

A SATISFACTORY ANSWER? THE *ENRICA LEXIE* AWARD AND THE JURISDICTION OVER INCIDENTAL QUESTIONS

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Abstract

*This article situates the Enrica Lexie award's stance on the Tribunal's jurisdiction over the marines' immunity within the broader debate on the scope of the jurisdiction of international courts and tribunals over incidental questions. After illustrating the Tribunal's approach to the question at hand, the paper appraises those instances where an international tribunal with limited jurisdiction can decide issues and apply rules that are "external" to its principal jurisdiction. It then focuses on the question of the jurisdiction over incidental issues, which is the most debated avenue for an international tribunal to engage with substantive matters falling outside the scope of the tribunal's *ratione materiae* jurisdiction. Finally, the Tribunal's approach in the Enrica Lexie award is critically assessed against the above debate. It is submitted that, although the award arguably put an end to the longstanding dispute between India and Italy, the Tribunal's reasoning does not seem to be in line with the conditions for the exercise of jurisdiction over incidental questions as roughly sketched in relevant case law.*

Keywords: Enrica Lexie; award of the arbitral tribunal; immunity claim; compromissory clauses; jurisdiction over incidental questions.

1. INTRODUCTION

It may come as a surprise that, of the many issues addressed by the arbitral tribunal in the *Enrica Lexie* award,¹ the one that has drawn more attention – both within² and outside the Tribunal³ – pertains to an apparently rather peripheral

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¹ *The "Enrica Lexie" Incident (The Italian Republic v. The Republic of India)*, Award of 21 May 2020, PCA Case No. 2015-28. For a comprehensive analysis of the award, see RONZITTI, "Il caso della Enrica Lexie e la sentenza arbitrale nella controversia Italia-India", *RDI*, 2020, p. 937 ff.

² See the dissenting opinion of Judge Robinson and the concurring and dissenting opinion of Dr Rao.

³ METHYMAKI and TAMS, "Immunities and Compromissory Clauses: Making Sense of Enrica Lexie" (Parts I and II), *EJIL: Talk!*, 27 August 2020, available at: <<https://www.ejiltalk.org/>>; RAJU, "The Enrica Lexie Award – Some Thoughts on "Incidental" Jurisdiction" (Parts I and II), *Opinio Juris*, 22 July 2020, available at: <<http://opiniojuris.org/>>; SCHATZ, "Incidental jurisdiction in the award in 'The Enrica Lexie Incident (Italy v. India)'" (Parts I and II), *Völkerrechtsblog*, 23 and 24 July 2020, available at: <<https://voelkerrechtsblog.org/>>; KUMAR, "Jurisdiction of the Permanent Court of Arbitration over Marines' Immunity in the

question: the basis of the Tribunal's jurisdiction over the claim of immunity from criminal jurisdiction of the two marines. Indeed, something highly controversial lies behind such a question and the way the Tribunal approached it. Determining whether an international tribunal facing a multifaceted dispute can exercise its jurisdiction over incidental substantive matters that fall outside the scope of its principal jurisdiction is a much-debated issue in the contemporary practice of international adjudication. This question reflects the more general tension between the consensual paradigm of international jurisdiction and the need to settle disputes in a complete and – to borrow from the language of the *Enrica Lexie* Tribunal – “satisfactory” way.

The *Enrica Lexie* award adds another important piece to the ever-increasing number of recent international judicial decisions dealing with this tension. Moreover, as will be shown, some aspects of the award contribute to making the problem even more controversial, given the opaque reasoning underlying the finding that the arbitral tribunal had jurisdiction to entertain the question of immunity.

The present comment situates the *Enrica Lexie* award's stance on the jurisdiction over the marines' immunity within the broader debate on the scope of jurisdiction of international courts and tribunals over incidental questions. After illustrating the Tribunal's approach to the question at hand (Section 2), this paper discusses the main issues surrounding this kind of jurisdiction. Starting from an appraisal of those instances where an international tribunal with limited jurisdiction can decide issues and apply rules that are “external” to their principal jurisdiction (Section 3), the paper focuses on the jurisdiction over incidental questions, which is the most debated avenue for an international tribunal to engage with external issues (Section 4). Finally, the Tribunal's approach in the *Enrica Lexie* award is critically assessed against the above debate (Section 5).

2. THE TRIBUNAL'S TAKE ON THE EXERCISE OF JURISDICTION OVER THE CLAIM OF IMMUNITY

As a general rule, courts and tribunals referred to in Part XV of the UN Convention on the Law of the Sea (UNCLOS) have jurisdiction limited to any dispute concerning the interpretation and application of the Convention.⁴ Quite predictably, since the beginning of the litigation of the *Enrica Lexie* case before UNCLOS tribunals, the question arose as to whether Italy's claim on the immunity of the marines could fall within the limited jurisdiction of such tribunals.⁵

Enrica Lexie Incident: a Critical Evaluation”, Cambridge International Law Journal Blog, 12 February 2021, available at: <<http://cilj.co.uk/2021/02/12/jurisdiction-of-the-permanent-court-of-arbitration-over-marines-immunity-in-the-enrica-lexie-incident-a-critical-evaluation/>>.

⁴ Arts. 286 and 288(1) UNCLOS.

⁵ See RONZITTI, “The *Enrica Lexie* Incident: Law of the Sea and Immunity of State Officials Issues”, IYIL, 2012, p. 3 ff., p. 13; MILANO, “Il caso “Marò”: alcune considerazioni sull'utilizzo di strumenti internazionali di risoluzione delle controversie”, SIDIBlog, 3 April

Because of the ways India framed its objections to the jurisdiction, in the award under consideration the Tribunal addressed the question in two different stages. In the first place, it settled the parties' dispute as to their characterisation of the dispute, meaning whether the dispute as a whole concerned the interpretation and application of the Convention. Indeed, while according to Italy the dispute squarely fell within the scope of Article 288 UNCLOS, being essentially a dispute related to which State is entitled to exercise jurisdiction over the incident, thus involving the interpretation and application of several provisions of the Convention, India argued that the Tribunal should have declined to globally exercise jurisdiction over the dispute. India's argument was that "the core issue, the real subject matter of the dispute" was the question of immunity from criminal jurisdiction of the two marines, a question lying outside the jurisdiction of the Tribunal.⁶ The Tribunal ultimately agreed with Italy's characterisation of the dispute. According to the Tribunal, the Parties' dispute was "appropriately characterised as a disagreement as to which State is entitled to exercise jurisdiction over the incident", raising questions of interpretation and application of several provisions of the Convention, in respect of which the Parties had different views.⁷ With respect to the question of the immunity of the marines, which constituted a specific claim made by Italy accompanied by a request for a specific declaratory relief on it,⁸ the Tribunal noted that Italy's request:

was but one of several bases upon which Italy substantiated its more general request for a finding that, "by asserting and exercising jurisdiction over the *Enrica Lexie* and the Italian Marines", India violated the Convention". Indeed, the asserted immunity of the Marines was not the only basis upon which Italy alleges India's exercise of jurisdiction to be contrary to the Convention. On Italy's case, it was conceivable that the dispute between the Parties would be decided without a determination on the question of immunity (such as by a finding by the Arbitral Tribunal that Italy has exclusive jurisdiction over the incident under Articles 87 or 97 of the Convention).⁹

In other words, according to the Tribunal, the dispute as a whole was a dispute concerning the interpretation and application of the Convention which "may raise, but is not limited to, the question of immunity of the Marines".¹⁰

Having so characterised the dispute, the Tribunal was still left with India's specific objections to jurisdiction with respect to the question of immunity of the marines. Indeed, while India claimed that the Tribunal lacked jurisdiction entire-

2013, available at: <<http://www.sidiblog.org/2013/04/03/il-caso-maro-alcune-considerazioni-sullutilizzo-di-strumenti-internazionali-di-risoluzione-delle-controversi/>>.

⁶ Award, para. 226.

⁷ Award, para. 243.

⁸ Award, para. 75(2)(f).

⁹ Award, para. 239.

¹⁰ Award, para. 243.

ly, based on the fact that the dispute related to a question alien to the Convention, it also maintained, in the alternative, its specific objections to jurisdiction over the question of immunity.¹¹ That is the reason why the Tribunal ended up dealing with the question of its jurisdiction over the immunity of the two marines in a later stage. Having first found that, potentially, the question of immunity might not need to be decided, being “but one of several bases” on which Italy alleged that India violated the Convention, the same question turned out to be a decisive one for the dispute. In fact, after having established that both India and Italy were entitled to exercise jurisdiction over the incident, the Tribunal noted that the finding of concurrent jurisdiction was “without prejudice to the question whether India is precluded from exercising jurisdiction over the Marines because of their status as State officials entitled to immunity in relation to acts performed in the exercise of their official functions”.¹²

It should be recalled that Italy’s claim on immunity of the two marines was not raised without any reference to the Convention. In its final submission, Italy requested the Tribunal to adjudge and declare that “by asserting and continuing to exercise its criminal jurisdiction over [the two Marines], India is in violation of its obligation to respect the immunity of the Marines as Italian State officials exercising official functions, in breach of Articles 2(3), 56(2), 58(2) and 100 of UNCLOS”.¹³ The external issue of immunity, in Italy’s view, would be imported into the Convention by means of *renvoi* made by several UNCLOS provisions referring to “other rules of international law”, “the rights and duties of other States”, and “other pertinent rules of international law”.¹⁴ The Tribunal, however, found that these provisions were not pertinent and applicable in the present case. Thus, it acknowledged that the question of immunity was not covered by any provision of the Convention, meaning that, in principle, it should not have jurisdiction over the issue.

It is at this point that, crucially, the Tribunal turned to the shaky ground of the jurisdiction over incidental questions. Having found it necessary to assess whether “there is *any other justification* for it to exercise jurisdiction over the issue of the immunity of the Marines”,¹⁵ the Tribunal considered whether the issue of the entitlement to exercise jurisdiction over the incident “could be *satisfactorily* answered without addressing the question of the immunity of the Marines”.¹⁶ In this respect, the Tribunal found that, since immunity from jurisdiction “operates as an exception to an otherwise-existing right to exercise jurisdiction”, such an exception “forms an integral part of the Arbitral Tribunal’s task to determine which Party may exercise jurisdiction over the Marines”. In the Tribunal’s view, it “could not provide a *complete answer* to the question as to which Party may

¹¹ Award, para. 227.

¹² Award, para. 367.

¹³ Award, para. 75(2)(f).

¹⁴ As a subsidiary argument, Italy attempted to link the question of immunity also to Art. 297 UNCLOS. See Award, paras. 779 ff.

¹⁵ Award, para. 803 (emphasis added).

¹⁶ Award, para. 805 (emphasis added).

exercise jurisdiction without incidentally examining whether the Marines enjoy immunity”. By referring only to one judicial precedent, together with some pieces of scholarship, the Tribunal stated that the issue of immunity “belongs to those ‘questions preliminary or incidental to the application’ of the Convention”.¹⁷ Accordingly, it found that:

while the Convention may not provide a basis for entertaining an independent immunity claim under general international law, the Arbitral Tribunal’s 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.¹⁸

As known, the Tribunal then proceeded in analyzing on the merits the question at hand and concluded that, since the two marines enjoyed immunity in relation to the incident, India was precluded from exercising its jurisdiction over the marines.¹⁹ It is thus fair to observe that what was supposed to be a mere incidental question finally turned out to be the crucial question for the case. As has been rightly noted, given that the main question of jurisdiction had been resolved in the sense that both parties had concurrent jurisdiction over the incident, “had the Tribunal bypassed the question of immunity, India would have walked away with a binding award affirming its jurisdiction”.²⁰

The final outcome of the case, however, rests on murky legal reasoning. It is not by chance that the Tribunal’s approach as to its jurisdiction over the question of immunity met with strong dissent by two judges. According to Judge Robinson, the Tribunal should have declined jurisdiction over the whole dispute because the “external” issue of the immunity of the marines was the core element of the dispute, and not an incidental one. The “original error” of the Majority was the mischaracterisation of the dispute, which led, in Judge Robinson’s opinion, to a “cascade of errors”, including the Majority’s failure to properly consider and apply the law relating to incidental questions in light of the relevant case law.²¹ Less radically, though still dissenting, Dr Rao argued that, instead of taking a global approach to the dispute, the Tribunal should have characterised the case as one involving “two distinct and separate disputes”, one on the entitlement of jurisdiction over the incident and the other concerning the immunity of the two marines. It is only over the first dispute that the Tribunal should have exer-

¹⁷ Award, para. 808, referring to *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Judgment of 25 August 1925, PCIJ Series A, No. 6, p. 18 ff., and to CHENG, *General Principles of Law as applied by International Courts and Tribunals*, Cambridge, 1987 (first published 1953), p. 266; KOTUBY JR and SABOTA, *General Principles of Law and International Due Process*, Oxford, 2017, pp. 159-160.

¹⁸ Award, para. 809. In a slightly different wording the Tribunal concluded 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” (para. 811).

¹⁹ Award, paras. 838 ff.

²⁰ METHYMAKI and TAMS, *cit. supra* note 3. In similar terms, RAJU, *cit. supra* note 3.

²¹ Dissenting opinion of Judge Robinson, paras. 80-81.

cised its jurisdiction without entertaining a claim that fell outside the scope of the Tribunal's adjudicatory power and could not be considered as "incidental" to the question of the entitlement of jurisdiction over the incident.²²

3. COMPROMISSORY CLAUSES AND THE OUTSIDE WORLD

Already in themselves, the two dissents convey how controversial is the ground upon which the Tribunal decided to exercise its jurisdiction over the question of immunity. In order to fully appreciate the reasons why the *Enrica Lexie* award stimulates the debate surrounding the question of jurisdiction over matters falling outside the scope of compromissory clauses some preliminary considerations are in order.

It is not unusual for international tribunals whose jurisdiction is based on compromissory clauses to decide issues and apply rules that are external to the scope of the relevant treaty containing the compromissory clause. Even if compromissory clauses limit the exercise of jurisdiction only to a certain set of disputes concerning the interpretation and application of the relevant treaty, an international tribunal should be able to resort to other rules of international law that may come into play in the process of adjudicating a dispute. That is the reason why the law applicable by international tribunals is usually not confined to the treaty whose interpretation and application is disputed. For instance, while under Article 288(1) UNCLOS, courts and tribunals constituted according to the Convention have jurisdiction over "any dispute concerning the interpretation and application of the Convention", Article 293(1) provides that the law applicable by such courts and tribunals shall be the Convention "and other rules of international law not incompatible with the Convention".

There are at least two instances in which it is well-established that international tribunals may decide upon external issues and applying external law. First, *secondary* or *foundational rules* are often applied to settle issues which are not regulated by the disputed treaty.²³ Issues whose settlement in the course of proceedings require the application of general principles of procedure, the law of treaties, the rules on State responsibility or rules on diplomatic protection are often decided by applying these external norms.²⁴ Second, and relatedly, external *primary rules* can be applied to assist the interpretation and application of the disputed treaty. To assist the *interpretation* of the disputed treaty, external primary

²² Concurring and Dissenting opinion of Dr Rao, conclusions.

²³ *Arctic Sunrise Arbitration (Netherlands v. Russia)*, Award on the Merits of 14 August 2015, PCA-Case No. 2014-02, para. 190. See also *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, Award of 5 September 2016, PCA-Case No. 2014-07, para. 208. In both decisions the arbitral tribunals held that "in order properly to interpret and apply particular provisions of the Convention, it may be necessary for a tribunal to resort to foundational or secondary rules of general international law such as the law of treaties or the rules of State responsibility". See further *infra* note 27.

²⁴ See PAPADAKI, "Compromissory Clauses as the Gatekeepers of the Law to be 'Used' in the ICJ and the PCIJ", *Journal of International Dispute Settlement*, 2014, p. 560 ff.

rules may be imported through the gate of the principle enshrined in Article 31(3) (c) of the 1969 Vienna Convention on the Law of Treaties.²⁵ When it comes to assisting the *application* of the disputed treaty, external rules may be referred to if the disputed treaty itself expressly permits this in a so-called “referral clause”.²⁶ In such cases, the disputed treaty incorporates external rules, meaning that the disputed provision containing the referral clause will be interpreted and applied also in light of the external rules referred to by the provision.

Each instance sketched above is well-established in theory but in practice presents its own hurdles. Consider for instance the application of the secondary rules of State responsibility. No one would deny that, absent special rules provided by the relevant treaty, an international tribunal is entitled to apply the general rules concerning, for instance, the attribution of conduct or the issue of reparation.²⁷ More controversial is the case of defences based on non-reciprocal countermeasures. A respondent State may invoke the law on countermeasures to justify a conduct which the applicant State claims is a violation of a treaty between them. The treaty in question may limit the jurisdiction of any specified adjudicative body to disputes relating to the treaty’s interpretation and application. If so, the question is whether a tribunal can address a countermeasures defence, which would entail engaging with an assessment of the prior internationally wrongful act, allegedly committed by the applicant State, in a field partially or totally alien to the treaty providing for the jurisdictional clause. In the most recent *ICAO Council* cases, the International Court of Justice (ICJ) answered this question in the affirmative, holding that such an assessment of external issues upon which the defence is grounded would be possible “for the exclusive purpose of

²⁵ See e.g. *South China Sea Arbitration (Philippines v. China)*, PCA-Case No. 2013-19, Award on Jurisdiction and Admissibility of 29 October 2015, para. 176: “[t]he Tribunal is satisfied that Article 293(1) of the Convention, together with Article 31(3) of the Vienna Convention on the Law of Treaties, enables it in principle to consider the relevant provisions of the CBD for the purposes of interpreting the content and standard of Articles 192 and 194 of the Convention”. See also para. 282.

²⁶ See e.g. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, p. 46 ff., para. 63, where the Court excluded that Art. 41 of the 1975 Statute of the River Uruguay constituted a “referral clause”: “Consequently the various multilateral conventions relied on by Argentina are not, as such, incorporated in the 1975 Statute. For that reason, they do not fall within the scope of the compromissory clause and therefore the Court has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder”. See FORTEAU, “Regulating the competition between international courts and tribunals. The role of *ratione materiae* jurisdiction under Part XV of UNCLOS”, *The Law and Practice of International Courts and Tribunals*, 2016, p. 195 ff.

²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ Reports 2007, p. 43 ff., para. 149. See more recently, ITLOS, *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion of 2 April 2015, where the ITLOS held that, in order to examine the questions submitted, it would have been “guided by relevant rules of international law on responsibility of States for internationally wrongful acts” (para. 143).

deciding a dispute which falls within its jurisdiction”.²⁸ While the Court referred here to the ICAO Council and its dispute settlement function, its findings may be generalized and considered applicable to any international tribunal.²⁹ Still, practice remains inconsistent among international adjudicative bodies, with the WTO dispute settlement organs³⁰ and NAFTA investment tribunals³¹ rejecting, for reasons traceable to their limited jurisdiction, the possibility of examining “external” violations even if for the sole purpose of assessing the applicability of a circumstance precluding wrongfulness, that is to say the validity of a defence based on a non-reciprocal counter-measure.³²

Also, when it comes to those instances where external primary norms are at stake there are a number of issues that are still subject to intense debate. Resort to primary norms through the principle of systemic integration under Article 31(3) (c) of the Vienna Convention should be limited to the purpose of interpreting the treaty over which a tribunal has jurisdiction and cannot constitute a *de facto* application of the external norm. This would have the effect of stretching the boundaries of the jurisdiction, inasmuch as a tribunal may even end up considering issues relating to the correct implementation of an external primary norm. Yet, in practice, the line between interpretation purposes and *de facto* application of external norms has often been subject to diverging approaches by international courts and tribunals.³³

²⁸ *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)* and *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)*, Judgments of 14 July 2020, para. 61. On these judgments, see the contribution by FORLATI in this volume.

²⁹ See VENTOURATOU, “Defences and Indispensable Incidental Issues: The Limits of Subject-Matter Jurisdiction in View of the Recent ICJ ICAO Council Judgments”, EJIL: Talk!, 23 July 2020, available at: <<https://www.ejiltalk.org/defences-and-indispensable-incident-issues-the-limits-of-subject-matter-jurisdiction-in-view-of-the-recent-icj-icao-council-judgments/>>; and CANNIZZARO and BONAFÉ, “Fragmenting International Law through Compromissory Clauses? Some Remarks on the Decision of the ICJ in the *Oil Platforms* case”, EJIL, 2005, p. 492 ff., with reference to the ICJ. See *contra* the declaration of Judge Gevorgian appended to the judgements in the *ICAO Council* cases.

³⁰ See most notably the WTO Appellate Body Report of 6 March 2006 in *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R. The approach taken by WTO dispute settlement organs is discussed, among others, by GRADONI, “Four Corners’ Doctrine”, in RUIZ-FABRI (ed.), *Max Planck Encyclopedia of International Procedural Law*, February 2018.

³¹ See e.g. *Archer Daniels Midland Co. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award of 26 September 2007; *Corn Products Int’l, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility of 15 January 2008.

³² A detailed account of the issue is provided by CALAMITA, “Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation”, *Georgetown Journal of International Law*, 2011, p. 233 ff.

³³ For reference to the ICJ practice, see e.g. PAPADAKI, *cit. supra* note 24; see also RACHOVISTA, “The Principle of Systemic Integration in Human Rights Law”, *ICLQ*, 2017, p. 557 ff.

Finally, the case of “referral clauses” may also raise the question of their proper interpretation. In some cases, they can in fact extend the jurisdiction by incorporating external primary norms for purposes of application of the disputed treaty.³⁴ However, in other cases, they are so broadly formulated that it may be questionable whether they import primary obligations capable of being litigated before a tribunal or simply have the purpose of assisting the interpretation of the relevant provision wherein they are included (being in such cases nothing more than express references to the principle of systemic integration). Apart from the *Enrica Lexie* award, where, as seen, the Tribunal found the alleged *renvoi* provisions invoked by Italy to be inapplicable without really enquiring on their scope,³⁵ the question recently arose before the ICJ in the *Immunities and Criminal Proceedings* case. In this case, the Court found that the reference to the principle of sovereign equality in Article 4 of the UN Convention against Transnational Organized Crime (Palermo Convention) does not incorporate the customary rules relating to immunities of States and State officials, therefore the dispute between the parties over the immunity did not concern the interpretation and application of the Palermo Convention.³⁶ The Court arrived at this conclusion after a rather detailed interpretation of the provision but still met with several dissents.³⁷ This shows how controversial the interpretation of provisions referring to external norms may be when it comes to assessing whether they extend the scope of jurisdiction of a tribunal to claims of violations of external obligations or simply work as interpretative references of the disputed treaty. It is submitted, at any rate, that even when a referral clause is deemed to be capable of sustaining a claim over an external issue, such a claim cannot be an “independent” claim lacking any attachment to the disputed treaty. A claim based on a referral clause should still be framed as a question concerning the interpretation and application of the treaty. As the ICJ recently put it, with respect to an asserted referral clause to immunity rules in the 1955 United States-Iran Treaty of Amity, for the questions of immunities to be relevant, “the breach of international law on immunities would have to be capable of having some impact on compliance with the right guaranteed by [the referral clause]”.³⁸

³⁴ See e.g. Arts. 19 and 39 UNCLOS; FORTEAU, *cit. supra* note 26, pp. 195-196; TZENG, “Supplemental Jurisdiction under UNCLOS”, *Houston Journal of International Law*, 2016, p. 535 ff.

³⁵ See the dissenting opinion of Judge Robinson, who elaborated on the issue and found that “[a]s a matter of law, those Articles do not constitute a *renvoi* to customary international law [...] the Articles are relevant as part of the applicable law, but they have no relevance for jurisdictional purposes” (para. 31).

³⁶ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment of 6 June 2018, ICJ Reports 2018, p. 292 ff., para. 102.

³⁷ Joint Dissenting Opinion of Vice-President Xue, Judges Sebutinde and Robinson and Judge *ad hoc* Kateka.

³⁸ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 13 February 2019, ICJ Reports 2019, p. 7 ff., para. 70.

Notwithstanding the difficulties that practice shows with respect to each instance of recourse to external primary or secondary rules in order to decide external issues, it seems clear that, in principle, such instances cannot entail an “expansion” of the jurisdiction of an international tribunal. There is no symmetry between the breadth of the law applicable by an international tribunal and its jurisdiction. A “cardinal distinction”³⁹ between jurisdiction and applicable law has often been emphasized in international jurisprudence, and particularly by UNCLOS tribunals. In *Arctic Sunrise*, an Annex VII Tribunal clearly held that “Article 293(1) does not extend the jurisdiction of a tribunal [...] [It] is not [...] a means to obtain a determination that some treaty other than the Convention has been violated, unless that treaty is otherwise a source of jurisdiction [as in the cases governed by Article 288(2)], or unless the treaty otherwise directly applies pursuant to the Convention”.⁴⁰ Moreover, as seen, even in the case of referral clauses, which is referred to in the last part of the quoted passage (“unless the treaty [or a customary rule] otherwise directly applies pursuant to the Convention”), a dispute over the external issue will be relevant and fall within the tribunal’s jurisdiction only if it is genuinely connected with the dispute over the referral clause, meaning that the dispute may be deemed to be one concerning the interpretation and application of the treaty.

At this point, one may wonder whether there are any other avenues for an international tribunal to decide external issues and apply external law. The question of immunity, as treated by the Tribunal in the *Enrica Lexie* award, clearly does not fall within any of the instances considered thus far. Besides not constituting an issue involving a secondary or foundational norm, the question of immunity was not taken into account for reasons of interpretation, nor because it formed part of a referral clause. The question of immunity was raised by Italy as a claim over an external primary norm whose application in the case at hand was challenged by India. The Tribunal decided the immunity issue and included its findings in the operative part of the award. How was that possible? As seen, the Tribunal relied on a third instance in which it is possible for international tribunals to decide external issues and apply external law.

³⁹ *Mox Plant Case (Ireland v. United Kingdom)*, Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures, Order No. 3 of 24 June 2003, para. 19. See also *The Eurotunnel Arbitration*, Partial Award of 30 January 2007, para. 152.

⁴⁰ Similarly, but with respect to customary law, ITLOS, “*ARA*” *Libertad Case (Argentina v. Ghana)*, Order of 15 December 2012, Separate Opinion of Judges Wolfrum and Cot, para. 7. It should be noted that in a much-criticized line of cases some UNCLOS tribunals overstretched the scope of their jurisdiction by resorting to the applicable law clause (Art. 293 UNCLOS) in order to exercise their jurisdiction over non-UNCLOS issues. See ITLOS, *M/V Saiga (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, paras. 155, 159 and 183(9); *Guyana v. Suriname*, Award of 17 September 2007, paras. 406, 487(ii) and 488; ITLOS, *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment of 14 April 2014, paras. 350-362 and 452(13). For a discussion, see MAROTTI, “Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals”, in DEL VECCHIO and VIRZO (eds.), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*, Cham, 2019, p. 384 ff.

4. THE THIRD WAY OF THE JURISDICTION OVER INCIDENTAL QUESTIONS

The third potential way for a tribunal to exercise jurisdiction over external issues looks directly at the scope of the compromissory clause and, particularly, at the character of the dispute brought pursuant to it. Here is where the notion of jurisdiction over incidental questions finds its place. In order to understand if and how compromissory clauses might leave some room for jurisdiction over external issues, it is worth starting from the general assumptions underlying the function of compromissory clauses.

States' consent to the jurisdiction of international tribunals given through compromissory clauses often may turn out as a stretch of the reality of international disputes. As acknowledged by the ICJ "[o]ne situation may contain disputes which relate to more than one body of law".⁴¹ States attempt to limit the possible multifaceted character of international disputes through compromissory clauses. Such clauses artificially produce a "compartmentalizing" effect, meaning that they "tend to draw a dividing line between the category of disputes which fall within their scope [...] from those which fall outside their scope".⁴² It is the task of international adjudicative bodies to set a balance between the need to preserve such a "compartmentalization", which reflects the consent given by States, and the effective exercise of the judicial function, which cannot be frustrated by the multifaceted character of an international dispute. The ICJ noted that "it cannot decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important".⁴³ At the same time, States cannot use a compromissory clause "as a vehicle for forcing an unrelated dispute with another State"⁴⁴ before an international tribunal. The required balance may be summarized – and generalized – once again with the Court's words whereby it "must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its full extent".⁴⁵

On these premises, it may be said that the jurisdiction over incidental questions is a tool to exercise jurisdiction "to its full extent". In fact, the notion refers to the capacity of international tribunals to decide external issues, involving the application of external law, which are incidental to the principal dispute and whose determination is necessary for the exercise of the principal jurisdiction

⁴¹ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, ICJ Reports 2011, p. 70 ff., para. 32. See also *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment of 24 September 2015, ICJ Reports 2015, p. 592 ff., para. 32.

⁴² CANNIZZARO and BONAFÉ, *cit. supra* note 29, p. 484.

⁴³ *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment of 24 May 1980, ICJ Reports 1980, p. 3 ff., para. 36.

⁴⁴ Separate Opinion of Judge Koroma in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, *cit. supra* note 41, para. 7.

⁴⁵ *Continental Shelf (Libya/Malta)*, Judgment of 3 June 1985, ICJ Reports 1985, p. 13 ff., para. 19.

over the main dispute.⁴⁶ There seems to be general agreement among scholars as to the power of international tribunals to decide such incidental questions. Judicial practice, however, is rather fragmented.

Recent instances in which the question arose as to the exercise of jurisdiction over incidental questions falling outside the principal jurisdiction relate to questions necessary to establish the *territorial jurisdiction* of the relevant tribunal. The International Criminal Court (ICC) has recently been called upon to determine whether Palestine can be considered “the State on the territory of which the conduct [...] occurred” under Article 12(2)(a) of the Rome Statute.⁴⁷ It relied on the interpretation of such provision, and particularly on the fact that it refers to a State Party to the Statute, to conclude that Palestine’s accession to the Rome Statute followed the correct and ordinary procedure “regardless of Palestine’s status under general international law”.⁴⁸ In the wake of the Ukraine-Russia strife, investment tribunals have also faced a similar situation when called upon to determine their territorial jurisdiction with respect to allegedly wrongful conduct committed in disputed territories.⁴⁹

These cases, however, seem less controversial than cases where the exercise of jurisdiction over incidental questions affects the jurisdiction *ratione materiae* of an international tribunal. When it comes to decide whether a given conduct has taken place on a given territory (for the sole purpose of establishing the jurisdiction *ratione loci*) and the incidental issue is represented by the determination of whether that territory belongs or not to a State party, the power to make such determinations finds its source in the principle whereby international tribunals have the power to determine their own competence (competence-competence).⁵⁰ Moreover, the treaty establishing the jurisdiction (or the tribunal itself) may expressly refer to the notion of *territory* which has to be interpreted by the relevant tribunal. This interpretation, in cases such as that of the ICC, may also benefit from an institutional setting (the accession procedure) which helps the tribunal

⁴⁶ See among others LOVE, “Jurisdiction over Incidental Questions in International Law”, ASIL, 2017, p. 316 ff.; TZENG, “The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction”, *New York University Journal of International Law & Politics*, 2018, p. 447 ff.; HARRIS, “Incidental Determinations in Proceedings under Compromissory Clauses”, *ICLQ*, 2021, p. 417 ff. Further references in MAROTTI, *cit. supra* note 40.

⁴⁷ ICC, Pre-Trial Chamber I, Decision of 5 February 2021 on the “Prosecution request pursuant to article 19(3) for a ruling on the Court’s territorial jurisdiction in Palestine”, ICC-01/18-143.

⁴⁸ *Ibid.*, para. 102. The Court stated that “[b]ased on the principle of the effectiveness, it would indeed be contradictory to allow an entity to accede to the Statute and become a State Party, but to limit the Statute’s inherent effects over it”.

⁴⁹ See among others ZARRA, “L’applicabilità dei trattati di protezione degli investimenti al caso della Crimea”, *RDI*, 2019, p. 454 ff.; TZENG, “Investment on Disputed Territory: Indispensable Parties and Indispensable Issues”, *Brazilian Journal of International Law*, 2017, p. 122 ff.

⁵⁰ See generally CRAWFORD, “Continuity and Discontinuity in International Dispute Settlement: An Inaugural Lecture”, *Journal of International Dispute Settlement*, 2010, p. 15 ff.

in discharging its role in determining the territorial jurisdiction.⁵¹ In the case of investment tribunals the determination of the meaning of territory may require an assessment of the legal and factual reality of the disputed territory. Even in such case, however, there is always a connection between such incidental determinations over external issues and the relevant treaty establishing the jurisdiction. It is the treaty itself that links the territorial jurisdiction of the tribunal to a legal or factual reality that, while “external” to the subject-matter jurisdiction, may be relevant to assess whether an investor of one Contracting Party has made an investment “on the territory of the other Contracting Party”.⁵²

In the case of jurisdiction over incidental issues that do not fall within the jurisdiction *ratione materiae* of an international tribunal, there is no such a direct treaty link between the potential external issue and the tribunal’s jurisdiction as delimited by the jurisdictional clause. When it comes to assessing whether an external issue should be incidentally entertained in order to decide the principal dispute – and not simply the jurisdiction *ratione loci* – the relevant link can only be found between the external issue and the dispute itself. In fact, the treaty is apparently clear in limiting the jurisdiction to disputes concerning its interpretation and application. This makes it much harder to draw general criteria as to the scope and limit of such jurisdiction. There may be an infinite variety of disputes with infinite degrees of connection with external issues that may be or may not be caught by the jurisdiction of international tribunals. It follows therefore that most of the solutions to the issues concerning the extent of jurisdiction over incidental questions are to be found on a case-by-case basis, and that international tribunals enjoy a rather wide discretion in this context. However, the lack of clarity in this area means that the jurisdiction over incidental questions is seldom expressly invoked in judicial practice, and that general statements on its contours are rare.

As seen, in the *Enrica Lexie* award the Tribunal relied only on the Permanent Court of International Justice (PCIJ) statement in the *Case Concerning Certain German Interests in Polish Upper Silesia* whereby:

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 pre-*

⁵¹ As the Court indeed noted, “given the complexity and political nature of statehood under general international law, the Rome Statute insulates the Court from making such a determination, relying instead on the accession procedure and the determination made by the United Nations General Assembly. The Court is not constitutionally competent to determine matters of statehood that would bind the international community. In addition, such a determination is not required for the specific purposes of the present proceedings or the general exercise of the Court’s mandate. As discussed, article 12(2)(a) of the Statute requires a determination as to whether or not the relevant conduct occurred on the territory of a *State Party*, for the sole purpose of establishing individual criminal responsibility” (Decision of 5 February 2021, *cit. supra* note 47, para. 108).

⁵² Art. 1 of the 1998 Bilateral Investment Treaty between Ukraine and Russia. See ZARRA, *cit. supra* note 49, p. 463.

liminary 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.⁵³

As aptly noted by Judge Robinson in his dissenting opinion, this case does not really help in identifying the conditions for the exercise of the jurisdiction over incidental questions, and particularly whether an external question might be considered as incidental to the principal dispute.⁵⁴ In Judge Robinson's view, "[t]he later cases show that since a court or tribunal would normally not have jurisdiction over the incidental question, it is of the greatest importance to ensure that the question is properly characterized as incidental".⁵⁵

Curiously enough, the Tribunal did not make any reference to the most recent case law dealing with the issue, which, by the way, comes precisely from UNCLOS Annex VII tribunals. Suffice it to recall here that in *Chagos Marine Protected Area Arbitration* the arbitral tribunal provided the most elaborated statement on the jurisdiction over incidental questions. Even though only *obiter*, the tribunal admitted the possibility of such jurisdiction but approached it in a more cautious way than the PCIJ.⁵⁶ According to the tribunal:

where a dispute concerns the interpretation or application of the Convention, the jurisdiction of a Court or Tribunal pursuant to Article 288(1) extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute pre-

⁵³ *Case Concerning Certain German Interests in Polish Upper Silesia*, *cit. supra* note 17, p. 18 (emphasis added).

⁵⁴ Dissenting opinion of Judge Robinson, para. 45: "there is noticeably absent from the PCIJ's decision in this case any significant examination of the relationship between the incidental question over which the Court had no jurisdiction and the dispute over which it had jurisdiction; in particular, there is no discussion as to whether the incidental question was the real issue dividing the Parties; if it warranted that description, the Court would have had no jurisdiction over it since it did not relate to the interpretation or application of the Geneva Convention".

⁵⁵ *Ibid.*

⁵⁶ It should be incidentally noted that in the subsequent *South China Sea Arbitration*, the arbitral tribunal, although again only in an *obiter dictum*, apparently closed the doors on the possibility of a jurisdiction over external "necessary" issues, holding that it "might consider that the Philippines' Submissions could be understood to relate to sovereignty [such as to exclude the jurisdiction] if it were convinced that [...] the resolution of the Philippines' claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly"; *South China Sea Arbitration*, *cit. supra* note 25, para. 153 (emphasis added). In a similar vein, Judge Robinson argued that "[i]f the Majority is right that the dispute, as characterized by it, cannot be resolved without examining the issue of the immunity of the marines, then that would suggest that that issue is anything but an incidental question" (Dissenting Opinion of Judge Robinson, para. 41). See TZENG, "Investment on Disputed Territory", *cit. supra* note 49; LOVE, *cit. supra* note 46, pp. 319-320; for a critical view, MAROTTI, *cit. supra* note 40, pp. 397-398.

sented to it [...] The Tribunal 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.⁵⁷

From this passage it may be inferred that in order for the external issue to fall within the tribunal's jurisdiction two conditions should be met.

First, the determination over the external issue must be necessary to settle the main dispute, meaning that the decision over the main dispute cannot be reached without a prior determination over the external issue. This is what the PCIJ arguably had in mind when referring to questions *preliminary or incidental* to the application of the disputed treaty over which it had jurisdiction (the application of the Geneva Convention being "hardly possible" without engaging with the external issue).⁵⁸

Secondly, the external issue must be "ancillary" or "incidental" to the main dispute. This requirement "essentially touches upon that of how the dispute [...] should be characterised".⁵⁹ It means that a tribunal should not conflate the incidental issue and the main dispute. In other words, the incidental (external) issue cannot constitute the real issue of the case and the object of the claim. As the *Chagos* tribunal held, "it is for the Tribunal itself 'while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties' [...] and in the process 'to isolate the real issue in the case and to identify the object of the claim'".⁶⁰ In the process of characterisation of the dispute, the tribunal should in turn identify incidental questions, which can be addressed only to the extent that they are necessary to resolve the main dispute. As a specification of such requirement, the *Chagos* tribunal referred to the "minor" character of the necessary and incidental issue. Indeed it may be argued that when a decision over a "major" external issue turns out to be necessary for the settlement of the dispute, this is a strong hint that the external issue is not really incidental but constitutes the real issue in the case.

As one can easily see, the conceptual framework of the jurisdiction over incidental questions, as provided by the *Chagos* award, appears rather vague. Moreover, the requirements set out therein have never been found to be fulfilled in practice, so it remains quite hard to picture an incidental issue meeting the

⁵⁷ *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award of 18 March 2015, PCA Case No. 2011-03, paras. 220-221.

⁵⁸ As SCHATZ, *cit. supra* note 3, aptly notes the Court here "equat[ed] the term 'incidental' with 'preliminary'". See also the Dissenting Opinion of Judge Robinson, para. 45.

⁵⁹ *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. The Russian Federation)*, Award Concerning the Preliminary Objections of the Russian Federation, 21 February 2020, PCA Case No. 2017-06, para. 194.

⁶⁰ *Chagos Marine Protected Area Arbitration, cit. supra* note 57, para. 208, quoting the ICJ in *Fisheries Jurisdiction (Spain v. Canada)*, Judgment of 4 December 1998, ICJ Reports 1998, p. 432 ff., para. 30, and *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, ICJ Reports 1974, p. 457 ff., para. 30.

conditions for the exercise of jurisdiction pursuant to the *Chagos* scheme.⁶¹ As already noted, a practical application of such test requires a case-by-case approach which is also inevitably discretionary-based. Characterising a dispute or determining whether external issues are “necessary” and “minor” enough to be incidentally decided are all exercises subject to subjective evaluations depending on a number of factors, including the way such issues are framed by the parties to a dispute and the nature of the rights and obligations at stake.⁶² In any case, the *Chagos* award provides, so far, the most detailed elaboration of the limits for the exercise of a jurisdiction which, in itself, extends beyond States’ consent to international adjudication. Yet this case was completely neglected by the *Enrica Lexie* tribunal.

5. CONCLUSION: THE *ENRICA LEXIE* AWARD BETWEEN FORM AND REALITY

Notwithstanding the uncertainties surrounding the jurisdiction over incidental questions, it may be seriously doubted that the external issue of immunity in the *Enrica Lexie* case met the requirements of such jurisdiction as set out in the *Certain German Interests* judgment and, most notably, in the *Chagos* award described above.⁶³

As seen, Judge Robinson basically contested the “ancillary” nature of the issue, claiming that the Tribunal erred in its characterisation of the dispute. The real issue of the case, in Judge Robinson’s opinion, was a dispute over the immunity issue. To this, one may also add that since the question of immunity finally turned out as a decisive question for the outcome of the case, it was not properly a mere “minor” issue related to the UNCLOS dispute. In any case, one

⁶¹ In the more recent *Ukraine v. Russia* case, *cit. supra* note 59, the Annex VII tribunal endorsed the *Chagos* approach, but found that “the Parties’ dispute regarding sovereignty over Crimea is not a minor issue ancillary to the dispute concerning the interpretation or application of the Convention” (paras. 193-195).

⁶² See e.g. TALMON, “The Chagos Marine Protected Area Arbitration: Expansion of the Jurisdiction of UNCLOS Part XV Courts and Tribunals”, ICLQ, 2016, p. 934 ff., arguing that, even if tribunals often stress the fact that the characterisation of a dispute should be made on an objective basis, this process remains an “inherently subjective exercise”. Indeed, to characterise a dispute, tribunals are called to weigh and balance different factors, including the parties’ submissions and other contextual elements which may lend themselves to different weighing and balancing. See also CROSATO NEUMANN, “Sovereignty disputes under UNCLOS: some thoughts and remarks on the Chagos Marine Protected Area Dispute”, Cambridge International Law Journal Blog, 7 August 2015, available at: <<http://cilj.co.uk/2015/08/07/sovereignty-disputes-under-unclos-some-thoughts-and-remarks-on-the-chagos-marine-protected-area-dispute/>>, referring to the assessment of the incidental nature of the issue, and particularly of its “minor” character, and arguing that “[t]his determination would not only need to be made on a case-by-case basis, but would also be very subjective, since it would depend on the judge or arbitrator’s connection and sensitivities towards a dispute”. See generally HARRIS, “Claims with an Ulterior Purpose: Characterising Disputes Concerning the “Interpretation or Application” of a Treaty”, *The Law and Practice of International Courts and Tribunals*, 2019 p. 279 ff.

⁶³ RONZITTI, *cit. supra* note 1, pp. 947-948; SCHATZ, *cit. supra* note 3; RAJU, *cit. supra* note 3.

may still conclude that the Tribunal was right in characterising the dispute as one concerning the entitlement of jurisdiction over the incident, thus concerning the interpretation and application of the Convention. After all, the process of characterisation of a dispute may be subject to divergent approaches in the weighing and balancing of the relevant elements that a tribunal should take into account to isolate the real issue of the case.

More problematic, in fact, appears the fulfilment of the requirement of “necessity”. If the logic underlying the jurisdiction over incidental questions is arguably based on the necessary character of the decision over the external issue, meaning that the exercise of the principal jurisdiction requires a prior determination of the incidental issue, it is evident that the question of immunity was not a “necessary” issue. The determination of what was, in the Tribunal’s view, the main dispute, viz. the question of the entitlement of jurisdiction over the incident pursuant to Articles 92 and 97 UNCLOS, was clearly not subject to a necessary prior determination of the question of immunity of the two marines. Indeed, the same Tribunal acknowledged that “it was conceivable that the dispute between the Parties would be decided without a determination on the question of immunity”. The finding that the parties have concurrent jurisdiction would have settled the UNCLOS dispute, even without any other findings on non-UNCLOS issues. It is worth recalling in this respect that even if immunity should be construed as a primary rule constituting an exception to the right to exercise jurisdiction,⁶⁴ the ICJ made it clear that “jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction”.⁶⁵

At a closer look, it thus seems that the Tribunal misconceived the “necessity” requirement for the exercise of jurisdiction over incidental questions. The decision over the issue of immunity was not necessary for the determination of the main dispute but was considered necessary for rendering a *satisfactory* and *complete* answer to the question as to which Party may exercise jurisdiction over the incident.

The law relating to the jurisdiction over incidental questions, as (imprecisely) defined by the relevant case law, does not provide, in the end, a sound legal basis for the exercise of jurisdiction over the non-UNCLOS dispute relating to immunity. In this sense, the award contributes to watering down the – already in themselves quite murky – conditions for the extension of jurisdiction over external issues. One may also argue that the award simply confirms that the scope and limits of the jurisdiction over incidental questions are also affected by the nature of the rights at stake. The “rule-exception” relation between jurisdiction and immunity might imply that less strict conditions are required for the jurisdiction over incidental questions involving rules that provide for exceptions to the disputed rights. Still, one is left with the impression that, now as much as ever,

⁶⁴ METHYMAKI and TZANAKOPOULOS, “Freedom With Their Exception: Jurisdiction and Immunity as Rule and Exception”, in BARTELS and PADDEU (eds.), *Exceptions and Defences in International Law*, Oxford, 2020, p. 225 ff.

⁶⁵ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, ICJ Reports 2002, p. 3 ff., para. 59.

more predictability in this field is needed, not least because the jurisdiction over incidental questions may risk becoming a potentially unlimited avenue for the expansion of the jurisdiction of international tribunals.

Even if the Award's treatment of the issue of immunity does not fit well with the framework of jurisdiction over incidental questions, its rationale may perhaps be found in the realistic, rather than formalistic, approach taken by the Tribunal in handling the dispute. The reference to the need for a *satisfactory* and *complete* answer to the whole dispute reflects the Tribunal's awareness that, without settling the dispute over immunity, the actual controversy between Italy and India would be only partially resolved. Due to the objective limits of its jurisdiction *ratione materiae*, the Tribunal attempted to anchor such a realistic approach to the only potentially available avenue for the exercise of jurisdiction over an external issue, that of incidental questions. But reality in this case did not match well with form, and the effective settlement of a longstanding dispute arguably came at the expense of a possible contribution to a consistent development of the law governing the jurisdiction over incidental questions.