Jurisdiction and Admissibility in International Investment Law

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Abstract

The distinction between jurisdictional and admissibility issues in investment arbitration is becoming more and more relevant. This results from an emerging jurisprudence emphasizing that a tribunal that lacks jurisdiction will have to dismiss a case brought before it, while it has discretion whether to dismiss a claim for reasons of inadmissibility, in particular, because the latter defects may be curable. Conceptually this difference is rooted in the idea that "jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal", [1] with the consequence that "[t]he concept of 'admissibility' refers to the varied reasons that a tribunal, although it has jurisdiction, may decline to hear a case or a claim."[2]

This overview article will briefly outline a number of issues in regard to which investment tribunals have disagreed whether to qualify them as jurisdictional or admissibility-related. These range from so-called waiting periods, requiring investors to first seek amiable dispute settlement or to litigate before national courts, to express or implied "in accordance with host state law"-clauses. This article argues that the outcomes of many of these cases, which often appear to be inconsistent, may be explained on the basis of different conceptual qualifications as jurisdictional or admissibility-related issues.

Keywords

Jurisdiction – admissibility – competence – waiting periods – MFN clauses – mass claims - "in accordance with host state law"-clauses – corruption

I. Introduction

Apparently, the organizers of the Bologna conference on jurisdiction and admissibility do not share the belief of the *Pan American* tribunal that "there is no need to go into the possible –

[1] *Hochtief Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011, para. 90.
[2] *Erhas Dis Ticaret Ltd. Sti, et al.* v. *Republic of Turkmenistan*, PCA Case No. 2013-27, Separate Declaration of Stanimir A. Alexandrov dated 19 May 2015, para. 5.

and somewhat controversial – distinction between jurisdiction and admissibility."[3] Rather, they seem to hold the view that these are important distinctions in investment arbitration.

The distinction has apparently also triggered a wave of academic interest and spurred quite some debate among scholars and practitioners.[4] A rough consensus seems to emerge that if a particular arbitral forum is challenged it is likely to be jurisdictional, whereas if the claim itself is challenged it is likely to relate to admissibility. As Veijo Heiskanen put it:

> "A typical way to explain this distinction is to say that, whereas jurisdiction is about the scope of the tribunal's authority, based on the State's consent to arbitrate, admissibility is about the particular claim raised by the claimant. Stated differently, while jurisdiction is about the scope of the State's consent to arbitrate, admissibility is about whether the claim, as presented, can or should be resolved by an international tribunal, which otherwise has found jurisdiction."[5]

II. The Distinction's Relevance

In spite of some voices to the contrary,[6] it is generally well established that jurisdiction and admissibility are distinct concepts,[7] and that the distinction is an important one. As the

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[3] *Pan American Energy LLC and BP Argentina Exploration Company* v. *Argentine Republic*, ICSID Case No ARB/03/13, Decision on Preliminary Objections, 27 July 2006, para. 54.

[4] See Zachary Douglas, *The International Law of Investment Claims* (2009), 134-150; Veijo Heiskanen, "Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration", 29(1) *ICSID Review* (2014), 231; Ian Laird, "A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in Salini v. Jordan and Methanex v. USA", in T. Weiler (ed.), *International Investment law and Arbitration: Leading Cases from ICSID, NAFTA and Customary International Law* (2005), 201; Lars Markert, *Streitschlichtungsklauseln in Investitionsschutzabkommen: Zur Notwendigkeit der Differenzierung von jurisdiction und admissibility in Investitionsschiedsverfahren* (2010); Jan Paulsson, "Jurisdiction and Admissibility", in G. Aksen, K.-H. Böckstiegel, P.M. Patocchi and A.M. Whitesell (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner* (2005), 601; Friedrich Rosenfeld, "Arbitral Praeliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after *BG* v. *Argentina*", 29(1) *Leiden Journal of International Law* (2016), 137; Christoph Schreuer, "Consent to Arbitration", in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008), 830; Yuval Shany, "Jurisdiction and Admissibility", in C.P. Romano, K.J. Alter and C. Avgerou, *The Oxford Handbook of International Adjudication* (2013), 779; Andrea Marco Steingruber, "Some remarks on Veijo Heiskanen's Note – Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration", 29(3) *ICSID Review* (2014), 675; Michael Waibel, "Investment Arbitration: Jurisdiction and Admissibility", in M. Bungenberg, J. Griebel, S. Hobe and A. Reinisch (eds.), *International Investment Law. A Handbook* (2015), 1212; David A. R. Williams, "Jurisdiction and Admissibility", in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008), 919; Gerold Zeiler, "Jurisdiction, Competence, and the Admissibility of Claims in ICSID Arbitration Proceedings", in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), 76.

[5] Heiskanen, *supra* note 4, at 237.

[6] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 33 ("[T]he distinction between admissibility and jurisdiction does not appear to be necessary in the context of the ICSID Convention, which deals only with jurisdiction and competence.")

[7] *Marion Unglaube and Reinhard Unglaube* v. *Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, para. 293 ("objections on the ground of admissibility are different in nature from objections to jurisdiction.").

tribunal in *Abaclat v. Argentina* confirmed, it is "not only appropriate but also necessary to distinguish issues relating to ICSID's jurisdiction *stricto sensu* and admissibility issues."[8]

A broad consensus has formed that while jurisdiction goes to the power of an investment tribunal to decide a case, admissibility relates to the claims put forward in investment arbitration proceedings.[9] Beyond the often-quoted view of Keith Highet in *Waste Management* that "lack of jurisdiction refers to the jurisdiction of the Tribunal and inadmissibility refers to the admissibility of the case",[10] it seems that investment tribunals concur with other international courts and tribunals that jurisdiction, the power to adjudicate, is fundamentally based on the consent of the parties, while admissibility relates to the quality of a claim.[11] As the ICSID tribunal in *Hochtief v. Argentina* put it:

> "Jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal."[12]

Or as formulated by the tribunal in *Micula v. Romania*,

> "[…] an objection to jurisdiction goes to the ability of a tribunal to hear a case while an objection to admissibility aims at the claim itself and presupposes that the tribunal has jurisdiction."[13]

The *Micula* tribunal further emphasized the crucial distinction that any element qualifying the consent of the parties will relate to the jurisdiction, whereas admissibility objections are often of a temporal nature.[14] In this sense jurisdiction is a primary issue which has to be affirmed first; and admissibility may be a secondary issue that only arises once a tribunal has affirmed its jurisdiction. This notion was also clearly expressed by one of the arbitrators in *Erhas Dis Ticaret Ltd. Sti* v. *Turkmenistan* saying that "[t]he concept of 'admissibility' refers to the varied reasons that a tribunal, although it has jurisdiction, may decline to hear a case or a

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[8] *Abaclat and Others* v. *Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 248.

[9] *Waste Management, Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Jurisdiction, Dissenting Opinion of Keith Highet, 8 May 2000, para. 58 ("Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it.").

[10] *Ibid*., para. 57.

[11] See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, *Judgment*, *I.C.J. Reports 2008*, p. 177, para. 48 (noting that "in determining the scope of the consent expressed by one of the parties, the Court pronounces on its jurisdiction, not on the admissibility of the application."); See also the observation by Judge Fitzmaurice in *Case concerning the Northern Cameroons (Cameroon* v. *United Kingdom)*, *Preliminary Objections*, *Judgment of 2 December 1963*, I.C.J. Reports 1963, p. 97, 101 (Separate Opinion of Judge Sir Gerald Fitzmaurice), that questions of jurisdiction "basically related to the competence of the Court to act at all", whereas questions of admissibility "relate to the nature of the claim, or to particular circumstances connected with it.".

[12] *Hochtief Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011, para. 90.

[13] *Micula* v. *Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, para. 63.

[14] *Ibid*., para. 64 ("The Tribunal is of the opinion that when an objection relates to a requirement contained in the text on which consent is based, it remains a jurisdictional objection. If such a requirement is not satisfied, the Tribunal may not examine the case at all for lack of jurisdiction. By contrast, an objection relating to admissibility will not necessarily bar the Tribunal from examining the case if the reasons for the inadmissibility of the claim are capable of being removed and are indeed removed at a subsequent stage. In other words, consent is a prerequisite for the jurisdiction of the Tribunal.").

claim."[15] Similarly, the tribunal in *Bureau Veritas* v. *Paraguay* referred to the "issue of admissibility" as the question "whether in the event that the Tribunal does have jurisdiction, the claim is admissible."[16]

In the end, an investment tribunal may dismiss a case because it finds that it lacks jurisdiction or because it considers that the claims are inadmissible. Thus, the valid question arises whether this distinction is not merely an artificial or, at best, academic, one that satisfies the observer's predilection for categorizing phenomena that may indeed be distinguishable, but in the end irrelevant. Therefore, it is crucial to determine whether the distinction entails different consequences before pursuing the matter further.

Some, like Jan Paulsson, have emphasized a crucial distinction, insofar as, in general, decisions on jurisdiction will be reviewable, whereas findings of admissibility will not.[17] A tribunal's determination whether it possesses jurisdiction or not can be regularly challenged before *ad hoc* committees in the case of ICSID proceedings or before national courts in the case of non-ICSID arbitrations. A tribunal's finding that a specific claim is admissible or inadmissible, however, will lead to a set-aside by domestic courts or to an annulment by an ICSID *ad hoc* committee only if it can be shown that the decision openly failed to state sufficient reasons or was arrived at after a serious departure from a fundamental rule of procedure. Also for that reason, it seems important to determine whether an issue is one pertaining to jurisdiction or to admissibility, and it has also been argued that reviewing bodies should have the power to reclassify a tribunal's categorization in order to avoid its attempted "immunization" from review.[18]

With that in mind, it makes sense to embark further on the quest to identify the distinction between jurisdiction and admissibility in more detail, as the organizers of the Bologna conference have been determined to do.

One further word of caution seems appropriate in view of additional complications that one may be faced in the context of ICSID arbitration. Since the ICSID Convention does not use the term "admissibility" at all and employs the concept of the "competence" of ICSID tribunals in addition to that of the "jurisdiction" of the Centre,[19] the distinction between jurisdiction and admissibility is even less clear in the case of ICSID arbitration. In fact, the

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[15] *Erhas Dis Ticaret Ltd. Sti, et al.* v. *Republic of Turkmenistan*, PCA Case No. 2013-27, Separate Declaration of Stanimir A. Alexandrov dated 19 May 2015, para. 5.

[16] *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V.* v. *Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Objections to Jurisdiction, 29 May 2009, para. 132 ("The issues that divide the parties [...] relate to two issues: the issue of jurisdiction, namely whether the Tribunal has jurisdiction over [Claimant's] claims under [the relevant BIT]; and the issue of admissibility, namely whether in the event that the Tribunal does have jurisdiction, the claim is admissible.").

[17] Paulsson, *supra* note 4, at 601; Douglas, *supra* note 4, at 146.

[18] In favour of such a power, Waibel, *supra* note 4, at 1277 ("[A]nnulment committees have the option of reclassifying an issue that the tribunal considered concerned admissibility as one affecting the tribunal's jurisdiction, and provided the requirements under the Convention for annulment are met, annul the award on that basis.").

[19] See Article 41 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159 ("(1) The Tribunal shall be the judge of its own *competence*. (2) Any objection by a party to the dispute that that dispute is not within the *jurisdiction* of the Centre, or for other reasons is not within the *competence* of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute." [emphasis added]).

absence of such wording has led some tribunals to consider the distinction not relevant for ICSID arbitration,[20] whereas others have considered the reference to "other reasons" that may lead a tribunal to conclude that a dispute is not within its competence to include issues of admissibility.[21]

a) The notion of jurisdiction in ICSID and non-ICSID proceedings

Because the ICSID Convention has an explicit provision on "jurisdiction" a rather voluminous jurisprudence on its specific requirements has evolved. According to Article 25 of the Convention the subject-matter jurisdiction (*ratione materiae*) of the Centre is limited to "legal disputes" arising "directly" out of an "investment", whereas its personal jurisdiction (*ratione personae*) extends over "Contracting States (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State)", on the one hand, and "nationals of another Contracting State", on the other.[22] The additional requirement of Article 25 that the parties to a dispute must have given their "consent in writing" has been broadly interpreted by ICSID tribunals to include, in addition to ICSID clauses in direct investor-host State agreements, "offers" in national legislation or in bilateral investment treaties (BITs)

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[20] See, e.g., *CMS Gas Transmission Company* v. *The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003, para. 41 ("The distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence."); see also *Ambiente Ufficio S.p.A. and others* v. *Argentine Republic (formerly Giordano Alpi and others v. Argentine Republic)*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 572 ("The present Tribunal is called to interpret and apply the Argentina-Italy BIT which does not differentiate between "mandatory" and "non-mandatory" requirements as well as "jurisdictional", "admissibility" or "procedural" prerequisites. Nor is such distinction contained in the ICSID Convention or the Arbitration Rules. Hence, as far as the applicable law is concerned, there is no *a priori* reason for the Tribunal to enter into the doctrinal intricacies of these distinctions and the related academic and judicial discourse.").

[21] See, e.g., *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, para. 112 ("[C]laimant and Respondent crossed swords in the course of the pleadings over whether an ICSID tribunal has the power to entertain an 'admissibility' objection at all. For the Claimant, no such power is conferred by the Convention, nor is there any trace of its being introduced by the terms of the BIT. Without going into the opposing arguments at greater length, the Tribunal observes merely that Rule 41(1) of the ICSID Arbitration Rules, although headed 'Objections to Jurisdiction', is so drafted as to cover (but without further definition or explanation), not merely objections that a dispute is not within the jurisdiction of the Centre, but also any objection that the dispute is 'for other reasons, not within the competence of the Tribunal'. […] In the circumstances – and in the absence of any indication of what the precise intention was behind the wording of Rule 41(1) – it seemed to the Tribunal only realistic to interpret the Rule with a degree of flexibility, one that would allow the respondent party some discretion over the formulation of reasoned objections, but on the basis that that party would bear the onus not merely of showing that its objection was well founded in substance, but also of demonstrating that, if the objection did not go to jurisdiction as such, it was nevertheless within the terms of the Convention and the Rules. In adopting this approach, the Tribunal drew on the Rules of the ICJ, which, in their current version, provide both for objections to jurisdiction and for any "other objection the decision upon which is requested before any further proceedings on the merits." With this in mind, the Minutes of the Tribunal's First Session record that "It was understood that the scope of the preliminary phase will not be confined to a narrow interpretation of the term 'jurisdiction' on its own but will cover all of the objections of a preliminary character that have been included in the Respondent's Answer, whether they go strictly to jurisdiction, or to questions of competence, or admissibility. The Tribunal expects the Claimant to respond to these objections and to address them in its subsequent written argument."), *cf*. Zeiler, *supra* note 4, at 90-91.

[22] Article 25 ICSID Convention, *supra* note 19 ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.").

which can be "accepted" by investors through instituting arbitral proceedings.[23] Today in the vast majority of ICSID cases jurisdiction is founded upon BITs – without any direct contractual agreement between the parties, so-called "arbitration without privity."[24]

Nevertheless, each of these jurisdictional elements has given rise to numerous facets of possible interpretation. The allegedly purposefully undefined[25] term "investment" has triggered an unending debate about the inherent elements of what might constitute an investment and whether this also required a contribution to the development of the host State, still characterized as a crucial jurisdictional requirement by the 2006 annulment committee decision in *Mitchell* v. *Congo*[26] and by the 2007 ICSID award in *Malaysian Historical Salvors* v. *Malaysia*,[27] or whether under a re-interpreted *Salini*-light-test,[28] only "the three objective criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk are necessary elements of an investment."[29]

As regards the *ratione personae* jurisdiction of ICSID, the language of Article 25 clearly excludes dual nationals from instituting ICSID proceedings against one of their home States, even if their other nationality is the effective one.[30] The nationality of a legal person is determined by domestic law which often merely requires incorporation or a seat (*siège social*) of a company. The ICSID Convention does not require any genuine economic link between a legal person and its country of incorporation or seat. This was stressed by the majority in the

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[23] See with regard to BITs: *AAPL* v. *Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, 4 ICSID Reports 246; *Fedax* v. *Venezuela*, ICSID Case No. ARB/96/3, ICSID Decision on Jurisdiction, 11 July 1997, 37 *ILM* 1378 (1998); with regard to national legislation: *SPP* v. *Egypt*, ICSID Decision on Jurisdiction I, 27 November 1985, 3 *ICSID Reports* (1995), 101, 112 and ICSID Decision on Jurisdiction II, 14 April 1988, 3 *ICSID Reports* (1995), 131, 140; *Tradex* v. *Albania*, ICSID Decision on Jurisdiction, 24 December 1996, 14 *ICSID Review* (1999), 161, 187.

[24] See Jan Paulsson, "Arbitration without Privity", 10 *ICSID Review* (1995), 232.

[25] Report of the World Bank Executive Directors, para. 27, reprinted in: 1 *ICSID Reports* (1993), 23, 28 ("[…] no attempt was made to define the term 'investment' given the essential requirement of consent by the parties [...].").

[26] *Patrick Mitchell* v. *Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006.

[27] *Malaysian Historical Salvors, SDN, BHD* v. *Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007.

[28] In the aftermath of *Salini Costruttori S.p.A. and Italstrade S.p.A.* v. *Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52 ("The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (*cf. commentary by E. Gaillard, cited above, p. 292*). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition."), investment tribunals have focused on: a certain duration, a certain regularity of profit and return, the assumption of risk, a substantial commitment, and a significant contribution to the host State's development. See Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd ed., 2009), 128 *et seq*.

[29] *Electrabel S.A.* v. *Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.43; Similar, *Deutsche Bank AG* v. *Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, para. 306; *GEA Group Aktiengesellschaft* v. *Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, para. 151; *KT Asia Investment Group B.V.* v. *Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 173; see already *Saba Fakes* v. *Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, para. 110 ("[…] that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention.").

[30] See *Champion Trading Company* v. *Arab Republic of Egypt*, ICSID Case No. ARB/02/9, Decision on Jurisdiction, 21 October 2003.

2004 *Tokios Tokelés* case,[31] which held that only the establishment under the laws of an ICSID Contracting Party was determinative for the question of the claimant's nationality even where the claimant company was owned and controlled by nationals of the Respondent State.[32] But tribunals have tried to limit attempts of forum shopping whereby claimants seek to access dispute settlement options through favourable BITs by disallowing corporate claimants to put forward investment claims on the basis of a nationality they have acquired after a dispute has arisen.[33] They have not taken issue, however, with prudent *ex ante* nationality planning even for dispute settlement purposes.[34]

With regard to legal persons, though, Article 25(2)(b) of the ICSID Convention appears less formalistic. It provides that "national of another Contracting State" means "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration, and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purpose of this Convention."[35]

The above discussed elements are those under Article 25 of the ICSID Convention which in cases brought under the ICSID Rules have to be fulfilled in addition to the jurisdictional requirements stemming from the applicable BIT or IIA in which the consent of the parties to the jurisdiction is expressed. Thus, ICSID tribunals are referring to a so-called double-barrelled test,[36] according to which an investment has to fall both under the investment definition of the applicable BIT or IIA as well as under the jurisprudentially developed notion

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[31] *Tokios Tokelés* v. *Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004.

[32] *Ibid.*, para. 81 ("The origin of the capital used to acquire these assets is not relevant to the question of jurisdiction under the Convention. In our view, the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive.").

[33] See *Phoenix Action, Ltd.* v. *Czech Republic*, ICSID Case No. ARB/06/5, Award , 15 April 2009, paras. 94-95; *Mobil Corporation and others* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction , 10 June 2010, paras. 204-205; *Pac Rim Cayman LLC* v. *Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012, para. 2.52 *et seq*.

[34] *Aguas del Tunari S.A.* v. *Republic of Bolivia,* ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005, para. 330 ("It is not uncommon in practice, and – absent a particular limitation – not illegal to locate one's operations in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.").

[35] Article 25(2)(b) ICSID Convention, *supra* note 19.

[36] See *Ceskoslovenska obchodni banka* v. *Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 68 ("A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties' consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT."); *Mytilineos Holdings SA* v. *1. The State Union of Serbia & Montenegro, 2. Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, para. 112 ("It is the established practice of ICSID tribunals to assess whether a specific transaction qualifies as an "investment" under the ICSID Convention, independently of the definition of investment in a BIT or other applicable investment instrument, in order to fulfill the *ratione materiae* prerequisite of Article 25 of the Convention."); *Malaysian Historical Salvors* v. *Malaysia*, *supra* note 27, para. 55 ("Under the double-barrelled test, a finding that the Contract satisfied the definition of "investment" under the BIT would not be sufficient for this Tribunal to assume jurisdiction, if the Contract failed to satisfy the criterion of an "investment" within the meaning of Article 25."); *Phoenix* v. *Czech Republic*, *supra* note 33, at para. 74 ("It is common ground between the parties that the jurisdiction of the Tribunal is contingent upon the fulfillment of the jurisdictional requirements of both the ICSID Convention and the relevant BIT. […].").

of "investment" under the ICSID Convention. The same is true for other jurisdictional requirements, such as those relating to *ratione personae*, etc. This, of course, implies that in each case a tribunal will also have to ensure that the parties have consented to its jurisdiction in the applicable instrument. In non-ICSID cases this will be the exclusive jurisdictional test. More generally, the jurisdiction of non-ICSID tribunals over treaty claims primarily depends upon the consent laid down in IIAs.

b) Admissibility

The ICSID Convention and most IIAs do not use the term "admissibility" at all. Thus, no clear guidance stems from them. Instead, tribunals have resorted to the concept of "admissibility" when declining to exercise their jurisdiction and refraining to decide particular claims. This concept has been particularly relied upon when claims were considered not to be "ripe" yet, such as when local remedies were not exhausted or when time limitations or negotiation periods before submitting a claim have not been respected. Similarly, admissibility arguments were used in cases of denial of benefits provisions, in the case of shareholder claims or an alleged lack of beneficial ownership of an investment claim. Further, "admissibility" has played a role in situations where corruption or another illegality occurred in the making of an investment.

These examples are not meant as an exhaustive list of admissibility issues. Instead of a comprehensive overview, the following discussion of cases where the relevance of the distinction between jurisdiction and admissibility has played a role will also shed light on the notion of admissibility.

III. Examples Where the Distinction between Jurisdiction and Admissibility has been Relevant

Over the last couple of years, investment arbitration has provided a number of examples where the distinction between jurisdiction and admissibility has proven relevant; both ICSID and non-ICSID tribunals have generally adhered to the distinction and relied on it, contributing to the investment law jurisprudence in this field. Most important in practice seem to have been issues concerning the temporal element of jurisdiction/admissibility, i.e. whether certain procedural steps before an investment arbitration can be instituted, are to be characterized as jurisdictional or as admissibility requirements.

a) Waiting Periods in Dispute Settlement Clauses – A Jurisdictional or Admissibility Requirement?

A classic example of disagreement about the jurisdictional or admissibility nature of an often invoked host-State defence is the question how so-called waiting periods should be qualified. They are by now a standard feature in many dispute settlement clauses of BITs and other IIAs,[37] and usually require investors to engage in consultations/negotiations before instituting

[37] See also Christoph Schreuer, "Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road", 5 *The Journal of World Investment and Trade* (2004), 231; Christoph Schreuer, "Consent to Arbitration", in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008), 830, 846.

investment arbitration. Respondent States regularly argue that non-compliance with such a requirement would deprive tribunals of their jurisdiction. In the past, however, most investment tribunals treated "consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature,"[38] i.e. they considered compliance with such provisions as questions of "admissibility" or procedure and not of "jurisdiction".[39]

This initial jurisprudence gave way, however, to more restrictive approaches stressing the jurisdictional character of all conditions precedent to the possibility of investment arbitration, thus qualifying also waiting periods as jurisdictional in nature and not as mere issues of admissibility. This turn-around became evident in 2010, when two ICSID cases departed from the hitherto established case-law. The tribunals in *Burlington*[40] and *Murphy*[41] found that non-compliance with a waiting period would not be merely a procedural or admissibility problem, but constituted a jurisdictional defect.[42] More recently, this approach was reaffirmed in *Dede v. Romania*,[43] in which an ICSID tribunal dismissed a claim due to the investors' failure to comply with a domestic litigation requirement in the applicable BIT which led the tribunal to

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[38] *SGS Société Générale de Surveillance S.A.* v. *Islamic Republic of Pakistan,* ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 184.

[39] Some of these tribunals even expressly found that non-compliance with a waiting period would not deprive them of their jurisdiction. For instance, in *Ronald S. Lauder* v. *The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 190, the tribunal was of the opinion that insistence on their expiry before the commencement of arbitration proceedings would "amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties." And in *Bayindir Insaat Turizm Ticaret Ve Sanayi AS* v. *Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 100, the tribunal supplied the efficiency rationale by stating that it "would simply mean that [an investor] would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage." This perspective was also shared by the ICSID tribunal in *Western NIS Enterprise Fund* v. *Ukraine*, ICSID Case No ARB/04/2, Order, 16 March 2006, paras. 6-7, which – as a result of the non-compliance with a waiting period – suspended its proceedings in order to permit the parties to reach an amicable settlement. Additionally, the tribunal found that the fact that "[p]roper notice of the present claim was not given" did not "in and of itself, affect the Tribunal's jurisdiction."

[40] *Burlington Resources Inc.* v. *Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010.

[41] *Murphy Exploration and Prod. Co. Int'l* v. *Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010.

[42] In *Murphy* v. *Ecuador*, the majority expressly disagreed with the previously accepted distinction between procedural consultation periods and mandatory jurisdictional requirements as identified in *SGS* v. *Pakistan*. The *Murphy* tribunal, *supra* note 41, at para. 149, found that "[…] the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, 'a procedural rule' or a 'directory and procedural' rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules."
In 2011, the ICSID tribunal in *Impreglio S.p.A.* v. *Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, at para. 90, followed this trend by holding that a waiting period was a jurisdictional requirement that had to be fulfilled before an ICSID tribunal could assert jurisdiction. Similarly, the tribunal in *Daimler Financial Services AG* v. *The Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Jurisdiction, 22 August 2012, at para. 194, dismissed the claims of a German investor for lack of jurisdiction because they were brought without complying with a domestic litigation requirement ("Since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere "procedural" or "admissibility-related" matter.").
Also in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi* v. *Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, at para. 6.3.15, an ICSID tribunal's majority stressed the importance of local litigation requirements in order to access investment arbitration and concluded that they were "[…] to be treated as conditions, and that the failure to meet those conditions [went] to the existence of the Tribunal's jurisdiction, and [were] not to be treated as issues of admissibility."

[43] *Ömer Dede and Serdar Elhüseyni* v. *Romania*, ICSID Case No. ARB/10/22, Award, 5 September 2013.

conclude that "[a]t the present time, the Tribunal does not possess jurisdiction to hear the claims presented by Claimants in these proceedings."[44]

However, some tribunals still remain hesitant to adhere to a clear distinction between jurisdiction and admissibility when characterizing waiting periods. For instance, the 2013 decision in *Philip Morris v. Uruguay*[45] rejected the argument that Philip Morris had failed to await a 6-month period for amicable settlement and an 18-month domestic litigation requirement. The tribunal held that the waiting periods had in fact been complied with and that "the core objective of this requirement, to give local courts the opportunity to consider the disputed matters, has been met. To require Claimants to start over and re-file this arbitration now that their 18 months have been met would be a waste of time and resources."[46] The *Philip Morris* tribunal, however, expressly avoided a precise characterization of the domestic litigation requirement as either one of admissibility or of jurisdiction.[47]

b) The Implications of the Jurisdiction/Admissibility Distinction on the MFN Debate

The MFN debate triggered by the *Maffezini*[48] decision continues to trouble investment tribunals.[49] ICSID (and non-ICSID) panels remain split on whether MFN clauses, regularly included in BITs and other investment instruments, are limited to substantive treatment or whether they can be invoked to import "procedural" benefits under other IIAs.

In regard to these "procedural" benefits, it appears crucial to determine whether they can be distinguished along the jurisdiction/admissibility dichotomy. The 2012 ICSID decision on jurisdiction in *Teinver* v. *Argentina*[50] nicely summarized the existing case law with reference to an UNCTAD study[51] along these lines:

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[44] *Ibid.*, para. 274.
[45] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*), Decision on Jurisdiction, 2 July 2013.
[46] *Ibid.*, para. 135.
[47] *Ibid.*, para. 142 ("In the present case, the Tribunal does not consider it necessary to characterize the 18-month domestic litigation requirement as pertaining to jurisdiction or to admissibility. Even if that requirement were considered as pertaining to admissibility, its compulsory character would be evident. This conclusion is confirmed by the object and purpose of the requirement in question which is aimed at offering the host State the opportunity to redress the violations of the BIT alleged by the investor. […]").
[48] *Emilio Agustín Maffezini* v. *Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000.
[49] See Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties – Standards of Treatment* (2009), 205-224; UNCTAD, *Most Favoured-Nation Treatment*, *UNCTAD Series on International Investment Agreements II*, UNCTAD/DIAE/IA/2010/1, 24 January 2011; ILC, *Final report - Study Group on the Most-Favoured-Nation clause* (4 May-5 June and 6 July-7 August 2015), UN Doc A/CN.4/L.852; Zachary Douglas, "The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails", 2(1) *Journal of International Dispute Settlement* (2011), 97; Pavel Sturma, "Goodbye, Maffezini?: On the Recent Developments of Most-Favoured-Nation Clause Interpretation in International Investment Law", 15 *The Law and Practice of International Courts and Tribunals* (2016), 81.
[50] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.* v. *The Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012.
[51] UNCTAD, *Most Favoured-Nation Treatment*, *UNCTAD Series on International Investment Agreements II*, UNCTAD/DIAE/IA/2010/1, 24 January 2011.

> "UNCTAD identifies the following cases as fitting within the "admissibility" category: *Maffezini*, *Siemens*, *Gas Natural*, *National Grid*, *Suez InterAguas*, *AWG Group* and *Wintershall*. To these cases, the Tribunal would add *Impregilo*, *Hochtief*, *Abaclat*, *ICS*, and *Daimler*. In each of these cases, the claimant was required under the respective terms of its BIT's dispute settlement provisions to seek a remedy before a local court of the host State for a period of time before bringing arbitration. Each of the claimants in these cases sought to use its BIT's MFN clause in order to "borrow" a dispute settlement provision from another treaty that did not contain a local court requirement as a precondition of arbitration. With the exceptions of *Wintershall*, *ICS* and *Daimler* the claimants' arguments were successful.
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> UNCTAD identifies the following cases as fitting within the "scope of jurisdiction" category: *Salini*, *Plama*, *Telenor*, *Berschader*, and *Tza Yap Shum*. In these cases, the claimants sought to use the MFN clause to expand the scope of jurisdiction under their applicable BIT. In *Salini*, the claimant attempted to use the MFN clause to bring in contract claims before an ICSID tribunal. In *Plama*, the claimant attempted to use the MFN clause to broaden the scope of jurisdiction beyond that of its applicable BIT, which only provided jurisdiction to resolve issues of compensation in the case of an expropriation. Similarly, in *Telenor* and *Berschader*, the claimants attempted to use the MFN clause to broaden jurisdiction beyond their BITs, which only provided jurisdiction over expropriation claims. In each of these cases, the claimant's attempts to rely on the MFN clause were rejected by the tribunals. UNCTAD identified only one case within this category, *RosInvestCo*, that departed from this trend."[52]

The *Teinver* tribunal clearly endorsed the *Maffezini* approach by qualifying the waiting periods in the Argentina-Spain BIT 1991 as mere "admissibility" requirements which could be avoided through reliance on the BIT's MFN clause since the "broad "all matters" language of the Article IV(2) MFN clause [was] unambiguously inclusive."[53] The tribunal stressed that "[…] Claimants have not requested that the Tribunal apply the MFN clause in order to replace the Treaty's provisions on the arbitral forum or rules. Nor have Claimants requested that the Tribunal apply the MFN clause in order to broaden the scope of legal issues that may be adjudicated through arbitration. Instead, they have argued that the procedural requirements of Article X, namely the negotiation and local court requirements, may be bypassed in favor of the more procedurally limited dispute settlement provisions of the Australia-Argentina BIT."[54]

That the *Maffezini* debate is still alive and controversial is aptly illustrated by the decision of the ICSID tribunal in *Daimler* v. *Argentina* which clearly rejected the *Teinver* approach[55] and

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[52] *Teinver* v. *Argentina*, *supra* note 50, paras. 170-171 (footnotes omitted).
[53] *Ibid.*, para. 186.
[54] *Ibid.*, para. 182.
[55] *Daimler Financial Services AG* v. *The Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Jurisdiction, 22 August 2012, para. 189 ("What is in dispute is not a mere waiting period but a requirement that the dispute be submitted to the domestic Argentine courts for potential judicial resolution for a period of at least 18 months.").

specifically endorsed the *Wintershall* approach.[56] It held that "[a]ll BIT-based dispute resolution provisions […] are by their very nature jurisdictional."[57] On this basis, it found that "[s]ince the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere "procedural" or "admissibility-related" matter."[58]

These cases clearly demonstrate that the jurisdiction/admissibility distinction is of immediate relevance for the reach of an MFN clause.

c) The Jurisdiction over or Admissibility of Mass Claims before ICSID

Also some of the recent bondholder cases, particularly those against Argentina, dealt with an interesting admissibility issue, i.e. the question whether investment arbitration could provide an adequate forum for a mass arbitration.

In that sense, one of the most interesting and innovative aspects of the decision on jurisdiction in the *Abaclat* case[59] was the question whether ICSID arbitration should be available for bondholder claims against the defaulting Argentina. In *Abaclat*, the tribunal's majority first found that the claimants' economic interests in various Argentine bonds constituted an "investment" for the purposes of Article 25 ICSID Convention and thus upheld its jurisdiction.[60]

Then the tribunal also held that Argentina's consent, as expressed in its BIT with Italy, covered "mass claims" and sovereign debt restructuring[61] – two findings vigorously disputed by the dissenting arbitrator[62] and cast in terms of admissibility and jurisdictional arguments.

The majority rejected Argentina's "jurisdictional" argument that permitting an ICSID tribunal to rule on sovereign debt restructuring would be counterproductive and go against current efforts to modernize foreign debt restructuring process. Instead, the *Abaclat* tribunal found that ICSID Contracting Parties had the possibility under Article 25(4) ICSID Convention to notify ICSID of the class or classes of disputes that it would want to exclude from the jurisdiction of the Centre. Since no such notification had been made by Argentina, the tribunal

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[56] The Daimler tribunal, *ibid.*, at para. 193, found that the applicable BIT "describes its dispute resolution process in mandatory and necessarily sequential language" and that it sets forth "the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties' consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts." This finding is followed by approvingly citing the *Wintershall* tribunal which stated: "That an investor could choose at will to omit the second step [the 18-month domestic courts requirement] is simply not provided for nor even envisaged by the Argentina-Germany BIT – because (Argentina's) the Host State's 'consent' (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in the local courts." *Wintershall Aktiengesellschaft* v. *Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 160.

[57] *Daimler Financial Services AG* v. *The Argentine Republic*, *supra* note 55, at para. 193.

[58] *Ibid.*, para. 194.

[59] *Abaclat* v. *Argentina*, *supra* note 8.

[60] *Ibid.*, para. 387.

[61] *Ibid.*, para. 467.

[62] *Ibid.*, Dissenting Opinion of Professor Georges Abi-Saab, 28 October 2011.

found no reason to exempt foreign debt restructuring situations from the scope of application of the BIT.[63]

As to the adaptability of the ICSID arbitration for mass claims, the tribunal distinguished the present case where the number and identity of claimants is established from US style class actions where a representative of an open class institutes proceedings. The tribunal saw no "jurisdictional" impediment to conducting a mass arbitration involving roughly 60.000 bondholders. Since it regarded the issue "whether or not the present mass proceedings could be conducted in the form of collective proceedings" as a question relating to the modalities and implementation of ICSID proceedings it treated it as an issue of "admissibility and not of consent."[64]

The "*Salini* light"-test used by the tribunal in *Abaclat* to assess the "investment" requirement of bonds was also followed by the majority of the ICSID tribunal in the second Argentinean bondholder case, in *Ambiente Ufficio v. Argentina*.[65] The tribunal considered it unnecessary, though, to distinguish precisely between the concepts of jurisdiction and admissibility.[66]

In the most recent bondholders' case, the award in *Poštová banka* v. *Hellenic Republic*[67] the issue of admissibility of mass claims was not reached because the tribunal denied its jurisdiction over claims by a Cypriot holding company and a Slovak bank, which held Greek government bonds, finding that these assets were not protected under the two respective BITs. The tribunal came to this conclusion, which departs from the earlier rulings in *Abaclat* v. *Argentina*[68] and *Ambiente Ufficio* v. *Argentina*,[69] as a result of a particularly narrow interpretation of the broad asset-based investment definition in the applicable BITs.

d) The Distinction Applied to "In accordance with host State law"-Clauses

In a number of cases, the question has come up whether so-called "in accordance with host State law"-clauses stipulate jurisdictional requirements, issues of admissibility or relate to the merits of a case.[70]

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[63] *Abaclat* v. *Argentina*, *supra* note 8, at para. 479.
[64] *Ibid.*, para. 515.
[65] *Ambiente Ufficio* v. *Argentina*, *supra* note 20.
[66] *Ibid.*, para. 574 ("The Tribunal would consider that the mission with which it has been entrusted by the Parties does not call it, in the first place, to give an answer as to whether the legal issues at stake are to be classified as questions of jurisdiction or admissibility. The Tribunal's mandate – and it is to this mandate that the title of the present Decision refers – rather requires it to take note of and thoroughly examine all legal claims made by the Parties under the labels of both jurisdiction and admissibility and to decide whether these are justified in law or not."). On the "admissibility" of multiple claimants the tribunal held that "the absence of a specific mass claim regime in ICSID does not at all prevent the Tribunal from dealing with the present dispute as what it is, i.e. a multi-party proceeding including 119 or 90 Claimants respectively, which is governed by the procedural provisions of the ICSID Convention and Rules and other applicable norms of international law." *ibid.*, para. 165.
[67] *Poštová banka, a.s. and Istrokapital SE* v. *The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015.
[68] *Abaclat* v. *Argentina*, *supra* note 8.
[69] *Ambiente Ufficio* v. *Argentina*, *supra* note 20.
[70] See *Inceysa Vallisoletana S.L.* v. *Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 190; *Fraport AG Frankfurt Airport Services Worldwide* v. *Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, para. 401; *Ioannis Kardassopoulus* v. *Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 182.

Express "in accordance with host State law"-clauses are generally considered to constitute jurisdictional limitations imposed by the parties; whereas a potential implicit legality requirement is rather seen as an admissibility issue.[71]

For instance, in the *Inceysa* and the *Fraport II* case, the tribunals' findings of lack of "jurisdiction" were based on violations of express "in accordance with host State law"-clauses. The tribunal in *Inceysa* v. *El Salvador* concluded that because the investment "was made in a manner that was clearly illegal […] the disputes arising from it are not subject to the jurisdiction of the Centre" and declared itself "incompetent to hear the dispute before it."[72] In *Fraport* v. *Philippines II*,[73] the tribunal equally found that it lacked jurisdiction because the Claimant had violated an "in accordance with host State law"-clause which in the tribunal's view shaped and conditioned the host State's consent to arbitration.[74]

In *Plama* v. *Bulgaria*,[75] however, an ICSID tribunal noted the absence of an express "in accordance with host State law"-clause.[76] Already in its jurisdictional decision it had held that an alleged misrepresentation on the part of the Claimant that may have constituted a violation of host State law did not deprive it of its jurisdiction.[77] Nevertheless, in its award it found "that the substantive protections of the ECT cannot apply to investments that are made contrary to law."[78] This deprivation of substantive protection can be interpreted as an "inadmissibility" of the claims.

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[71] Rahim Moloo and Alex Khachaturian, "The Compliance with the Law Requirement in International Investment Law", 34(6) *Fordham International Law Journal* (2011), 1473, 1499-1501; Stephan Schill, "Illegal Investments in Investment Treaty Arbitration", 11(2) *The Law & Practice of International Courts and Tribunals* (2012), 281, 288-291; Thomas Obersteiner, "'In Accordance with Domestic Law' Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors", 31(2) *Journal of International Arbitration* (2014), 265, 274.

[72] *Inceysa Vallisoletana SL* v. *Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006, para 257 ("[…] because Inceysa's investment was made in a manner that was clearly illegal, it is not included in the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre.").

[73] *Fraport AG Frankfurt Airport Services Worldwide* v. *Republic of the Philippines (Fraport II)*, ICSID Case No. ARB/11/12, Award, 10 December 2014; Already in 2007, a majority in the earlier *Fraport AG Frankfurt Airport Services Worldwide* v. *Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, dismissed the case for similar reasons. However, that award was annulled on 23 December 2010.

[74] *Fraport II*, *supra* note 73, at para. 467 ("Based on the foregoing analysis and after due and thorough consideration of the Parties' arguments and the evidence on the record, the Tribunal finds that Fraport violated the ADL when making its Initial Investment, the latter being consequently excluded as investment protected by the BIT because of its illegality. The illegality of the investment at the time it is made goes to the root of the host State's offer of arbitration under the treaty. As it has been held, '*States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their own law.*' Lack of jurisdiction is founded in this case on the absence of consent to arbitration by the State for failure to satisfy an essential condition of its offer of this method of dispute settlement." [footnote omitted]).

[75] *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

[76] *Plama* v. *Bulgaria*, *supra* note 75, para. 138 ("Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law. [...].").

[77] *Plama* v. *Bulgaria*, *supra* note 75, para. 112 ("Contrary to Respondent's argument, the matter of the alleged misrepresentation by Claimant does not pertain to the Tribunal's jurisdiction: that was already decided in the Decision on Jurisdiction (paras. 126-130 and 228-230). […].").

[78] *Plama* v. *Bulgaria*, *supra* note 75, para. 139.

One should note, however, that sometimes also tribunals which regarded the legality requirement to be an implicit one considered it to form a jurisdictional issue. This is aptly illustrated by the decision in *Phoenix* v. *Czech Republic*.[79] When discussing the elements of an investment in the sense of Article 25 ICSID Convention, the *Phoenix* tribunal added that what had to be taken into account also comprised whether assets were "invested in accordance with the laws of the host State" and "in good faith".[80] It ultimately dismissed the case for lack of jurisdiction because it considered that the specific investment had not been made in good faith.

e) The Distinction Applied to the Corruption Defence

The distinction between jurisdiction and admissibility may also be exemplified with a defence that is often raised, both as a jurisdictional one and as one of inadmissibility of a claim, the allegation that an investment had been procured by corruption. When one reviews the case-law so far, the corruption defence may be argued and lead to a lack of jurisdiction of a tribunal and it may lead to the inadmissibility as a result of the clean hands-doctrine or for other similar reasons.

One very plausible rationalization of the difference seems to be that corruption entails a lack of jurisdiction where the legality of an investment was an express requirement of the parties' consent to jurisdiction, as in the case of "in accordance with host State law"-clauses found in many BITs; whereas corruption will lead to the inadmissibility of claims where there is no such jurisdictional limitation.

Similarly, in *Metal-Tech*[81] the tribunal concluded that as a result of corruption it "lack[ed] jurisdiction over Metal-Tech's treaty claims as well as over Metal-Tech's claims based on Uzbek law."[82] Having explained that because of the Claimant's violation of the BIT's "in accordance with host State law"-clause, "the dispute did not meet the consent requirement" of the ICSID Convention,[83] the *Metal-Tech* tribunal continued to say that it could thus dispense with the admissibility objection based on international public policy.[84]

In *World Duty Free*, though, a contract claim where no "in accordance with host State law"-clause could affect the consent to the tribunal's jurisdiction, the tribunal did not resort to lack of jurisdiction. Rather, it effectively dismissed the claims as inadmissible when it held that

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[79] *Phoenix* v. *Czech Republic*, *supra* note 33.
[80] *Ibid.*, para. 114 ("1 – a contribution in money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop an economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*.").
[81] *Metal-Tech Ltd.* v. *Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013.
[82] *Ibid.*, para. 389.
[83] *Ibid.*, para. 373 ("Uzbekistan's consent to ICSID arbitration, as expressed in Article 8(1) of the BIT, is restricted to disputes 'concerning an investment.' Article 1(1) of the BIT defines investments to mean only investments implemented in compliance with local law. Accordingly, the present dispute does not come within the reach of Article 8(1) and is not covered by Uzbekistan's consent. This means that this dispute does not meet the consent requirement set in Article 25(1) of the ICSID Convention. Accordingly, failing consent by the host state under the BIT and the ICSID Convention, this Tribunal lacks jurisdiction over this dispute.").
[84] *Ibid.*, para. 374 ("Having reached the conclusion that it lacks jurisdiction over the treaty claims, the Tribunal can dispense with the analysis of the Respondent's other objections to jurisdiction and admissibility in respect of these claims, including the objections based on the violation of international public policy and transnational principles as well as on fraud.").

"claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal."[85]

Although not express, it appears that also the *Plama* tribunal's finding that "a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal"[86] can best be explained as implying the inadmissibility of claims based on such unlawfully procured contracts.

IV. Some Critical Concluding Remarks about Jurisdiction and Admissibility

There remains an underlying uneasiness with the elusive concepts of jurisdiction and admissibility. In particular, for lawyers trained under civil law traditions the uncertainty surrounding the concepts of jurisdiction and admissibility in the common law may contribute to this "reserved" attitude. Even in the field of jurisdiction proper this may have to do with different legal cultures. For a civil law trained jurist, the jurisdiction of courts is usually an easily ascertainable task because the applicable codes of (civil) procedure will clearly identify the appropriate court. Many civil law countries follow the old Roman law maxim *actor sequitur forum rei*,[87] that the plaintiff must follow the forum of the thing or defendant involved, nowadays also enshrined in the European Brussels Regulation (Brussels Ia).[88] This contrasts with the much more complex approach to jurisdiction, for instance in the US, which allows the exercise of adjudicatory jurisdiction even over foreigners with few contacts to the forum State as long as some minimum contacts as defined in US Supreme Court jurisprudence developed in *International Shoe*[89] are complied with. Similarly, the concept of *forum non-conveniens*,[90] pursuant to which common law courts may refrain from exercising their jurisdiction if they consider other courts to be in a better position to adjudicate a specific case, is often hard to comprehend for civil lawyers who may consider that the failure of a court to exercise its jurisdiction can amount to a denial of justice.

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[85] *World Duty Free Company Limited* v. *Republic of Kenya*, ICSID Case No ARB/00/7, Award, 4 October 2006, para. 157.

[86] *Plama Consortium Limited* v. *Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 143.

[87] See *Codex Justinianus* 3.13.2 (Diocletianus, Maximianus) and 3.19.3 (Gratianus, Valentinianus, Theodosius) ("Actor rei forum, sive in rem sive in personam sit actio, sequitur. sed et in locis, in quibus res propter quas contenditur constitutae sunt, iubemus in rem actionem adversus possidentem moveri."); Arthur T. von Mehren, *Adjudicatory Authority in Private International Law: A Comparative Study* (2007), 153-158; Jochen Schröder, *Internationale Zuständigkeit* (1971), 229-232.

[88] Article 4(1), Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 1) ("[P]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.").

[89] *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

[90] See Edward L. Barrett Jr., "The Doctrine of Forum Non Conveniens", 35 *California Law Review* (1947), 380; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), at 507 ("The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."); *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, 2012 ON SC 4351, 25 July 2012, para. 43(i) ("The doctrine of *forum non conveniens* is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine").

Transposed to the investment arbitration field, it would seem that similar concerns could be raised with regard to the non-exercise of jurisdiction as a result of regarding specific claims "inadmissible". Would that not deprive claimants of their right to have access to justice in a situation where an investment tribunal has "jurisdiction"? Of course, asking such a question would touch on the preliminary issue whether not only domestic courts, but also international investment tribunals have to provide access to justice in the first place.

But even if it were only a policy maxim that investment tribunals should dispense justice by adjudicating investment claims that fall under their jurisdiction, the difficult problems start if one accepts that there may be justifiable grounds in order to protect the integrity of the investment arbitration system which can require a tribunal to hold some claims inadmissible. What are the precise criteria for such admissibility decisions? How can one clearly define and predict the requirements and conditions necessary to make a claim admissible?

It is the task of tribunals and scholars alike to contribute to more clarity in this field of the law, and it is hoped that the papers of the Bologna workshop assembled in this special issue of *The Law and Practice of International Courts and Tribunals* will do so.