General Principles of Law as Applied by International Courts and Tribunals

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CAMBRIDGE

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apply in one legal system and not another, not because the latter rejects it, but because the circumstances justifying its application in the one system are absent from the other. Therefore, in applying the same principle to a third system, it is necessary to ascertain whether, and to what extent, the circumstances justifying its application exist. Here the general principle is that a tribunal is incompetent to act beyond its jurisdiction. Where the limits of jurisdiction are binding upon the parties, the question of competence may be raised, either by the parties or *proprio motu* by the tribunal, whether municipal or international, at any stage of the proceedings.[21] But where the parties have the power to confer jurisdiction upon the tribunal or to extend it, once they have concurred in doing so in a given matter, either simultaneously or successively, either by express words or by acts conclusively establishing it, neither party may subsequently question the tribunal's competence. In such cases, it may be said that, since the procedural acts of the parties will, in proper cases, be interpreted as acceptance of the tribunal's jurisdiction, the possibility of raising such an objection will gradually disappear as the proceedings develop.

B. Jurisdiction over Incidental Questions

Where a tribunal has jurisdiction in a particular matter, it is also competent with regard to all relevant incidental questions, subject to express provision to the contrary. For instance, in virtue of Article 250 of the Treaty of Trianon, the Hungaro-Serb-Croat-Slovene Mixed Arbitral Tribunal was competent to adjudicate upon claims of Hungarian nationals for the restitution of their property. In the case of the *Compagnie pour la Construction du Chemin de Fer d'Ogulin à la Frontière, S. A.* (1926), the ownership of the property claimed was in dispute and the defendant contested the Tribunal's jurisdiction to decide the question of disputed ownership. The Tribunal held that the question of ownership was an incidental question and:—

" Incidental questions arising in the decision of a case ought to be examined by the judge competent to decide on the principal issue, unless the law provides otherwise; nothing in the Treaty of

[21] *Cf.* Pol.-Germ. M.A.T.: *Tiedemann Case* (1926), 7 T.A.M., p. 702, at p. 708. See *infra*, pp. 355 *et seq.*

Trianon excludes examination of the preliminary question concerning ownership from the jurisdiction conferred upon the Mixed Arbitral Tribunals by Article 250 of the said Treaty; in these circumstances, the Tribunal is competent to consider the application." [22]

In the *German Interests Case* (Jd.) (1925), the Permanent Court of International Justice held that:—

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

"The jurisdiction possessed by the Court under Article 23 in regard to differences of opinion between the German and Polish Governments respecting the construction and application of the provisions of Articles 6 to 22 concerning the rights, property and interests of German nationals is not affected by the fact that the validity of these rights is disputed on the basis of texts other than the Geneva Convention." [23]

It should, however, be mentioned that the effect of a decision on incidental questions is not exactly the same as that of a decision on the principal question, as will be seen in the Chapter dealing with the principle of *res judicata*.[24]

C. Competence to Indicate Interim Measures of Protection

What may perhaps be regarded as another form of extension of jurisdiction is the power of a tribunal to indicate provisional

[22] 6 T.A.M., p. 505, at p. 507. Transl. Pol.-Germ. M.A.T.: *Kunkel Case* (1925), *ibid.*, p. 974, at p. 977. *Zeltweg-Wolfsberg and Unterdrauburg-Woellan Railways Case* (Prel.Obj.) (1934), 3 UNRIAA, p. 1795, at p. 1803. *Cf.*, however, Greco-Bulg. M.A.T.: *Société Dospat-Dag Case* (1924), 4 T.A.M., p. 477; *Hatiboglou Case* (1925), 5 *ibid.*, p. 905.

[23] A. 6, p. 18. See also PCIJ: *Mavrommatis Palestine Concessions Case* (Jd.) (1924), A. 2, p. 28; *German Interests Case* (Merits) (1926), A. 7, pp. 25, 42; *Free Zones Case* (Jgt.) (1932), A/B. 46, pp. 114, 154–56; *Zeltweg-Wolfsberg and Unterdrauburg-Woellan Railways Case* (Prel.Obj.) (1924), 3 UNRIAA, p. 1795, at p. 1803.

Cf. also PCIJ: *Chorzów Factory Case* (Jd.) (1927), A. 9, p. 23; ICJ: *Corfu Channel Case* (Merits) (1949), *ICJ Reports 1949*, p. 4, at p. 23 *et seq.*

[24] *Infra*, pp. 350 *et seq.*