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SYMPOSIUM ON INCIDENTAL JURISDICTION

INCIDENTAL JURISDICTION IN INVESTMENT TREATY ARBITRATION AND THE QUESTION OF PARTY CONSENT

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Arbitral tribunals in investment treaty arbitration have not contributed much to the theoretical development of the concept of incidental jurisdiction, even though they have occasionally exercised it in practice. One possible explanation for their apparent reluctance to make explicit and greater use of the concept of incidental jurisdiction is the tendency to adopt a strict approach to jurisdiction governed by party consent. In this essay, I argue that incidental jurisdiction is not in tension with the consensual foundations of international jurisdiction when it is viewed as one inherent power of international courts and tribunals. Key to this argument is that incidental determinations are not binding, and therefore do not need to fall within party-defined jurisdictional limits.

Insights from Investment Treaty Arbitration

The practice of arbitral tribunals regarding incidental jurisdiction is unclear. Tribunals have been reluctant to make express proclamations on their power to resolve incidental questions. Nevertheless, tribunals do seem to effectively exercise incidental jurisdiction, without acknowledging so explicitly.

An early mention of the concept appeared in the second *Amco v. Indonesia* decision on jurisdiction, in which the tribunal commented in passing that "[i]t is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes *res judicata*."[1] A number of complex scenarios involving incidental questions have appeared since then. For present purposes, I focus on two, involving incidental questions originating in both domestic and international (or supranational) legal orders.

The first scenario concerns umbrella clauses, i.e., treaty clauses guaranteeing the observance of commitments toward investors found elsewhere (e.g., in contracts). A treaty claim for breach of an umbrella clause necessarily involves questions as to the existence of statutory or contractual commitments and their breach, which might be outside the jurisdiction of a treaty-based tribunal. The two most famous early decisions, *SGS v. Pakistan* and *SGS v. Philippines*, avoided addressing the concept of incidental jurisdiction. On the one hand, in *SGS v. Pakistan* the tribunal effectively denied the effect of umbrella clauses.[2] Nevertheless, it was confronted with the argument that all treaty claims "require a prior finding" on contractual breaches and that consequently the proceedings should be dismissed or stayed.[3] The tribunal disagreed. Insisting that its jurisdiction was limited to treaty claims,

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[1] AMCO v. Republic of Indonesia, ICSID Case No. ARB/81/1, Resubmitted Case Decision on Jurisdiction, para. 32 (May 10, 1988).

[2] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, paras. 163–74 (Aug. 6, 2003).

[3] *Id.*, para. 185.

it said that it "can and must consider all facts relevant to determination of the BIT [bilateral investment treaty] causes of action, including facts relating to the terms of the [relevant contract]," but that findings on contractual breaches "are not a factual or legal predicate for" and are "not dispositive of" treaty claims.[4] On the other hand, the tribunal in *SGS v. Philippines* found that it had proper jurisdiction under the bilateral investment treaty to consider contractual violations, but that the exercise of such jurisdiction was in conflict with an exclusive forum selection clause in the contract.[5] The tribunal seemed to allude to incidental questions when it stated that the treaty claim was "subject to 'the factual predicate of a determination' by the Regional Trial Court of the total amount owing by the Respondent [i.e. the contract claim]."[6] However, it then stayed the proceedings in favour of the contractual forum, citing the interests of justice and not mentioning the possibility of exercising incidental jurisdiction.[7]

Despite the absence of explicit references to incidental jurisdiction, some tribunals seem to implicitly exercise it to examine the existence and breaches of statutory or contractual commitments, preceding the establishment of treaty breaches. In *Burlington Resources Inc. v. Ecuador,* for example, the tribunal analysed the existence of specific obligations toward the investor in national legislation, finding none.[8] The tribunal in *Strabag SE v. Libya,* whose jurisdiction was limited to treaty breaches, conducted an extensive analysis of a variety of contractual claims preceding the finding of breaches of the umbrella clause.[9] However, it remains unclear whether the latter tribunal did so because it simply assumed it could address contractual claims as incidental questions, or due to its finding that Libyan local courts, and consequently the contractual forum selection clause, were not safely available.[10]

Incidental examinations of contractual breaches are not limited to umbrella clauses but may extend to virtually all other treaty protections. In *Telefónica S.A. v. Argentina*, the tribunal first clarified that it was not faced with an umbrella clause claim incorporating a contractual claim, but a set of alleged violations of treaty protections.[11] It then noted in a footnote: "This would not prevent the Tribunal, when dealing with the merits, from examining *incidenter tantum* whether there have been breaches of the Transfer Agreement, should this be relevant in order to ascertain whether Argentina has committed the BIT breaches that Telefónica alleges."[12] The case was discontinued, leaving no occasion for the point's development. The tribunal in *Burlington Resources Inc. v. Ecuador* made a similar statement and went further. It stated that it had to examine contractual rights in the context of an expropriation claim, but that it "does not act as a contract judge but exclusively as a treaty judge, addressing contract matters as preliminary issues insofar as it is necessary to rule on a Treaty claim."[13] The tribunal then conducted a complex analysis of contractual rights, insisting that it made conclusions "for the sole purpose of the resolution of the Treaty claim before it."[14]

[4] *Id.*, paras. 186–89.

[5] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, paras. 130–55 (Jan. 29, 2004).

[6] *Id.*, para. 174.

[7] *Id.*, para. 175.

[8] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, paras. 201–07 (Dec. 14, 2012) [hereinafter *Burlington*].

[9] Strabag SE v. Libya, ICSID Case No. ARB(AF)/15/1, Award, paras. 346–874 (June 29, 2020).

[10] *Id.*, paras. 195–208.

[11] Telefónica S.A. v. The Argentine Republic, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, para. 87 (May 25, 2006).

[12] *Id.*, n. 36.

[13] *Burlington*, *supra* note 8, para. 256.

[14] *Id.*, paras. 275–335.

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The second scenario concerns intra-European Union (EU) cases and the power of treaty-based investment tribunals to address questions of EU law as incidental to questions of international law. The tribunal in the second *Micula and Others v. Romania* arbitration stated that "such a tribunal may well have to have regard to EU law, but this will be incidental and will not be a question going to the core issues of the dispute."[15] Unfortunately, the point was not developed further. Other tribunals have not mentioned the concept of incidental jurisdiction but have arguably implicitly exercised it. In *Electrabel S.A. v. Hungary,* the tribunal conducted an extensive analysis of the requirements set by a decision of the European Commission, which were in dispute between the parties, and which preceded the issue of international legal responsibility.[16]

The appearance of questions of EU law in investment arbitrations could have motivated an analysis of the concept of incidental jurisdiction from the EU constitutional perspective, but unfortunately it has not. Incidental jurisdiction of investment tribunals over EU law matters was not even considered by the Court of Justice of the European Union in the *Achmea* decision, which effectively banned intra-EU investment arbitrations.[17] Nor was the issue addressed in the Opinion 1/17, in which the court concluded that the division of powers between the EU and its member states was outside the reach of tribunals under the EU-Canada Comprehensive Economic and Trade Agreement.[18]

This is only the tip of the iceberg. Various other incidental questions, relating to state sovereignty, human rights, and environmental standards, as well as countermeasures, among others, now regularly appear in investment arbitrations. However, despite its theoretical importance and occasional practical exercise, incidental jurisdiction has never been addressed to a satisfactory extent, in terms of defining its origin and scope, or even recognized as such. The reasons for this paradox are unclear. On the one hand, investment arbitration might be dominated by the classical international law view that considers questions of domestic law and contracts as facts.[19] This view can arguably be observed in the two *SGS* cases above. Similarly, the tribunal in the first *Micula and Others v. Romania* arbitration applied the fact-finding principle of burden of proof to the examination of a specific commitment in relation to an umbrella clause, and it considered EU law part of the "factual matrix."[20] However, it would be naïve to label the above-described activities of modern investment tribunals as fact finding, considering the depth and intensity of their legal analyses. On the other hand, the reluctance to openly accept incidental jurisdiction might have something to do with the strict view on party consent and jurisdictional limits in investment arbitration, to which I now turn.

Party Consent, Proper Jurisdiction, and Incidental Jurisdiction

Investment treaty arbitration represents the paradigmatic case of international adjudication based on party consent. By virtue of their consent, disputing parties define the scope of prospective disputes—usually with reference to a subject matter area—that can be settled by the arbitral tribunal with binding force. Only for present purposes, I label this "proper jurisdiction."

[15] Mr Ioan Micula and Others v. Romania, ICSID Case No. ARB/14/29, Award, para. 283 (Mar. 5, 2020).

[16] Electrabel S.A. v. The Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, paras. 6.70–6.93 (Nov. 30, 2012).

[17] Case C-284/16, Slovak Republic v. Achmea BV, ECLI:EU:C:2018:158, Judgment (Mar. 6, 2018).

[18] Opinion 1/17, Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part (CETA), ECLI:EU:C:2019:341, para. 132 (Apr. 30, 2019).

[19] Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 PCIJ (ser. A) No. 7, at 19 (May 25).

[20] Ioan Micula and Others v. Romania, ICSID Case No. ARB/05/20, Award, paras. 328, 459 (Dec. 11, 2013).

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In international law practice generally, incidental jurisdiction is considered to constitute either a permissible extension[21] or an impermissible breach of proper jurisdiction.[22] Unfortunately, this is basically the end of considerations on the issue, leaving a striking gap regarding more nuanced justifications and critiques of incidental jurisdiction, especially regarding the consensual basis of international adjudication.

My view is that incidental jurisdiction does not require a proper jurisdictional, and consequently consensual, basis. So far, incidental questions have rarely been characterized as falling outside proper jurisdiction. While in practice jurisdictional extensions have been sought for the sake of resolving incidental questions, in theory there is a view that incidental questions present an issue of applicable law, not jurisdiction.[23] But the starting point in this dilemma is that incidental questions are also in dispute and disputes tie to jurisdiction. The task of international courts and tribunals is defined in terms of settling a dispute.[24] If a question falls within the defined borders of proper jurisdiction, the court or tribunal has complete authority to resolve that question with binding force, and there is no need to reach for the concept of incidental jurisdiction in the first place. Only if a question falls outside defined jurisdictional borders can it be called "incidental."

Incidental questions can be conceptualized as falling outside proper jurisdiction because they are not resolved with binding force. Practice during the past century shows that: incidental determinations are made solely for the purpose of resolving the principal dispute;[25] they do not have *res judicata* status;[26] and they can be made only in the course of the reasoning for the decision and cannot be included in the operative part of a decision.[27] In short, incidental determinations simply enable the resolution of the principal dispute, and they do not bear any formal value on their own.

It all comes down to this: because incidental questions are not resolved with binding force, they do not need to fall within proper jurisdiction; and because they do not need to be within proper jurisdiction, they do not need to be covered by party consent. But if tribunals are not empowered to resolve incidental questions by virtue of proper jurisdiction, how are they empowered to do so?

Incidental Jurisdiction as an Inherent Power

The inherent powers of international courts and tribunals are those powers that are necessary for the proper exercise of the dispute settlement function.[28] They do not require an explicit mandate. Their existence can be

[21] *See, e.g.*, The "Enrica Lexie" Incident (It. v. India), PCA Case No. 2015-28, Award, paras. 809, 811 (May 21, 2020); Chagos Marine Protected Area Arbitration (Mauritius v. UK), PCA Case No. 2011-03, Award, para. 220 (Mar. 18, 2015) [hereinafter *Chagos*]; Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Preliminary Objections, Judgment, 1925 PCIJ (ser. A) No. 6, at 18 (Aug. 25).

[22] See, *e.g.*, although without explicit mention of incidental jurisdiction, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/05, Award, paras. 128–33 (Nov. 21, 2007).

[23] Callista Harris, *Incidental Determinations in Proceedings Under Compromissory Clauses*, 70 Int'l Comp. L. Q. 417, 419 (2021).

[24] Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 ICJ Rep. 53, para. 49 (Nov. 12).

[25] Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory) (Ger. v. Pol.), Judgment, 1927 PCIJ (ser. A) No. 13, at 26 (diss. op. Anzilotti, J., Dec. 16) [hereinafter *Chorzów* (Anzilotti)]; Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt, and United Arab Emirates v. Qatar), Judgment, 2020 ICJ Rep. 172, para. 61 (July 14).

[26] Factory at Chorzów (Ger. v. Pol.), Claim for Indemnity, Merits, 1928 PCIJ (ser. A) No. 17, at 76 (diss. op., Ehrlich, J., Sept. 13); *Chorzów* (Anzilotti), *supra* note 25, at 26.

[27] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 ICJ Rep. 3, para. 85 (Feb. 3); Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2009 I.C.J. Rep. 28 (dec., Abraham, J., Jan. 19).

[28] Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 Brit. Y.B. Int'l L. 195, 228–37 (2005).

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assumed in light of the task given to international courts and tribunals. When disputing parties consent to the judicial settlement of disputes, they define a specific task (dispute settlement) and method (judicial) of a third-party body. If the exercise of the dispute settlement function requires the resolution of incidental questions, the power to do so should be an inherent one. Furthermore, if the judicial method that must be employed in the exercise of the dispute settlement function requires the ability to resolve incidental questions, the case for qualifying such power as an inherent one should be even stronger.

The inherent power to resolve incidental questions is comparable to two other well-established inherent powers, namely the power to resolve jurisdictional questions and the power to award remedies. They concern the ability to resolve certain contentious issues without an explicit mandate. This ability is based on the premise that the resolution of certain questions is necessary for the fulfilment of the dispute settlement function.[29] In fact, the power to resolve incidental questions fits quite comfortably, as do the two comparator inherent powers, into the International Court of Justice's broad description of inherent powers:

> Such inherent jurisdiction, on the basis of which the Court is *fully empowered to make whatever findings may be necessary for the purposes just indicated* [safeguarding the exercise of jurisdiction, the settlement of the entire dispute, the inherent limitations on the judicial function, and the judicial character], derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.[30]

Like any other inherent power, incidental jurisdiction should not be exercised if it has been excluded either explicitly or implicitly in a broader regulatory context.[31] Of course, implicit exclusion requires interpretation. For example, the resolution of the matters that are explicitly excluded from proper jurisdiction as incidental questions would probably be inconsistent with the broader regulatory context, although I leave this question open for debate.

Finally, incidental jurisdiction as an inherent power is not susceptible to abuse. It cannot be used to resolve de facto principal disputes outside the limits of party consent. As held by the *Chagos* tribunal, an incidental connection between the "real issue in the case" and some matter within proper jurisdiction is insufficient to establish jurisdiction.[32] Furthermore, the *Monetary Gold* principle continues to protect third parties by precluding adjudication where legal interests of a non-consenting party "would form the very subject-matter of the decision."[33]

Conclusion

Incidental jurisdiction should be used more extensively and openly in investment treaty arbitration, and for that matter in international adjudication in general. The consensual foundations of international adjudication do not pose an obstacle to this exercise because incidental questions do not result in binding decisions. Furthermore, the concept of inherent powers accommodates well the power to decide incidental questions. The problem is that incidental jurisdiction remains largely unaddressed in the practice of investment arbitral tribunals. Its discovery and use on a larger scale could assist with complex questions that now regularly appear in investor-state disputes.

[29] *See, e.g.*, Corfu Channel (UK v. Alb.), Merits, Judgment, 1949 ICJ Rep. 4, at 26 (Apr. 9); Nottebohm (Liech. v. Guat.), Preliminary Objection, Judgment, 1953 ICJ Rep. 111, at 120 (Nov. 18).

[30] Nuclear Tests (Austl. v. Fr.), Judgment, 1974 ICJ Rep. 253, para. 23 (Dec. 20) (emphasis added).

[31] Brown, *supra* note 28, at 239–40, 240–42.

[32] *Chagos*, *supra* note 21, para. 220.

[33] Monetary Gold Removed from Rome in 1943 (It. v. Fr., UK, and U.S.), Preliminary Objection, Judgment, 1954 ICJ Rep. 19, at 32 (June 15).

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