Incidental jurisdiction in the award in “The ‘Enrica Lexie’ Incident (Italy v. India)” – Part I

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On 21 May 2020 the arbitral tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) in the The ‘Enrica Lexie’ Incident (Italy v. India) rendered its award. While both parties succeeded with some of their (counter-)claims, the Indian Ministry of External Affairs merely took note of the award, whereas the Italian Ministry of Foreign Affairs was “pleased”. Pending review by the parties with respect to confidential information, on 2 July 2020, the Permanent Court of Arbitration (PCA) published the operative part (dispositif) of the award. This post is based on the final award as submitted to the Indian Supreme Court. Out of respect for the confidentiality review of parties and the rules of procedure this post will not include a link to the award until such time it is published by the PCA.

The award is rich in interesting legal issues – substantive and procedural – and it may be expected that it will attract considerable scholarly attention. However, the purpose of this post is not to discuss the issues raised in the award in their entirety. Rather, it specifically focuses on the arbitral tribunal’s decision to accept incidental jurisdiction over Italy’s immunity claim under customary international law. This part of the award was strongly criticized in the dissenting opinion of Judge Patrick L. Robinson (paras. 4-54) and the dissenting and concurring opinion of Dr. Pemmaraju Sreenivasa Rao (paras. 24-59). It has also already come under scholarly attack elsewhere (here and here).

In this context, the award raises at least three important questions: Do UNCLOS tribunals have incidental jurisdiction over external issues under Article 288(1)? If so, what are the requirements of such incidental jurisdiction? Finally, were these requirements fulfilled in the case at hand? My analysis is split into two posts, the first of which addresses the existence and requirements of incidental jurisdiction of UNCLOS tribunals based on Article 288(1) UNCLOS and existing jurisprudence. The second post analyzes the approach of the arbitral tribunal Italy v. India to incidental jurisdiction over the immunity issue against the background of the general doctrine of incidental jurisdiction presented in the first post.

Incidental jurisdiction of UNCLOS tribunals under Article 288(1)

As stated by Articles 286 and 288(1) UNCLOS, jurisdiction ratione materiae of UNCLOS tribunals operating under the compulsory dispute settlement mechanism is limited to disputes concerning the interpretation or application of UNCLOS. Accordingly, the jurisdiction of UNCLOS tribunals is limited to submissions based on
provisions of UNCLOS and, therefore, excludes claims based on rules external to
UNCLOS (e.g., customary international law).

However, it is widely accepted that international courts and tribunals can have a
(limited) extent of incidental jurisdiction depending on the instrument that grants
them jurisdiction. In its judgment in the *Case Concerning Certain German Interests
in Polish Upper Silesia (Germany v. Poland) (Preliminary Objections)*, the Permanent
Court of International Justice (PCIJ) famously accepted jurisdiction over the
interpretation of Article 256 of the Treaty of Versailles, which was outside its primary
jurisdiction under the Geneva Convention, but which was a question “preliminary or
incidental” to the application of the Geneva Convention (p. 18).

The extent of incidental jurisdiction specifically of UNCLOS tribunals under
Article 288(1) UNCLOS remains an intricate issue and few attempts have been
made to systematically analyse its requirements and limits. A notable exception
is that of implicated sovereignty issues, which are equally matters of incidental
jurisdiction (addressed below). The arbitral tribunal in *Mauritius v. United Kingdom*
was the first UNCLOS tribunal to explicitly accept the possibility of incidental
jurisdiction over external issues (para. 220), and its analysis was later accepted by
the arbitral tribunal in *Ukraine v. Russia* in its award on preliminary objections (paras.
193-194).

**Requirements of incidental jurisdiction**

The arbitral tribunal in *Mauritius v. United Kingdom* defined the requirements for
incidental jurisdiction as follows:

[W]here a dispute concerns the interpretation or application of [UNCLOS],
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 (para. 220, emphasis
added).

Arguably, two main requirements of incidental jurisdiction may be deduced from
the existing jurisprudence as well as a systematic and teleological interpretation of
Article 288(1) UNCLOS.

**The “necessity” requirement**

First, the determination of an external issue must be “necessary” to resolve an
UNCLOS dispute that itself falls within the scope of Article 288(1). In order to
respect the principle of consent, an exercise of incidental jurisdiction is arguably
only ever “necessary” where an UNCLOS dispute under Article 288(1) cannot be
decided without a prior determination of a non-UNCLOS issue, rendering the latter
a preliminary question (and equally an ‘indispensable issue’). In other words, only
where a claim based on a provision of UNCLOS cannot be decided without first, as a
preliminary question, making a determination of an external issue, that determination
is “necessary”.

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This is also how the PCIJ appears to have approached the subject in *Certain German Interests*, equating the term “incidental” with “preliminary” (p. 18).

Interestingly, while this use of the term “incidental” may seem awkward in the English language, coincidentally, the German term “inzident” means “preliminary” (it could be speculated whether this might have to do with the native language of the president of the PCIJ at the time or the fact that Germany was a party in the case).

**The “ancillarity” requirement**

Second, the external issue must arguably be what the arbitral tribunal in *Mauritius v. United Kingdom* referred to as “ancillary” to the UNCLOS dispute. Although the term “ancillary” has a similar meaning as the term “incidental” in English (implying that the issue is “minor”), for the reasons stated above, the term “ancillary” is preferable in order to avoid further terminological confusion. The exact contours of this concept have not been clarified so far, but its purpose is to weed out “necessary” determinations of external issues that are not “minor” to the UNCLOS dispute, but in fact “major”. In this respect, the approach in *Mauritius v. United Kingdom* was focused on the characterization of the dispute by establishing the “real issue” in the case. According to the arbitral tribunal, this required an assessment of “where the relative weight of the dispute lies” (paras. 211 and 229).

As the arbitral tribunal in *Ukraine v. Russia* noted, this test “essentially touches upon that of how the dispute before it should be characterised (para. 194)” . Indeed, the “ancillarity” requirement is so closely related to the characterization of the dispute that it might be predominently an additional incentive to make sure the dispute was indeed properly characterized. For example, the arbitral tribunal in *Ukraine v. Russia*, when faced with the undoubtedly preliminary (and thus “necessary”) question of territorial sovereignty over Crimea in the context of Ukraine’s UNCLOS claims, “the Parties’ dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of [UNCLOS] (para. 195)”.

**Preliminary conclusion**

Incidental jurisdiction in the context of compromissory clauses in subject-specific treaties is still a fairly opaque concept in international dispute settlement and it is rarely explicitly invoked. While the exact requirements and limits of incidental jurisdiction must be separately identified for each compromissory clause, the preconditions developed in the past jurisprudence of arbitral tribunals established under Annex VII of UNCLOS – the way I understand them – could potentially be generalized to some extent. The strict “necessity” test proposed here, which requires the external determination to constitute a preliminary issue, links the doctrine of incidental jurisdiction back to the States Parties’ consent granted in the compromissory clause. The “ancillarity” test provides an additional safeguard to respect the limits of such implicit consent to jurisdiction.

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