Chapter 2

Incidental (Accessory) Jurisdiction

1 Introduction

Having analyzed the principal jurisdiction of the Tribunal (mainline jurisdiction or jurisdiction on the merits) attention must now be paid to its incidental or accessory jurisdiction. By exclusion, this incidental competence covers issues other than the principal dispute, although directly or indirectly linked to it, and, as the case may be, susceptible to a specific decision, whether it be part of, or separated from, the judgment. Terminologically speaking, the adjectives “accessory” and “incidental” will be used as synonyms. In my opinion, it is possible to distinguish a slight difference between one and the other. In this respect, it is true that, in dealing with the jurisdiction of the International Court of Justice, the use of the word “incidental” is frequent, although the term “accessory” is also used. The word “incidental” is also found in the Rules of the International Tribunal for the Law of the Sea, in which its section dealing with the majority of these proceedings (arts. 89–106) is entitled “Incidental Proceedings.” Some judges of the Hamburg Tribunal also use this expression in their academic works while others use the alternate as well. Without putting into question the choice of the word “incidental” when referring to this type of jurisdiction, I find preferable the term “accessory” as being more accurate than the other. In my opinion, while the word “accessory” may univocally designate the whole of this jurisdiction, the term “incidental” seems to designate not only the whole but also, more precisely, a particular part of the competence which is defined by its own sub-set of characteristics. Thus, “incidental” jurisdiction, like “accessory,” may mean the competence to deal with all issues that

1 The online Oxford English Dictionary defines “accessory,” inter alia, as “(noun) a thing which can be added to something else in order to make it more useful, versatile or attractive (…), and (adjective) contributing to or aiding an activity or process in a minor way; subsidiary or supplementary.”


are not a part of the principal or mainline dispute (or point, in advisory jurisdiction). However, the term “incidental” jurisdiction can also allude, in particular, to the competence to settle incidental issues through incidental proceedings. As we shall see below, the said incidental questions are endowed with distinct properties that make them different from the remaining issues that are settled by the Tribunal within the framework of its accessory jurisdiction. In this respect, not all questions decided by ITLOS in the exercise of its accessory competence may be regarded, strictly speaking, as incidental questions. The power of ITLOS to decide on its own competence when such competence is not questioned by the parties; or its power to ordinarily conduct the proceedings in the absence of disagreement about the particular step to be followed; or to clarify the content of a judgment, inter alia, these are all examples of its accessory jurisdiction without instituting (nor opening) incidental proceedings. On the other hand, there are other manifestations of its power, such as its jurisdiction to decide on a request for provisional measures, that must be dealt with in incidental proceedings. For this reason, the power of the Hamburg Tribunal to decide the latter will be called incidental jurisdiction stricto sensu in the paragraphs below.

Whatever the name, different manifestations of accessory jurisdiction have the two following features in common. Firstly, unlike principal jurisdiction, which is associated with “direct” consent, accessory jurisdiction doesn’t need direct or explicit consent by the parties; the consent is implicit in the creation of the tribunal or court itself. In this respect, these powers are inherent to the judicial institution’s own existence to the point of constituting a real conditio sine qua non and thus, essential, for it to comply with the functions for which it was created. That is the reason why, despite the fact that those powers are often explicitly recognized, they correspond to the tribunal even when they don’t appear in any text. In second place, accessory jurisdiction, as its name suggests, helps or assists to principal jurisdiction, on which it depends and to which it is connected, carrying out a secondary function in respect to it. Nonetheless, that dependence, accessoriness, subsidiarity or “incidentallity” must be understood in accurate terms: it is not, strictly speaking, that accessory jurisdiction depends on the principal to the point that if the latter disappeared the former would cease to exist as well; it is, more accurately understood, that accessory jurisdiction makes sense only because principal jurisdiction exists, as an auxiliary tool for implementation. The competence de la competence makes sense in determining whether the tribunal has

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5 The term “direct” is used by Rosenne, cit., p. 81.
6 Eiriksson, cit., p. 133.