribunal does not have jurisdiction *ratione materiae*".[28] An ICT may exercise jurisdiction over incidental issues, not indispensable ones.

1.2. How ICTs approach incidental jurisdiction

The problem of incidental issues is known to have been expressly highlighted for the first time is the *Certain German Interests* case. The background to this dispute was as follows: Poland expropriated certain assets held by German nationals in the Polish territory. Germany availed itself of the compromissory clause of the German–Polish Convention regarding Upper Silesia of 1922 (referred to as "Geneva Convention" *in casu*), which vested the PCIJ with the competence to interpret and apply the Geneva Convention.[29] Poland relied in its defence on Article 256 the Peace Treaty of Versailles and other instruments outside PCIJ's jurisdiction. The PCIJ took the following stance on Poland's argument:

> It is true that the application of the Geneva Convention is *hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles* and the other international stipulations cited by Poland. But these matters then constitute merely questions preliminary or *incidental to the application of the Geneva Convention*. Now the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as *incidental* to a decision on a point in regard to which it has jurisdiction (italics added).[30]

Some arbitral tribunals established under Annex VII to the UNCLOS (hereinafter — Annex VII tribunals) have subsequently treated this pronouncement as a guidance on incidental issues.[31] However, close reading of the passage quoted reveals that the PCIJ only interpreted the provision of a treaty that was within its jurisdiction by taking account of pertinent rules of international law. Indeed, the PCIJ itself held that the application of the Geneva Convention was hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles.[32] In fact, the PCIJ only interpreted the Treaty of Versailles to apply the Geneva Convention. Moreover, the PCIJ could have regard to Article 256 of the Treaty of Versailles by way of *renvoi* to this Article contained in Article 4 of the Geneva Convention.[33] Thus, the Court interpreted Article 4 taking into account Article 256 of the Treaty of Versailles in order to apply Article 6 of the Geneva Convention. If so, the PCIJ did not exercise incidental jurisdiction.

The next case to address the problem of incidental issues was Annex VII *Chagos MPA* arbitration. In this case Mauritius challenged the legality of the marine protected area (hereinafter — MPA) established by the United Kingdom. Mauritius claimed sovereignty over the Chagos Archipelago, and the long-standing dispute between the two states over the archipelago was the underlying issue *in casu*.

Mauritius claimed that the United Kingdom was not the coastal state under the UNCLOS.[34] The tribunal had to decide whether the claim of Mauritius fell within the ambit of interpretation or application of the UNCLOS, as is required under its Article 288.[35] To answer this question, the tribunal had to characterise the

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25 Herdt S. W. de. *Op. cit*. P. 360.
26 See Tzeng P. *Incidental Jurisdiction…* § 10.
27 Ibid.
28 Tzeng P. *The Doctrine of Indispensable Issues: Mauritius v. United Kingdom, Philippines v. China, Ukraine v. Russia, and Beyond* // EJIL:Talk! Blog of the European Journal of International Law. URL: https://www.ejiltalk.org/the-doctrine-of-indispensable-issues-mauritius-v-united-kingdom-philippines-v-china-ukraine-v-russia-and-beyond/ (accessed: 17.07.2024).
29 PCIJ. *Certain German Interests in Polish Upper Silesia*. Judgment of 25 August 1925. P. 13.
30 Ibid. P. 18.
31 See, e.g. Tzeng P. *Incidental Jurisdiction…*; An arbitral tribunal constituted under Annex VII to the 1982 UNCLOS. *The "Enrica Lexie" Incident* (Italy v. India). Award of 21 May 2020. § 808, fn. 1454.
32 PCIJ. *Certain German Interests in Polish Upper Silesia*. Judgment of 25 August 1925. P. 18.
33 PCIJ. *Certain German Interests…*. Judgment of 25 May 1926 P. 29–30; Harris C. *Incidental Determinations…* P. 434.
34 *Chagos Marine Protected Area Arbitration*. § 163, 203.
35 Ibid., § 206.

dispute[36] by determining "where the relative weight of the dispute lies".[37] In the end, the tribunal held that the claim at hand was "properly characterized as relating to land sovereignty over the Chagos Archipelago".[38]

The tribunal proceeded to analyse whether the sovereignty issue could still fall within its jurisdiction.[39] Relying on the above-mentioned reasoning in the *Certain German Interests* case, the tribunal held that its jurisdiction "extends to making such findings of fact or *ancillary determinations of law as are necessary to resolve the dispute presented to it*" (italics added).[40] However, the tribunal then added that if the "object of the claim" does not relate to the application or interpretation of the UNCLOS, "an incidental connection" between the claim and the UNCLOS does not suffice for an Annex VII tribunal to have jurisdiction.[41] *Obiter*, the tribunal also noted 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" (italics added),[42] but that was not the case.

At first glance, it may appear that the tribunal endorsed the PCIJ's reasoning that if the consideration of an "inside" issue is impossible without an "outside" issue, the latter is within the ICT's jurisdiction. However, in effect, the tribunal's reasoning was rather that if the consideration of an "outside" issue is *necessary* (as a prerequisite or precondition) to exercise jurisdiction over the "inside" issue, then the issue is indispensable and cannot be adjudicated upon. This reasoning was prompted by the fact that the determination as to which state was the coastal state was impossible without the determination of sovereignty. Since the determination as to which state was sovereign was *necessary* (indispensable) for the determination on which state was the coastal one, the latter fell outside the Annex VII tribunal's competence.

The third case, the *Coastal State Rights*, is being considered by the Annex VII tribunal as well. In 2020, the tribunal rendered its award on preliminary objections. The case concerns the alleged violations of Ukraine's coastal state rights committed by Russia. Specifically, the alleged violations concern the territorial sea and exclusive economic zone adjacent to the Crimean peninsula. Russia therefore raised an objection that "the dispute in this case concern[ed] Ukraine's claim to sovereignty over Crimea".[43] Ukraine, on the other hand, contended that the dispute fell within the scope of Article 288(1) of the UNCLOS and concerned interpretation or application of the UNCLOS.[44]

As in the *Chagos MPA*, the tribunal began with the characterisation of the dispute. In doing so, it stated that Ukraine's claim could not be considered "*without first examining* and, *if necessary, rendering a decision on* the question of sovereignty over Crimea" (italics added).[45] The tribunal reasoned that it "would not be able to decide the claims of Ukraine insofar as they are premised on the settled status of Crimea as part of Ukraine *without first addressing the question of sovereignty* over Crimea" (italics added).[46] The tribunal concluded that "the question as to which State is sovereign over Crimea, and thus the 'coastal State' <…> is *a prerequisite to the decision* of the Arbitral Tribunal on a significant part of the claims of Ukraine" (italics added).[47]

Thus, the tribunal held that sovereignty disputes do not concern the interpretation or application of the UNCLOS "except for a situation where a sovereignty issue is 'ancillary' to a dispute concerning the interpretation or application of the Convention".[48] However, in the words of the tribunal, sovereignty was "not a minor issue ancillary to the dispute", which was supposed to be over the interpretation or application of the UNCLOS.[49] The tribunal also seems to have correctly articulated that if it is necessary to address the sovereignty issue, this issue is then indispensable, not incidental, hence outside the tribunal's jurisdiction.

The latest case that recognised the problem of incidental issues is the *Enrica Lexie* case. The dispute revolved around the enforcement actions taken by India with respect to the "Enrica Lexie" oil tanker flying the Italian flag. The two Italian marines were alleged to have killed two fishermen on the Indian vessel

[36] Harris C. *Claims with an Ulterior Purpose: Characterising Disputes Concerning the "Interpretation or Application" of a Treaty* // The Law & Practice of International Courts and Tribunals. 2020. Vol. 18. № 3. P. 283–285.
[37] *Chagos Marine Protected Area Arbitration*. § 211.
[38] Ibid., § 230.
[39] Ibid.
[40] Ibid., § 220.
[41] Ibid., § 221.
[42] Ibid.
[43] An arbitral tribunal constituted under Annex VII to the UNCLOS. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation). Award of 21 February 2020. § 43.
[44] Ibid., § 44.
[45] Ibid., § 152.
[46] Ibid., § 154.
[47] Ibid.
[48] Ibid., § 157.
[49] Ibid., § 195.

"St. Antony". As the situation occurred off the Indian coast, India exercised criminal jurisdiction over these marines. Italy claimed that India had not been entitled to exercise jurisdiction over them since they were entitled to immunities. On this account, Italy invoked Articles 2(3), 56(2), 58(2) of the UNCLOS as the basis for marines' immunities. Although these articles do not deal with immunities directly, Italy contended that they "import immunity by *renvoi*".[50]

The tribunal began its analysis by stating that Articles 2(3), 56(2), 58(2) of the UNCLOS were not pertinent to the case at hand since the enforcement actions had taken place in Indian internal waters — the situation envisioned neither in these Articles, nor in the UNCLOS as a whole. Nevertheless, the tribunal stated that the issue of the marines' immunity was supposed to be considered, as an incidental matter, before addressing the issue of jurisdiction.[51] Quoting the PCIJ, it proceeded analysing on the assumption that immunity was an incidental issue.[52] The tribunal held that its "competence extends to the determination of the issue of immunity of the Marines *that necessarily arises as an incidental question* in the application of the Convention"[53] (italics added). The tribunal ruled that "examining the issue of the immunity of the Marines *is an incidental question that necessarily presents itself in the application of the Convention* in respect of the dispute before it"[54] (italics added).

The tribunal seems to have approached the incidental issue analysis primarily from the "necessity" standpoint. Indeed, it several times underscored that the issue of the marines' immunity necessarily arose prior to the consideration of the question of India's jurisdiction. It found, contrary to the *Chagos MPA*, that it was necessary to examine the issue of immunities in order to make determinations as to India's exercise of jurisdiction.

The incidental issue analysis cannot be commenced without identifying an "inside" issue, which should lie within the terms of the instrument at hand. As Judge Robinson stressed in his dissenting opinion, the main shortcoming of the tribunal majority's conclusion was that it failed to properly characterise the issue of immunities as "the real issue in dispute".[55] Moreover, not only did the tribunal miss the first step of analysis, but it also ruled in *dispositif* that the Marines were entitled to immunity.[56] It is worth noting that the tribunal itself found that it was the dispute over the exercise of jurisdiction, not immunities, that concerned the interpretation or application of the UNCLOS.

Therefore, the issue of immunities did not fall within its jurisdiction, neither as incidental, nor as a primary issue, and the tribunal could not exercise jurisdiction over it. Taking into account the fact that ruling on the matter in *dispositif* is an indication of the exercise of the ICT's jurisdiction,[57] the Annex VII tribunal in *Enrica Lexie* clearly exceeded its competence.

As has been demonstrated above, there is no uniform approach to the exercise of incidental jurisdiction. For the lack of a well-founded approach to incidental jurisdiction, some ICTs have occasionally opted for leaving the problem untouched. Rather, they have employed strategies that allow an "inside" issue to be considered without deciding if it is possible to consider an "outside" issue. Such strategies are considered below.

2. Strategies to avoid exercising incidental jurisdiction[58]

2.1. Treaty interpretation

One of the possible ways for an ICT to exercise jurisdiction over an "inside" issue without touching upon an "outside" issue is treaty interpretation. More precisely, ICTs may consider an "outside" issue as part of

[50] *The "Enrica Lexie" Incident*. § 734.
[51] Ibid., § 808.
[52] Ibid.
[53] Ibid., § 809.
[54] Ibid., § 811.
[55] An arbitral tribunal constituted under Annex VII to the UNCLOS. *The "Enrica Lexie" Incident* (Italy v. India). Dissenting Opinion of Judge Patrick Robinson. § 47.
[56] *The "Enrica Lexie" Incident*. § 1094(B)(2).
[57] d'Argent P. *The Monetary Gold Principle: A Matter of Submissions* // American Journal of International Law Unbound. 2021. Vol. 115. P. 152.
[58] There may be other techniques used in case law of the ICTs, the list is not intended to be exhaustive. On the discussion of various "escape mechanisms" and respective case law, see Tzeng P. *Investments on Disputed Territory: Indispensable Parties and Indispensable Issues* // Revista de Direito Internacional. 2017. Vol. 14. № 2. P. 132–134; Tzeng P. *Incidental Jurisdiction…* § 28–30; Tzeng P. *The Implicated Issue Problem…* P. 490–491; Raible L. *Incidental Jurisdiction in Human Rights Litigation: Surprising Absence and Rival Techniques* // American Journal of International Law Unbound. 2022. Vol. 116. P. 178–180; Radović R. *Incidental Jurisdiction in Investment Treaty Arbitration and the Question of Party Consent* // American Journal of International Law Unbound. 2022. Vol. 116. P. 181–183.

systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (hereinafter — VCLT).[59] Where an implicated issue arises, an ICT does not address it from the jurisdictional standpoint, but rather makes determinations as part of the treaty interpretation process taking into account "any relevant rules of international law applicable in the relations between the parties". In this vein, instead of addressing an issue as an implicated one, ICTs have drawn the decision in by means of treaty interpretation.

An appropriate example of this technique is the *Oil Platforms* case. The case concerned the destruction of four Iranian oil platforms in retaliation for the attack on two U.S.-flag vessels.[60] Invoking the compromissory "interpretation or application" clause referring to the ICJ in Article XXI of the Treaty of Amity, Economic Relations and Consular Rights between the U.S. and Iran of 1955 (hereinafter — Treaty of Amity), Iran filed an Application against the U.S. Iran claimed that the U.S. violated Article X(1) of the Treaty of Amity, which established that there shall be freedom of commerce and navigation between the territories of Iran and the U.S.[61] The U.S. put forward the defence offered by Article XX(1)(d) of the Treaty of Amity, which allowed the application of measures necessary to protect a party's essential security interest.[62] The U.S. claimed that the attacks against the oil platforms constituted self-defence and a measure whose enforcement was necessary to protect the U.S.' essential security interests.[63]

The Court reasoned that this matter was "one of interpretation of the Treaty, and in particular of Article XX, paragraph 1(d)".[64] It concluded that "the interpretation and application of that Article will necessarily entail an assessment of the conditions of legitimate self-defence under international law".[65] The Court held that Article XX could not operate in such a way as to condone the unlawful use of force. Therefore, the law on the use of force, as the Court stated, "form[ed] an integral part of the task of interpretation".[66] In the end, it determined that the attacks on the oil platforms were contrary to *jus ad bellum* and constituted an unlawful use of force. Consequently, they could not qualify as a measure necessary to protect essential security interests.[67]

The Court's approach attracted criticism. Indeed, the Court's jurisdiction was limited to the interpretation or application of the Treaty of Amity. It therefore could not legitimately apply the law on the use of force unless the Treaty of Amity contained a reference to such rules, *quad non*. The issue of the legality of the use of force by the U.S. was, in fact, an "outside" issue, while the defence under Article XX(1)(d) formed an "inside" issue. As E. Cannizzaro and B. Bonafé pointed out, "the Court seems to have considered interpretation as a means by which to escape the narrow limits of its jurisdictional bounds".[68] Indeed, while stating that the analysis of the use of force was part of interpretation of Article XX(1)(d), the Court did not even resort to the interpretation of the text of that paragraph in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, as required under the VCLT. The Court failed to establish the plain meaning of the clause, although, as F. Berman remarked, "[t]he clause had a clearly discoverable meaning on its face, and that should have sufficed".[69] The only instance the Court resorted to the plain text of the clause to interpret it was analysis of the word "necessary".[70] However, even in that instance, the Court did so rather for the sake of self-defence analysis. Overall, it can thus be concluded, as Judge Higgins pointed out in her separate opinion, that the Court "has rather invoked the concept of treaty interpretation to displace the applicable law",[71] and acknowledged that

> [i]t cannot <…> be 'desirable' or indeed appropriate to deal with a claim that the Court itself has categorized as a claim relating to freedom of commerce and navigation by making the centre of its analysis the international law on the use of force.[72]

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59 International Law Commission. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission, finalised by Mr. M. Koskenniemi). Document A/CN.4/L.682 and Add. 1. URL: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf (accessed: 17.07.2024). P. 84–86.

60 ICJ. *Oil Platforms* (Islamic Republic of Iran v. United States of America). Judgment of 6 November 2003. § 23–26.

61 Ibid., § 22.

62 Ibid., § 32.

63 Ibid., § 49.

64 Ibid., § 40.

65 Ibid.

66 Ibid., § 41.

67 Ibid., § 78.

68 Cannizzaro E., Bonafé B. *Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the Oil Platforms Case* // European Journal of International Law. 2005. Vol. 16. № 3. P. 492.

69 Berman F. *Treaty "Interpretation" in a Judicial Context* // Yale Journal of International Law. 2004. Vol. 29. № 2. P. 321.

70 Kammerhofer J. *Oil's Well That Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case* // Leiden Journal of International Law. 2004. Vol. 17. № 4. P. 703.

71 *Oil Platforms*. Separate Opinion of Judge Higgins. § 49.

72 Ibid.

Even if the Court considered that the rules on the use of force were "relevant", they could have been taken into account only in order to establish the meaning of the provision at hand.[73]

Indeed, the Court could not allow the U.S. to justify the alleged breach of an obligation by its unlawful actions. Therefore, the Court found it necessary to assess whether the use of force by the U.S. was legal in order to determine whether that use of force was a measure necessary to protect the U.S.' essential security interest. Otherwise, the Court would have been able to resolve the "inside" issue without undertaking the analysis of the "outside" issue. This "outside" issue would have not been implicated at all then, which was not the case. In order to reconcile the interest of justice with the jurisdictional limits, the Court could delimit the "margins" of its incidental jurisdiction that would comprise the issue of the use of force. The Court could make a determination that appeared to fall within the category of incidental determinations.

Quite a similar problem appears in the jurisprudence of the European Court of Human Rights (hereinafter — ECtHR). Notably, the ECtHR has used Article 31(3)(c) of the VCLT with respect to the interplay between international human rights law and international humanitarian law (hereinafter — IHL). The ECtHR began to elaborate its approach to the problem in the *Hassan v. the United Kingdom* case, where the applicant, an Iraqi national, was detained by the United Kingdom forces during the military operation in Iraq. He claimed that the United Kingdom had violated Article 5 of the European Convention on Human Rights by detaining him. The United Kingdom argued that Article 5 was inapplicable because IHL was *lex specialis* and had primacy over the human rights norms.[74] The applicant argued that such an approach was incorrect and that "at most, the provisions of [IHL] might influence the interpretation of the provisions of the Convention".[75]

The ECtHR opined on the role of IHL and held that "the Convention must be interpreted in harmony with other rules of international law of which it forms part" and that "[t]his applies no less to [IHL]".[76] It held that "the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of [IHL]".[77] In the end, the ECtHR ruled that the detention of the applicant was not contrary to the Third and Fourth Geneva Conventions and was not arbitrary.[78]

Under the European Convention on Human Rights, the jurisdiction of the ECtHR extends to the interpretation and application of the Convention itself. The provision governing ECtHR's jurisdiction is thus a typical compromissory clause.[79] The ECtHR should therefore be mindful of the fact that its jurisdiction is limited to the interpretation and application of the European Convention on Human Rights. There is no provision on the applicable law in this treaty, so the Convention itself is the applicable law, apart from secondary rules of international law on state responsibility and treaty interpretation.[80]

Therefore, the ECtHR might find it necessary to address this "outside" issue, although it will not be an indispensable issue, for the ECtHR may find the violation of the Convention without having recourse to *jus in bello*. In this case, it may be argued that if the ECtHR finds it necessary to test a set of facts against the norms of IHL, then it could do so by treating the issue of IHL as an incidental issue.[81] In fact, the similar methodology was used by the ICJ in the *Genocide* (Croatia v. Serbia) case: the Court observed that although its jurisdiction was limited to the disputes on the interpretation, application, and fulfilment of the Convention on the Prevention and Punishment of the Crime of Genocide, it did not prevent the Court from considering, "in its reasoning", if a violation of [IHL] occurred to the extent that this was relevant for the analysis of the issues pertaining to the Genocide Convention.[82] Taking into account the similarity in jurisdictional limits and the remits of applicable law, this approach might be informative for the ECtHR.

2.2. Issues unnecessary to consider

An ICT may encounter a situation where the determination on a particular point is not necessary in order to address a particular claim. In such a case, it is possible to "escape" respective considerations and rule on an

[73] Berman F. *Treaty "Interpretation"*… P. 320.
[74] ECtHR. *Hassan v. The United Kingdom*. Application no.29750/09. Judgment of 16 September 2014. § 87.
[75] Ibid., § 83.
[76] Ibid., §102.
[77] Ibid., §104.
[78] Ibid., §110.
[79] Harris C. *Incidental Determinations…* P. 417.
[80] ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia). Judgment of 3 February 2015. § 124–125.
[81] Raible L. *Op. cit.* P. 180.
[82] ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia). Judgment of 3 February 2015. § 85.

"inside" issue without ruling on an "outside" issue.[83] It may be the case that although an "outside" issue apparently arises, an ICT does not have to consider it to decide an "inside" issue. In *Guyana v. Suriname* Guyana asked the Annex VII tribunal to delimit its maritime boundary with Suriname in the territorial sea, continental shelf, and exclusive economic zone. Suriname raised an objection that the delimitation of the territorial sea was impossible absent the settled land boundary between the two states,[84] which was outside the scope of the UNCLOS.

The tribunal referred to the factual matrix of the case before it. It was established that both parties to the dispute conceded that they were, in fact, in agreement over the first three nautical miles of the delimitation line. These three nautical miles were laid on the line at an azimuth of N10°E from the reference point determined by the Mixed Boundary Commission in 1936. This N10°E line was agreed by the colonial predecessors of the parties to the dispute. Therefore, the only thing the Annex VII tribunal was supposed to do was to determine the starting point of the N10°E line. It reasoned that the starting point should be the intersection of the low water line of the west bank of the Corentyne River and N10°E line.[85]

In this case, the issue of maritime delimitation was the "inside" issue, while the issue of an undefined land boundary terminus was the "outside" issue. The tribunal thus "escaped" the consideration of the issue of land territory, which would have been outside its jurisdiction *ratione materiae*. It can thus be said that the issue of the land boundary terminus was a prerequisite for the Annex VII tribunal's determination on the territorial sea delimitation. However, it is necessary to stress that this "outside" issue was, at first glance, implicated by the "inside" issue, which is why the implicated issue problem could have potentially been addressed. In this particular case, the tribunal could state that the issue was, in effect, not implicated since it was not necessary to determine the land boundary terminus in order to delimit the maritime boundary.

Another line of cases where it has not been necessary for ICTs to draw a conclusion on an "outside" issue is the delimitation of the continental shelf beyond 200 nautical miles (the outer continental shelf). In this type of cases an ICT is requested to delimit the outer continental shelf while the Commission on the Limits of the Continental Shelf (hereinafter — CLSC) has not made a recommendation as to its limits yet, as required by Article 76(8) of the UNCLOS. The question that ensues is whether it is possible to delimit the outer continental shelf if it is not clear where its limits lie.

There have been dissimilar decisions of ICTs on this matter. In the *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal* (Bangladesh v. Myanmar), the International Tribunal for the Law of the Sea (hereinafter — ITLOS) ruled that it had jurisdiction to delimit the outer continental shelf. The ITLOS pointed out the difference between delimitation of the outer continental shelf and delineation of its limit, hence the specific competence of the CLSC with respect to outer limits only.[86]

The tribunal in the *Bay of Bengal* case (Bangladesh v. India) supported this conclusion and added that the competence of the UNCLOS tribunals and the CLSC does not overlap.[87] This was upheld by the ITLOS Special Chamber in the *Dispute concerning delimitation of the maritime boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (Ghana v. Côte d'Ivoire).[88] It also pointed out that the fact that the CLSC had not yet made a recommendation with regard to Côte d'Ivoire, and it did not affect the request for the delimitation of the outer continental shelf by Côte d'Ivoire.[89]

Another approach was adopted later by the ICJ in the *Territorial and Maritime Dispute*, where the Court observed that Nicaragua had not proven that it had an area of its continental shelf that overlapped with Colombia's continental shelf.[90] Therefore, it was not necessary to consider the issue of the outer limit at all.

In the given disputes, delineation of the outer limits of continental shelves was an "outside" issue, while their delimitation was an "inside" issue. Thus, delineation could be said to be implicated by the latter because it appears to be impossible to delimit the continental shelf without knowing where its limits lie. Although the ICTs, for different reasons, found that it was not necessary, it would nevertheless be more precise to evaluate this issue from the standpoint of incidental jurisdiction.

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[83] Tzeng P. *Incidental Jurisdiction…* § 28.

[84] Arbitral tribunal constituted pursuant to Article 287, and in accordance with Annex VII of the UNCLOS. *Guyana v. Suriname*. Award of the Arbitral Tribunal of 17 September 2007. § 174–176.

[85] Ibid., § 325.

[86] ITLOS. *Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangladesh v. Myanmar). Judgment of 14 March 2012. § 376.

[87] PCA. *Bay of Bengal Maritime Boundary Arbitration* (Bangladesh v. India). Award of 7 July 2014. § 80.

[88] ITLOS. *Delimitation of the Maritime Boundary in the Atlantic Ocean* (Ghana v. Côte d'Ivoire). Judgment of 23 September 2017. § 517.

[89] Ibid., § 519.

[90] ICJ. *Territorial and Maritime Dispute* (Nicaragua v. Colombia). Judgment of 19 November 2012. § 129.

2.3. Obtaining parties' consent and conditional decisions

International judicial and arbitral practice has given rise to the separate legal basis of ICTs' jurisdiction, whereby a party consents to dispute settlement in the course of proceedings. This legal basis, known as *forum prorogatum*,[91] has been entertained in the ICJ case law.[92] While the ICJ's possibility to found its jurisdiction on the *forum prorogatum* basis is established by the broad wording of Article 36(1) of the ICJ Statute, a similar provision is contained in Article 21 of the ITLOS Statute. Although there is no like provision for Annex VII arbitration settings, Article 288(1) of the UNCLOS itself broadly grants Annex VII tribunals jurisdiction over disputes as to the interpretation or application of the UNCLOS.

In the *Bay of Bengal* arbitration (Bangladesh v. India), the dispute concerned the delimitation of maritime boundaries. For this was a mixed dispute with an undetermined land boundary terminus, the tribunal apparently could not rule on the issue of territorial sovereignty, which clearly was an "outside" issue, while the maritime delimitation was an "inside" issue. However, the tribunal indicated that the parties agreed in the course of proceedings that "the land boundary terminus is to be used as the starting point of the maritime boundary between them".[93] Therefore, "[t]he Parties further agree[d] that the land boundary terminus is to be established on the basis of the Radcliffe Award, and that the Tribunal has jurisdiction to identify it on that basis".[94]

The parties thus themselves vested the tribunal with the jurisdiction to determine the land boundary terminus after the arbitration had been commenced.[95] Despite the land terminus being the "outside" issue, the tribunal was nevertheless competent to adjudicate on the matter since the parties to the dispute agreed to it. Therefore, in contrast with the *Guyana v. Suriname* case, the tribunal did not need to "escape" the consideration of the "outside" matter in order to address an "inside" issue. Nevertheless, the present technique is still worth being counted as a way to avoid the implicated issue problem, as P. Tzeng suggests.[96] Indeed, by obtaining parties' consent the tribunal indeed did not need to deal with incidental jurisdiction since the parties' consent was properly obtained and no jurisdictional problem therefore was present. Otherwise, this would have resulted in a conclusion that the tribunal simply could not exercise jurisdiction over the principal dispute.

Another technique could be used if there is no perspective of obtaining parties' consent. In such a scenario, an ICT may render a conditional decision that would not determine the matter exclusively, but would rather leave the question open subject to a further determination.[97]

This strategy was applied by the ICJ in the *Pedra Branca* (Malaysia v. Singapore) case. The dispute concerned the sovereignty over an island and two maritime features in the Singapore Strait. Whereas the Court was able to determine the sovereignty over the island and one of the maritime features, the sovereignty over the other feature (an "inside" issue) was not possible absent the determination as to maritime boundaries, which was "outside" of the Court's jurisdiction under the Special Agreement.

The Court decided not to rule on the "outside" issue and reasoned simply that sovereignty over the disputed maritime feature had the state, in whose territorial waters it was located.[98] In this manner, the Court in fact "escaped" the necessity to rule on the issue of maritime delimitation, which clearly was not within its competence.[99]

Therefore, the ICJ developed quite a unique technique that allows it to avoid the consideration of "outside" issues in order to fulfil the mandate established by the Special Agreement. According to P. Tzeng, this approach could well be used in mixed disputes, such as *Coastal State Rights*.[100] However, the Annex VII tribunal in that case rightly decided to address the implicated issue problem and render the decision based

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[91] Quintana J. J. *Op. cit*. P. 109, 232.

[92] ICJ. *Corfu Channel* case (United Kingdom of Great Britain and Northern Ireland v. Albania). Judgment of 25 March 1948. P. 27–28; ICJ. *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France). Judgment of 4 June 2008. § 61.

[93] *Bay of Bengal Maritime Boundary Arbitration*. § 58.

[94] Ibid.

[95] Ibid., § 509(2).

[96] Tzeng P. *Incidental Jurisdiction…* § 29.

[97] Such a decision may be called a "Solomonic" one to some extent. For the discussion of this phenomenon in greater detail, see, e.g. Grossman N. *Solomonic Judgments and the Legitimacy of the International Court of Justice* // *Legitimacy and International Courts* / ed. by N. Grossman, H. G. Cohen, A. Follesdal, G. Ulfstein. Cambridge ; New York : Cambridge University Press, 2018. P. 43–61.

[98] ICJ. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore). Judgment of 23 May 2008. § 299.

[99] Ibid., § 298.

[100] Tzeng P. *Conditional Decisions: A Solution for Ukraine v. Russia and Other Similar Cases?* // EJIL:Talk! Blog of the European Journal of International Law. URL: https://www.ejiltalk.org/conditional-decisions-a-solution-for-ukraine-v-russia-and-other-similar-cases/ (accessed: 17.07.2024).

on the criteria established beforehand in case law. Otherwise, it would be another award adding to the problem of incoherence if the Annex VII tribunal had decided to "escape" the consideration of the implicated issue problem in that case.

Thus, as has been demonstrated, there is no consistent approach among ICTs on incidental jurisdiction. On the one hand, ICTs exercise or refuse to exercise incidental jurisdiction addressing it in express terms. In each case, ICTs use their own methodology to approach incidental issues. On the other hand, other ICTs tend to refrain from addressing incidental jurisdiction at all and use other techniques in order to exercise jurisdiction over "inside" issues and not exceed their competence simultaneously. Apparently, such a situation results in judicial fragmentation among ICTs on the issue of law, namely on incidental jurisdiction, as well as in decrease in ICTs' legitimacy. Therefore, the next section of this paper explores a possible way to achieve coherence, namely by use of the *res judicata* principle.

3. *Res judicata* as a means to achieve coherence

3.1. Do incidental determinations have *res judicata* force?

The doctrine according to which "a final adjudication by a court or arbitral tribunal is conclusive" is known as *res judicata*.[101] This doctrine is most commonly regarded as a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute.[102] The doctrine is therefore applied by the ICTs and has a long history in that regard.

The ICJ summarised the test for the application of the doctrine in the following terms: "[T]he principle of *res judicata* requires an identity between the parties (*personae*), the object (*petitum*) and the legal ground (*causa petendi*)".[103] Although it has been suggested that ICTs' decisions have the force of *res judicata* when the dispute involves the same parties and the same subject matter,[104] Judge Anzilotti in his dissenting opinion in the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* case summarised that for *res judicata* to apply, there must be "the three traditional elements for identification, *persona*, *petitum*, *causa petendi*".[105] Generally, this "formula" is accepted by the ICTs in dealing with the doctrine.[106]

The PCIJ in the *Société Commerciale de Belgique* case characterised the *res judicata* effect of an inter-state arbitral award as "nothing else than recognition of the fact that the terms of that award are definitive and obligatory".[107] Similarly, the ICJ in the *Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) case pointed out that *res judicata* implies that the Court's decisions are not only binding on the parties, but also final, i.e. the issues that are determined cannot be relitigated.[108]

As has been pointed out by the ICJ, the *res judicata* force of its decisions follows from Article 59 of the Statute, which says that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case", and Article 60 of the Statute, which reads that "[t]he judgment is final and without appeal".[109] The doctrine thus entails that an ICT's decision is binding on the parties to the case, which is known to be a "positive effect" of *res judicata*, as well as definitive, which means that the matter cannot be decided again and is known as a "negative effect" of *res judicata*.[110]

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[101] Dodge W. S. *Res iudicata* // Max Planck Encyclopedias of International Law. URL: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1670?prd=MPIL (accessed: 17.07.2024). § 1.

[102] ICJ. *Effect of Awards of Compensation Made by the U.N. Administrative Tribunal*. Advisory Opinion of 13 July I954. P. 53. With regard to similarly worded Article 38(3) of the Statute of the Permanent Court of International Justice, see PCIJ. *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*. Judgment of 16 December 1927. Dissenting Opinion by M. Anzilotti. P. 27.

[103] ICJ. *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast* (Nicaragua v. Colombia). Judgment of 17 March 2016. § 55.

[104] PCA. *The Pious Fund of the Californias* (The United States of America v. The United Mexican States). Award of the Tribunal of 14 October 1902. P. 3; Reinisch A. *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes* // The Law & Practice of International Courts and Tribunals. 2004. Vol. 3. № 1. P. 50–51.

[105] PCIJ. *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*. Judgment of 16 December 1927. Dissenting Opinion by M. Anzilotti. P. 23.

[106] ICSID. *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*. Decision on Jurisdiction of 14 November 2005. § 72.

[107] PCIJ. *Société Commerciale de Belgique* (Belgium v. Greece). Judgment of 15 June 1939. P. 175, 178.

[108] 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. § 115.

[109] ICJ. *Corfu Channel* case (United Kingdom of Great Britain and Northern Ireland v. Albania). Judgment of 15 December 1949. P. 248; 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. § 138.

[110] Schaffstein S. *The Doctrine of Res Judicata Before International Arbitral Tribunals*: PHD Thesis. Centre for Commercial Law Studies Queen Mary and Westfield College, University of London and at the Faculty of Law of the University of Geneva. 2012. § 268; Dodge, William S. *Op. cit.* § 1.

It is worth noting that the effects of *res judicata* are limited to the parties to the dispute. Article 59, which is "formulated in negative terms", is designed to prevent the judgements of the ICJ from being of precedential nature.[111] As the PCIJ stated in the *Certain German Interests*, "[t]he object of this article is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes".[112]

Thus, in international law, the concept of *res judicata* itself precludes the effect of *stare decisis* of the ICTs' decisions.[113] Their decisions in particular cases are binding on the parties to such cases only. Then the logical question arises: what can be considered as determined by an ICT with binding force for it and the parties and thus be preclusive in light of *res judicata*? In order to ascertain which determinations have *res judicata* force in a judgement or an award, the distinction should be made between *dispositif* and the reasons leading to the determinations in *dispositif* — *motifs*. The interplay between them is key to understanding which parts of ICTs' decisions should be treated as being *res judicata*. The PCIJ and the ICJ have approached the interpretation of their judgements with the premise that *dispositif* should be read together with *motifs.*[114] Therefore, in determining the meaning of *dispositif*, it is necessary to have regard to the reasons given by an ICT in coming to the decision reflected in *dispositif*.

However, should *motifs* have the same preclusive force as *dispositif*? Some light was shed on this issue by the PCIJ in the *Polish Postal Service in Danzig* advisory opinion, where the Court stated that "it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned".[115] However, as was determined by the Court in *Delimitation Beyond 200 Nautical Miles* (Nicaragua v. Colombia), the meaning of *dispositif*, which is *res judicata*, is to be derived from the reasoning in the judgement.[116]

Incidental determinations may fall within the category of *motifs* since they are usually reasons that lead an ICT to determine whether it has jurisdiction or not, or, if on merits, whether the party's contention should be upheld or rejected. However, incidental determinations cannot be equated to the determinations on the issues over which an ICT has primary jurisdiction. The problem was highlighted in the early jurisprudence of the PCIJ in the *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* case. The PCIJ there determined that the alienation of German nationals' property by Polish courts was illegal.[117] As the PCIJ itself stated, the latter finding "indisputably acquired the force of *res judicata*".[118] Indeed, it appears in *dispositif* of the judgement on merits. However, the Court stated that the finding of illegality "constitute[d] a condition essential to the Court's decision" and was, furthermore, "consequently included amongst the points decided by the Court in Judgment No. 7, and possessing binding force in accordance with the terms of Article 59 of the Statute".[119]

Thus, the PCIJ stated that the incidental determination was to be treated as *res judicata*. As noted by B. Cheng, this finding of the PCIJ should be read together with the dissenting opinion by Judge M. Anzilotti, who stated that incidental determinations made exclusively for the purposes of a specific case are not binding in another case.[120]

Indeed, as was noted earlier, *res judicata* force of ICTs' decisions extends only to the parties to a particular case and binds them only in the context of that case. Moreover, in his dissenting opinion to the *Factory at Chorzów* (Merits) case Judge M. Ehrlich stated: "It is generally admitted that the principles of litispendency and *res judicata* do not apply to questions decided as incidental and preliminary points".[121] This supports the understanding that incidental determinations' *res judicata* force is circumscribed only to the reasoning of an ICT in a particular case.

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[111] Quintana J. J. *Op. cit*. P. 591.

[112] PCIJ. *Certain German Interests in Polish Upper* Silesia. Judgment of 25 May 1926. P. 19.

[113] It is worth stressing for greater clarity that the effects of *res judicata* in international law might well differ from the effects stemming from courts' judgements in domestic legal systems. For a comparative analysis of the preclusionary effects of national courts' decisions, see Chase O., Hershkoff H., Silberman L., Sorabji J., Stürner R., Taniguchi Y., Varano V. *Civil Litigation in Comparative Context*. St. Paul, MN : West Academic Publishing, 2017. P. 566–594.

[114] PCIJ. *Polish Postal Service in Danzig*. Advisory Opinion of 16 May 1925. P. 30; ICJ. *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand). Judgment of 11 November 2013. § 68.

[115] *Polish Postal Service in Danzig*. P. 29.

[116] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*. § 61.

[117] PCIJ. *Certain German Interests in Polish Upper* Silesia. Judgment of 25 May 1926. P. 20.

[118] Ibid.

[119] PCIJ. *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*. Judgement of 16 December 1927. P. 20.

[120] Ibid. Dissenting Opinion by M. Anzilotti. P. 26.

[121] PCIJ. *Factory at Chorzów* (Jurisdiction). Judgment of 26 July 1927. Dissenting Opinion by M. Ehrlich. P. 76.

Therefore, the early jurisprudence of the PCIJ suggested the methodology that can be employed in dealing with incidental issues. Indeed, incidental determinations are rather *motifs* that lead an ICT to the principal determinations in a case. Although *motifs*, in principle, can be treated as *res judicata*,[122] it is incidental determinations that lack the *res judicata* force in general. Even if they are treated as *res judicata*, this does not still prevent other ICTs from reconsidering the matter in subsequent proceedings since the force of *res judicata* of such incidental determinations extends only to the framework of a particular case.

3.2. How could the doctrine of *res judicata* be used by ICTs to exercise incidental jurisdiction?

As has been demonstrated, ICTs have not yet developed a consistent approach to incidental jurisdiction. When the case at issue involves some "outside" issues, an ICT would address them either from the standpoint of incidental jurisdiction or by employing alternative techniques that allow to exercise primary jurisdiction without addressing incidental jurisdiction.

Such a state of affairs can be seen as posing the risk of so-called judicial fragmentation. As P. Webb explains the phenomenon, judicial fragmentation is "a significant divergence in the reasoning on the same/similar legal issue or in relation to the same/similar factual scenario".[123] Judicial fragmentation can be viewed as a sub-category of institutional fragmentations, which refer to the divergence of views among the international institutions, in the present study — ICTs.[124] Scholars have argued that judicial fragmentation is seen as resulting in detriment to the predictability of international dispute settlement.[125] If ICTs render contradictory decisions on the same legal issue, states have less trust in these ICTs for the lack of predictability as to the outcome of litigation. Overall, the consequence is that the legitimacy of these ICTs will decay.[126]

According to R. Wolfrum, legitimacy can be defined as "the justification of authority".[127] The ICTs' legitimacy is primarily derived from states' consent.[128] Viewed from the standpoint of consent, legitimacy is referred to as "normative legitimacy", in contrast with "sociological legitimacy", which is primarily concerned with the degree of support by relevant constituencies, in the present study — states.[129] When ICTs' legitimacy is considered based on consent, the consent is said to be a "source-oriented factor" in scholarly studies of ICTs' legitimacy.[130]

That being stated, it appears that consent plays the key role in assessing the ICTs legitimacy, whether normative or sociological. Indeed, it is difficult to imagine the situation where an ICT exercises its jurisdiction beyond the parties' consent and the source-based legitimacy of such an ICT decreases, while this ICT still remains legitimate in states' views.[131]

It can thus be argued that where ICTs "trespass" the boundaries of the authority delegated by states, the decrease in legitimacy ensues.[132] In the present situation, exercising incidental jurisdiction on undefined or unauthoritative grounds may be equal to overstepping states' consent to dispute settlement. The same effect follows from the unjustified exercise of jurisdiction over, or mere consideration of, an issue that falls outside an ICT's competence. It may be seen as illegitimate that ICTs make determinations on the matters not falling strictly within their competence. Since international dispute settlement is a consent-based system, states' consent is crucial to the functioning of an ICT, hence to its legitimacy too.

In order to remedy the situation and prevent it from becoming worse in the future, ICTs may consider adopting a more reasoned and balanced approach. Furthermore, when dealing with incidental jurisdiction,

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[122] Marotti L. *Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals* // *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* / ed. by A. del Vecchio, R. Virzo. Cham : Springer International Publishing, 2019. P. 400.

[123] Webb P. *International Judicial Integration and Fragmentation*. International Courts and Tribunals Series. Oxford : Oxford University Press, 2013. P. 6.

[124] Peters A. *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization* // International Journal of Constitutional Law. 2017. Vol. 15. № 3. P. 675.

[125] Ibid. P. 679; Webb P. *Op. cit.* P. 6.

[126] Webb P. *Op. cit.* P. 6–7.

[127] Wolfrum R. *Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations* // *Legitimacy in International Law* / ed. by R. Wolfrum, R. Volker. Berlin ; Heidelberg : Springer Berlin Heidelberg, 2008. P. 6.

[128] Klabbers J., Peters A., Ulfstein G. *The Constitutionalization of International Law*. Oxford ; New York : Oxford University Press, 2009. P. 38, 42.

[129] Ibid.

[130] The others being process- and result-oriented factors. See Wolfrum R. *Op. cit*. P. 6; Grossman N., Cohen H. G., Follesdal A., Ulfstein G. *Legitimacy and International Courts — A Framework* // *Legitimacy and International Courts* / ed. by N. Grossman, H. G. Cohen, A. Follesdal, G. Ulfstein ; Cambridge ; New York : Cambridge University Press, 2018. P. 5.

[131] This stance can be exemplified by Solomonic decisions. See Grossman N. *Solomonic Judgments…* P. 55–60.

[132] Grossman N., Cohen H. G., Follesdal A., Ulfstein G. *Op. cit.* P. 5.

ICTs could enunciate the reasoning in more express terms and adopt a particular methodology to be used in each particular case.[133] The legitimacy of the ICTs can be reinstated, *inter alia*, through the coherent application of law,[134] by which judicial integration may be achieved.[135]

As was discussed above, the existing approaches to incidental jurisdiction are incoherent. Therefore, it is desirable that the ICTs take a consistent stance on incidental jurisdiction. However, the ICTs might feel to some extent constrained by the existing case law and the reasoning elaborated on in previous cases. It appears that this might have been the very reason for the Annex VII tribunals in *Chagos MPA*, *Coastal State Rights*, and *Enrica Lexie* to adopt the reasoning of the PCIJ in *Certain German Interests* as persuasive. Indeed, the *Certain German Interests* seemed to be authoritative enough to follow suit.

It is submitted, however, that the ICTs should not adhere to the approaches that are incorrect or not suitable for another reason. As was discussed with regard to *res judicata*, the ICTs are not bound by the reasoning developed in previous cases. The determinations that are made in a decision in one case cannot be binding in future cases. For there is no *stare decisis* force of previous judgements or awards, the ICTs are free to make deliberations as to how to approach incidental issues arising in cases. If it is argued, on the other hand, that previous ICTs' decisions have persuasive force, case law demonstrates that the ICTs still can abandon the approaches that were developed there and coin their own, more correct ones. The fact that previous decisions are erroneous or at least imperfect suffices as a reason to adopt a new one with correct determinations of law. Similarly to where the ICTs have exercised incidental jurisdiction, the ICTs should approach "outside" issues only from the standpoint of incidental jurisdiction and not resort to strategies that allow to bypass the respective discussion.

Taking into account that the reasoning of the ICTs as to whether incidental jurisdiction may be exercised varies, the ICTs should be cautious not to adopt some criteria and elaborate more on others, or abandon them as well and invent their own approach. Moreover, they may address incidental jurisdiction in express terms. It is submitted that they could legitimately do so. In that event, they should be inspired by the *res judicata* doctrine, which prevents the previous decisions from having binding force in future cases.

Even though the effects of *res judicata* with regard to incidental determinations are clear, one could argue that *res judicata* cannot be an ultimate solution to the lack of coherence. Indeed, it appears that *res judicata* doctrine has its primary focus on the effects of ICTs' decisions. These effects are prospective, namely they take place only after the decision has been taken. Therefore, the doctrine provides only partial justification for the exercise of incidental jurisdiction.

It also does not explain why ICTs may exercise incidental jurisdiction from the standpoint of their powers. To that end, an argument could be made in this respect that ICTs have inherent power to make incidental determinations.[136] One of such inherent powers of ICTs, for example, is the power to rule on their jurisdiction, which is known as the *compétence de la compétence* (*Kompetenz-Kompetenz*) principle.[137] Although international courts are vested with such a power expressly, it can be said that they have an inherent power to decide the true scope of a claim.[138]

Moreover, from the standpoint of the characteristics of a judgement or an award, if an ICT renders a decision on the issue outside its competence, such a decision is null.[139] Therefore, the exercise of incidental jurisdiction may be seen as exceeding ICT's competence. In that regard, *res judicata* does not buttress the ICTs' power to exercise incidental jurisdiction since the sole fact, that the decision will not have binding and preclusive effect except for the parties to a certain case, does not cancel the fact that such a decision may still be null. On the other hand, it is safe to argue that absent the agreement of both parties to the dispute, it is impossible to submit an ICT's decision to another tribunal for review.[140] Thus, except for the International Centre for Settlement of Investment Disputes framework,[141] the annulment of a judgement or an award is in practice rarely possible, even if it was rendered in excess of ICT's competence.

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[133] Grossman N. *Solomonic Judgments…* P. 60.

[134] McDermott Y., Wedad E. *Legitimacy* // Research Handbook on International Courts and Tribunals / ed. by W. A. Schabas, S. Murphy. Cheltenham ; Northampton : Edward Elgar Publishing, 2017. P. 245.

[135] Webb P. *Op. cit.* P. 6–7.

[136] Harris C. *Incidental determinations…* P. 435–436.

[137] Competence-competence (French, German). For more thorough discussion, see Cheng B. *General Principles of Law as Applied by International Courts and Tribunals*. Cambridge ; New York : Cambridge University Press, 2006. P. 275–278.

[138] Kolb R. *The International Court of Justice*. Oxford : Hart Publishing, 2013. P. 188–190.

[139] Cheng B. *Op. cit.* P. 261.

[140] Oellers-Frahm K. *Judicial and Arbitral Decisions, Validity and Nullity* // Max Planck Encyclopedia of Public International Law. URL: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e53?rskey=YYswy3&result=1&prd=MPIL (accessed: 17.07.2024). § 16–20.

[141] Ibid., § 21.

Conclusion

Existing case law in which ICTs have exercised incidental jurisdiction does not demonstrate coherence of approaches. While some ICTs exercise incidental jurisdiction and address the implicated issue problem, other ICTs rather avoid addressing incidental jurisdiction in order to still exercise jurisdiction over an "inside" issue that falls within these ICTs' primary jurisdiction. The lack of coherence among ICTs on incidental jurisdiction leads to the decrease in ICTs' legitimacy. The lack of coherent justification for the exercise of incidental jurisdiction may be treated as overstepping the boundaries of states' consent to dispute settlement, which leads to legitimacy concerns. Moreover, the diversity of approaches to the same legal problem, namely incidental jurisdiction, leads to judicial fragmentation, which, in turn, can be the cause of the decay of ICTs' legitimacy.

The *res judicata* doctrine may to some extent justify ICT's exercising incidental jurisdiction. It appears that ICTs may refuse to take into account previous decisions of ICTs that have exercised incidental jurisdiction if such decisions are incorrect since the reasoning of an ICT on incidental issues cannot be considered to have *res judicata* force. Moreover, it is possible for ICTs to rely on *res judicata* in order to exercise incidental jurisdiction. However, it is necessary to acknowledge that *res judicata* cannot provide a comprehensive justification for ICTs' exercising incidental jurisdiction.

ОСУЩЕСТВЛЕНИЕ МЕЖДУНАРОДНЫМИ СУДАМИ ВСПОМОГАТЕЛЬНОЙ ЮРИСДИКЦИИ: СОГЛАСОВАНИЕ ПОДХОДОВ ЧЕРЕЗ КОНЦЕПЦИЮ *RES JUDICATA*

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Аннотация

Проведенный автором анализ позволяет утверждать, что международные суды и трибуналы могут осуществлять вспомогательную юрисдикцию, однако их практика свидетельствует о том, что на настоящий момент отсутствуют последовательные и единообразные подходы к ее осуществлению. В работе также проводится анализ механизмов обхода необходимости осуществления вспомогательной юрисдикции. Отмечается, что международные суды и трибуналы могут «избегать» осуществления вспомогательной юрисдикции из соображений сохранения легитимности, поскольку рассмотрение вспомогательных вопросов может вести к преступлению согласия сторон на процедуру разрешения спора. Ввиду этого автор исследует возможности осуществления вспомогательной юрисдикции в ситуациях, когда международные суды и трибуналы предпочли ее «избегать». В статье обосновывается, что сам факт наличия разных подходов к вопросу осуществления вспомогательной юрисдикции может вести к судейской фрагментации и ослаблению легитимности международных судов и трибуналов. В этой связи автор обосновывает необходимость утверждения последовательного подхода к осуществлению международными судами и трибуналами вспомогательной юрисдикции и приходит к выводу о том, что последовательный подход может быть выработан путем применения концепции *res judicata*, в силу которой решение международного суда или трибунала не является обязательным, кроме как для сторон спора в рамках конкретного спора. Также делается вывод об отсутствии у решений по вспомогательным вопросам силы *res judicata*. В связи с отсутствием обязательной силы у решений по вспомогательным вопросам резюмируется, что международные суды и трибуналы могут осуществлять вспомогательную юрисдикцию, не выходя при этом за рамки согласия сторон. При этом в статье делается вывод и о том, что концепция *res judicata* не может сама по себе быть достаточным основанием для осуществления международными судами и трибуналами вспомогательной юрисдикции, поскольку роль концепции *res judicata* в этом отношении ограничена.

Ключевые слова

вспомогательная юрисдикция, res judicata, разрешение международных споров, международные суды и трибуналы, легитимность международных судов и трибуналов

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