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Jurisdiction and Admissibility in Investment Arbitration.

A View from the Bridge at the Practice

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Abstract

The jurisdiction of international courts and tribunals and the admissibility of inter-state claims under international law are central to international adjudication, operating as gateway to the litigation on the merits – the end goal of the proceedings. Still, these concepts remain inherently under-defined, and can be shaped in multiple ways to formulate preliminary objections in international litigation in general. International investor-State arbitration adds specific aspects and complexities to the issue. This introductory contribution accounts for the theoretical deficiencies underpinning the notions of jurisdiction and admissibility with a special focus of on international investment arbitration, and introduces the selected case-studies which form the subject of this Special Issue's articles. The recent Urbaser award is also used as an example of the unexplored potential of novel – and critical – legal argumentation relating to the jurisdiction of investment tribunals.

Keywords: jurisdiction — admissibility – investment arbitration – competence – preliminary objections – *Urbaser* – counterclaims.

A Introduction

Investment arbitration¹ is a branch of compulsory dispute settlement with a hybrid nature. Claims that are normally based on international legal instruments are resolved by tribunals whose operation may evoke that of commercial arbitration.²

The *lex arbitri* governing investment arbitration, especially in matters of procedure, sits at the intersection of two legal traditions. When the applicable instruments require construction, or even integration, it draws inspiration from the general principles governing the practice of international courts and tribunals whilst looking at international commercial arbitration – with its usages – as its next of kin.

The institutions of jurisdiction and admissibility add to the hybrid nature of investment arbitration, insofar as they occupy an area of overlap between issues of substance and issues of procedure. To borrow again from arbitral jargon, the jurisdiction of investment tribunals and the admissibility of investment claims are regulated by the *lex contractus* as well as the *lex arbitri*. They are governed by the rules to which States agreed when they introduced the possibility of compulsory arbitration determining the jurisdictional competence of the arbitral tribunal. At the same time, they condition the operation of tribunals within and during the proceedings. In other words, questions of jurisdiction and admissibility shape both the *whether* and the *how* of investment arbitration in any given case.

¹ When a general statement is made, it normally refers to the classic system of investor-State dispute settlement based on the appointment of one-off tribunals. The project of establishing permanent courts, currently explored by some States and by the European Union, is outside the scope of this analysis unless otherwise noted.

² The break-down of the different laws governing all elements of investment arbitration is more complex and cannot be summarised without simplification. For a fuller study, see Veijo Heiskanen, “Forbidding depeçage: law governing investment treaty arbitration”, 32 *Suffolk Transnational Law Review* (2008), 367, 375 where the following categorisation is made: “Thus, one must distinguish between: (a) the law governing the arbitration agreement; (b) the law governing the arbitral proceedings; (c) the law governing the arbitral tribunal; (d) the law governing the merits of the claim, or the subject matter of the dispute; and (e) the law governing the recognition, enforcement and execution of the award.” This article, and the Special Issue at large, deal primarily with issues (a) to (c), with occasional forays into issue (d). For similar reflections, see Ian Laird and Rebecca Askew, “Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System”, 7 *Journal of Appellate Practice and Process* (2005), 285, 285.

In international litigation in general, arguments relating to jurisdiction and admissibility populate the well-travelled battleground of preliminary objections. In this battleground, respondents attempt to convince the tribunal to throw the case out, possibly before the merits of the claim are even broached. Endless legal creativity and loosely defined concepts, combined, give occasion to infinite permutations of objections which challenge the competence of the tribunal or the admissibility of a claim, or both. This Special Issue of *The Law and Practice of International Courts and Tribunals* offers a snapshot of the practice on those issues with a specific focus on international investment arbitration, without pretence of classification. The fight on the battleground of preliminary objections has opened new fronts, whilst old fronts have developed or mutated in recent years. For an instance of the former aspect – of new fronts – one may note how the increasing trend of terminating or replacing investment treaties has generated a fresh set of jurisdictional objections *ratione temporis*.³ For an instance of the latter aspect – *i.e.* of old fronts still worth exploring –, one would stress how the familiar struggle to distinguish treaty-based and contractual claims, in the presence of umbrella clauses or wide arbitration provisions, retains its currency and does not seem to subside.⁴

Sometimes, it is even doubtful whether an issue belongs in the preliminary battleground at all. This is the case for the question of attribution, arguably a species of the category of *défenses au fond* that retain a preliminary character.⁵ The obverse scenario – such as that of a jurisdictional objection that cannot be treated in a preliminary manner – occurs when the defendant challenges the application of the instrument containing the State’s consent to arbitration, which is a question of applicable law. When, for instance, the respondent contends that the investor is not protected under the relevant BIT,⁶ it raises an objection to jurisdiction *ratione personae* which, however, falls often to be determined together with the merits of the case.

³ See Andrea Gattini’s contribution to this *Special Issue*, at ***.

⁴ See Mary Footer’s contribution to this *Special Issue*, at ***.

⁵ See Giulio Cortesi’s contribution to this *Special Issues*, at ***.

⁶ Because it does not fit the definition in the treaty, or because of an alleged breach of the legality clause therein.

There is no unifying theory that connects the contributions in this *Special Issue*, and this is what makes each of them all the more necessary. Simplification, in this area of law, is not convenient: practice rarely springs from general principles. Conversely, scoping exercises which dissect the practice are helpful, if necessarily incomplete and periodically obsolete.

Part B of this introductory contribution addresses the distinction between jurisdiction and admissibility, a discrete doctrinal and practical conundrum. Part C introduces the individual contributions which form this *Special Issue*, emphasising the constellation of questions that tribunals face when reviewing jurisdictional objections. In part D, we point to some future fronts of the jurisdictional battleground, referring to the recent *Urbaser* award. Part E contains our final thoughts and welcomes the reader to the further instalments of this *Special Issue*.

B An Elusive Difference with Unclear Implications

Jurisdiction and admissibility suffer from conceptual under-definition. The underlining ideas are familiar but imprecise. Familiarity and vagueness discourage attempts to assess the precise contours of these legal institutions and their interaction. There is no perceived urgency to draw a line between the two, and the task is inevitably complicated by the lack of a reliable conceptual matrix. As a result, the distinction between the concepts of jurisdiction (*competence*) and admissibility (*recevabilité*) in investment arbitration is a problem in its own right, which regularly emerges in the practice and persists in spite of scholarly attempts to solve it.

Ultimately, the current situation is quickly summarised. Preliminary objections raised before an investment tribunal can assert the tribunal's lack of jurisdiction or the claim's inadmissibility, or both, on the basis of certain circumstances, such as, for instance, the investor's failure to respect a pre-arbitration waiting period. When host States and tribunals seek to associate the relevant circumstances to the relevant objection – either to the tribunal's jurisdiction or the admissibility of the claim – there is no predetermined process to guide the allocation.

Tribunals and scholars turn to adages that have some reassuring value but little analytical force. Some truisms recur, as August Reinisch correctly relates in his contribution to this Special Issue.⁷ One is that admissibility review is separate from, and follows necessarily, an affirmative finding of jurisdiction. Another is that jurisdictional objections address the powers of the tribunal, whilst admissibility objections relate to some flaw affecting the claim or the claimant. The *Unglaube v. Costa Rica*⁸ tribunal used these two heuristics to characterise the Respondent's argument that the investor's claim was premature, so long as its application for a development permit was still pending before domestic authorities. The Tribunal relied on the distinction in hand to justify the treatment of the admissibility objection as non-preliminary in nature and, accordingly, to join it to the merits⁹ as follows

‘... objections on the ground of admissibility are different in nature from objections to jurisdiction. Respondent has not maintained that the Tribunal may not properly rule on these matters, but that, it should not – both as a matter of prudence and in consideration of the ongoing deliberations of courts and administrative bodies in Costa Rica, which should be permitted to complete their functions without interference or interruption’.¹⁰

That the admissibility test follows a finding of jurisdiction is accurate, but the sequencing of the two institutions in question does not evince their content. The other point whereby jurisdiction concerns tribunals, whilst admissibility concerns claims, seems capable, at least, to generate a workable test to distinguish the concepts. Tribunals' determinations on jurisdiction and admissibility arguably answer different questions. Namely, whether *a*) the parties had conferred on the tribunal the power to decide on a specific claim, or *b*) there is anything wrong with the claim, or claimant, that prevents the tribunal from exercising its jurisdiction in this case.

⁷ See August Reinisch, **.

⁸ *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award of 16 May 2012.

⁹ At the merits stage, in light of the full facts scrutinised, the Tribunal determined that the admissibility objection could not stand, see *ibid.*, para. 295.

¹⁰ *Ibid.*, para. 293. Emphasis in the original.

However, it is often possible to fit the relevant circumstances in either question. In fact, the question whether the parties had conferred on the tribunal the power to decide on *pre-mature claims raised before the end of the waiting period* is just as plausible as the question whether the tribunal should reject *a pre-mature claim raised before the waiting period was over*. Each question seems a correct characterisation of the judicial test applicable, and neither falsifies the other. Therefore, it must be concluded that the definitions used to indicate the limits of jurisdiction and limits of admissibility are not mutually exclusive and, thus, have limited definitional power. Tribunals show awareness of the permeability between the two concepts. To that end, one may recall the disenchanted words of the tribunal in *Apotex v. US* (UNCITRAL) which concerned with the requirement of finality of judicial acts in connection with denial of justice claims and the futility exception:

‘The Parties have differed ... on the precise calibration of the “obviously futile” exception. At the outset of the oral hearing, the Tribunal questioned the proper characterisation of this objection, and in particular whether it raised an issue of jurisdiction or admissibility, or whether it might also be viewed as a preliminary substantive objection. This is a debate with a long heritage as a matter of international law, and long-divided views. ... In line with both Parties’ approach, the Tribunal proceeds on the basis that this objection concerns the Tribunal’s jurisdiction *ratione materiae*. In the alternative, the Tribunal has also considered the matter in terms of the admissibility of claims’.¹¹

Conceptual blur is harmless when it has no practical consequence. If the only effect of successful objections to jurisdiction or admissibility were the impossibility to proceed to the merits, a false positive – such as lack of jurisdiction taken for inadmissibility, or *vice versa* – would not matter. However, whether the distinction matters in the practice remains an open question.

¹¹*Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility of 14 June 2013, para. 258, 260.

In the literature, some studies are to be found that purport to list the practical differences between a finding of inadmissibility and one of lack of jurisdiction. What follows is a distillation from these lists. Namely, the jurisdiction of a tribunal must be assessed only as of at the time of the claim, whilst the reasons leading to the inadmissibility of the claim may arise during the proceedings; the grounds for inadmissibility may be waived by the parties and be subject to different rules of invocability, in the sense that the tribunal might have no obligation to raise them *proprio motu*,¹² or the parties could lose the right to invoke them after a certain phase of the proceedings;¹³ whereas the jurisdiction of a tribunal is fixed, the inadmissibility of a claim does not become *res judicata* and can sometimes be cured as, for instance, when brought anew after the local remedies are exhausted or the waiting period is expired. Furthermore, a crucial difference purportedly concerns the possibility of review of decisions,¹⁴ in the sense that findings on jurisdiction might be subject to the review of a controlling body entitled to ascertain that the decision-maker did not exceed its powers, but determinations on the admissibility of a claim are final.¹⁵ Finally, it has been highlighted how characterising a matter as pertaining to

¹² The seemingly unusual case of *Larsen/Hawaii* (*Lance Larsen v. the Hawaiian Kingdom*, PCA, case no. 99-001, under the UNCITRAL 1976 Rules, Award, 5 February 2001, (2001) 119 ILR 566; (2001) 95 AJIL 927–933), in which the Tribunal appeared to analyse admissibility *proprio motu*, is exceptional because it deals with a fabricated claim in which both parties had no interest in raising procedural objections. An obverse exception might be found in *Transglobal Green Energy, LLC and Transglobal Green Energy de Panama, S.A. v. The Republic of Panama*, ICSID Case No. ARB/13/28, Award of 2 June 2016, where the tribunal noted that the Respondent had failed to pursue a jurisdictional objection *ratione materiae*, and that a decision on it was unnecessary (para. 96). Since the claim failed on other preliminary objections, this remark might have been just a signal of judicial economy rather than a refusal to observe jurisdictional objections *proprio motu*. See also *ibid.*, para. 100: “The Tribunal may choose to consider the objections to its jurisdiction in any particular order.” On the impossibility to examine admissibility flaws *proprio motu*, see the characterisation of the ICJ’s approach in *Hochtief AG v. Argentina*, ICSID Case no. ARB/07/31, Decision on Jurisdiction of 24 October 2011, para. 5: “[i]n the ICJ, for example, rules on admissibility include such matters as the rules on the nationality of claims and the exhaustion of local remedies. The ICJ may have jurisdiction to decide whether State A had injured corporation B in violation of international law; but it may be that the claim actually filed is inadmissible because it has been brought by the wrong State, or because local remedies have not yet been exhausted. But if no objection is raised on such grounds, the Court will not raise the matter *proprio motu*.”

¹³ Chittharanjan F. Amerasinghe, *International Arbitral Jurisdiction* (2011), 71: “an objection relating to *recevabilité* may be waived or the opportunity to raise it lost, whereas a defect in jurisdiction can technically never be cured.”

¹⁴ This distinction is used by Jan Paulsson (see the article “Jurisdiction and Admissibility”, in G. Aksen et al (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (2005), 601) to highlight the importance of the distinction between jurisdiction and admissibility.

¹⁵ This distinction is crucial in the field of international arbitration, where annulment or setting aside of awards is typically possible only on narrow grounds which do not include a review of the merits.

competence rather than admissibility might affect the logical sequencing of the analysis carried out by the tribunal, as well as the allocation of the evidentiary *onus* between the parties.¹⁶

Whereas some tribunals have considered the distinction to be irrelevant, others have endeavoured to put some order in the matter. In *Micula*, the tribunal echoed some of the commonly cited differences between jurisdiction and admissibility stressing how reasons for inadmissibility can arise or be removed after the seisin¹⁷ and must be raised by the parties – as opposed to reasons for lack of jurisdiction which the tribunal can raise *motu proprio*.¹⁸ The *Achmea* tribunal followed closely this canon¹⁹ but somewhat revealed its contradictions. First, it set a deadline to the respondent for the submission of procedural objections pertaining also to the jurisdiction of the tribunal,²⁰ warning that further objections would be regarded as waived; then it proclaimed that jurisdictional objections must be considered by the tribunal irrespective of the parties' invoking them, implicating that no waiver is possible and that, accordingly, no deadline is applicable.²¹ In neither dispute did the distinction prove critical to the outcome.

¹⁶ Shany, *supra* note **Error! Bookmark not defined.**, 130, accompanies the list of these practical consequences with a careful assessment of the 'analytical reasons' which depend on the correct distinction between jurisdiction and admissibility, that is, 'the distinction may help us better understand the way courts exercise judicial power and the legal interests of relevant constituencies affected as they do so.'

¹⁷ *Joan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmil S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility of 24 September 2008, para. 64: "[W]hen 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."

¹⁸ *Ibid.*, para. 65: "a tribunal can rule on and decline its jurisdiction even where no objection to jurisdiction is raised if there are sufficient grounds to do so on the basis of the record."

¹⁹ *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2013-12 (Number 2), Award on Jurisdiction and Admissibility of 20 May 2014.

²⁰ See the letter to the parties dated 31 March 2013, quoted in footnote 147 of the award: "the Respondent shall file a statement containing all and any of its objections to the jurisdiction of this Tribunal and to the admissibility of Claimant's claims to be submitted on or before 14 June 2013, failing which the Respondent will have waived the possibility to raise any further objections thereafter."

²¹ *Achmea supra* note 19, para. 120.

As recently as 18 January 2017, an ICSID tribunal in *Supervision y Control v. Costa Rica*²² took to heart the distinction between jurisdiction and admissibility embarking on a digression to extol it. The tribunal noted that ‘a court’ might review only findings on jurisdiction, not those on admissibility.²³ One may find this to be a surprising statement since it comes from an ICSID tribunal, whose findings cannot be subject to challenge in domestic courts. The arbitrators went on to illustrate the abstract distinction of the targets of either objection,²⁴ as well as the practical differences between the two defences in question also drawing from the scholarly narrative,²⁵ then reiterated the general statement that “[w]hereas jurisdiction refers to the authority or the ability of the Tribunal to hear and decide upon a case, admissibility refers to the characteristics of the claims submitted to arbitration”.²⁶ It eventually concluded that “because of this distinction, questions of jurisdiction must be analysed before answer questions relating to admissibility”.²⁷

This reasoning had little critical bearing on the tribunal’s final decision according to which all of the investor’s claim were eventually found inadmissible. Some of them were still pending in domestic courts, in contravention of the pre-arbitration requirement to “desist” from domestic litigation to access arbitration.²⁸ Others met this requirement, but the investor had raised them for the first time during the arbitration, failing therefore to meet the notification requirement and the ensuing pre-arbitration waiting period of six months.²⁹

While the investor’s claim failed at the preliminary stage, the reasons for its dismissal could be remedied by the investor retracting from the duplicative proceedings in domestic courts and

²² *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Final Award of 18 January 2017.

²³ *Ibid.*, para. 268.

²⁴ *Ibid.*, para. 269: “An objection to jurisdiction refers to the ability of a tribunal to hear a case, while an objection to admissibility refers to the claim itself, assuming that the tribunal has jurisdiction.”

²⁵ Michael Waibel, “Investment Arbitration: Jurisdiction and Admissibility”, in A. Reinisch et al. (eds.), in August Reinisch et al (eds), *Handbook on International Investment Law* (2015), 1212.

²⁶ *Supervision v. Costa Rica*, *supra* note 22, 271.

²⁷ *Ibid.*, para. 274.

²⁸ See Article XI.3 of the BIT between Spain and Costa Rica.

²⁹ *Ibid.*, Article XI.1.

complying with the cooling-off condition. In this case, the admissibility paradigm fits better the case and, subject to a change of the relevant circumstances, the claim could be brought anew in fresh arbitration proceedings.

Whereas the practice sometimes proves conspicuously that a difference between the two procedural institutions in hand does exist – like in the case just discussed –, the theory behind the dividing line is still rudimentary. The differences between jurisdictional and admissibility objections that are often cited have some descriptive value but have limited normative force. It will be sufficient here to show the shortcomings of some of distinctions that are most commonly invoked. Since the predictive value of a general rule is undermined by the existence of exceptions, the following thoughts may discourage reliance on the commonplace distinctions between jurisdiction and admissibility.

First, the assumption that tribunals must always be satisfied of their jurisdiction *proprio motu* may not be taken for granted under all circumstances. *Achmea* proved the point, as commented above.³⁰ Furthermore, the assertion by which arbitration tribunals are in any case bound to assess *ex officio* the existence of the grounds for their jurisdictional competence appears to contravene the pertinent ICSID and UNCITRAL rules. By setting a deadline for jurisdictional objections they clearly imply that after a critical point in time the tribunal should even ignore an objection raised *ex parte*, let alone entertain it *proprio motu*.³¹

Second, in respect of the burden of proof, its allocation might differ with regard to proving the grounds of jurisdiction or those of admissibility. This distinction, however, is mostly theoretical,³² there is virtually no difference in the practice. Whereas as a general rule it is the

³⁰ See above, text at notes 19 to 21.

³¹ ICSID Convention, Article 41(1), UNCITRAL Rules, Article 21(3); Revised UNCITRAL Rules, Article 23(2). On this, see Judith Levine, “Navigating the parallel universe of investor–State arbitrations under the UNCITRAL Rules”, in C. Brown and K. Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (2011), 369, 395.

³² The investor must prove the existence of the jurisdictional requirements; the State must prove that a claim on which jurisdiction exists is inadmissible. See *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 58-64: “if jurisdiction rests on the existence of certain facts, they have to be proven [not just established *prima facie*] at the jurisdictional phase”; *Pac Rim Cayman LLC v. Republic of El Salvador*,

party relying on certain facts that must prove them,³³ it is worth noting how, with respect to an objection based on estoppel and abuse of process, the tribunal in *Rusoro v. Venezuela*³⁴ could not resolve itself to classify it as pertaining to jurisdiction or admissibility, but declared that in either case the State would equally have to provide the decisive evidence.³⁵

Third, another oft-cited distinction is the different regime of review of jurisdictional determinations – *i.e.* reviewable or annulable –, on the one hand, as opposed to findings on admissibility – *i.e.* immune from review –, on the other. This distinction finds little textual rooting in the ICSID system, where the standard for annulment is manifest excess of powers or a serious departure from a fundamental rule of procedure.³⁶ A mistaken finding on jurisdiction could within the scope this standard just as well as a mistaken finding on admissibility, provided that the critical gravity threshold is reached.³⁷ The *ad hoc* committee deciding on the annulment of the *TECO v. Guatemala* award clarified that the jurisdiction/admissibility divide is *per se* irrelevant to the success of an annulment application as follows:

ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections of 1 June 2012, para. 2.9-2.11.

³³ See the discussion in *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction, and Partial Dissenting Opinion of Professor Francisco Orrego Vicuña of 11 April 2007, para. 138 ff (it was not for the claimant to prove that he was not Egyptian, but for the State to support with evidence the relative jurisdictional objection).

³⁴ *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award of 22 August 2016, para. 350 ff.

³⁵ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award of 1 December 2008, para. 138-142.

³⁶ ICSID Convention, Article 52.

³⁷ Consider the statement of the Committee in the case *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment of 9 March 2017, para. 110: “the Committee accepts that there is some force in the argument advanced by Venezuela that matters of jurisdiction may call for a more rigorous approach than other grounds for annulment, simply because a tribunal ought not to be allowed to exercise a judicial power it does not have (or vice versa). The Committee also accepts that there is weight in the Mobil Parties’ contention that questions of admissibility may require to be approached in a different way from questions of jurisdiction for the purposes of the annulment scheme laid down in Article 52 of the ICSID Convention. It is plain on the face of it that the reference in Article 52(1)(b) to a tribunal having “manifestly exceeded its powers” fits most naturally into the context of jurisdiction, in the sense that it covers the case where a tribunal exercises a judicial power which on a proper analysis had not been conferred on it (or vice versa declines to exercise a jurisdiction which it did possess).” This *obiter dictum*, however, does not rule out the possibility of annulment of an admissibility decision, and limits itself to note, in the abstract, that the threshold of gravity might be less likely to be met.

‘... the Committee wishes to clarify that it cannot accept Guatemala’s theory according to which a tribunal’s incorrect decision on jurisdiction can never survive annulment because any excess of jurisdiction is necessarily manifest’.³⁸

In a complementary way, the *Urbaser* tribunal noted that admissibility findings can be annulled, and chastised the attempts to distinguish between admissibility and jurisdiction on the basis of annullability. To that end, the tribunal stressed that

‘under the ICSID system, a decision stating that a claim lacks admissibility may be brought before an annulment committee based on one of the grounds listed in Article 52(1) of the Convention and in particular when the claimant alleges that the tribunal had ‘manifestly exceeded its powers’ (lit. b). This feature of ICSID practice renders both the distinction wrong in theory and useless in practice’.³⁹

Outside the ICSID circuit, the distinction might be relevant, but only in light of the arbitral rules applicable in the domestic proceedings. The UNCITRAL Model Law does not seem to use the jurisdiction/admissibility distinction as a reference when listing the grounds for setting an award aside.⁴⁰ Whether admissibility decisions are immune from review ultimately depends on how the national arbitration law transposed the UNCITRAL grounds. It might be that “lack of jurisdiction”⁴¹ is listed as a ground for annulment of a tribunal’s award, whereas a mistaken finding on admissibility is not. However, this possibility must be ascertained on case by case basis, and certainly should not support a general statement on the difference between the reviewability of jurisdictional decisions as opposed to that of admissibility ones.

³⁸ *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment of 5 April 2016, para. 215.

³⁹ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction of 12 December 2012, para. 117.

⁴⁰ Relevant here are Article 34(2)(a)(ii), Article 34(2)(b)(i) and (ii), regarding excess of authority, non-arbitrability of the dispute and the public policy safeguard.

⁴¹ See, for instance, the Swiss Federal Statute on Private International Law, Chapter 12, Article 190 (Action for Annulment). See Susan D. Franck, “The legitimacy crisis in investment treaty arbitration: privatizing public international law through inconsistent decisions”, 73 *Fordham Law Review* (2005), 1521.

In essence, both the doctrine and the practice have difficulty in drawing a line between jurisdictional and admissibility elements. To the extent that some practical advantages might be derived from this state of uncertainty, it is to be expected that parties will try to exploit it. This situation renders the tribunals' task ever more daunting.

C On This Special Issue – The Contributions

The article by Jensen Calamita and Elsa Sardinha is the ideal starter for anybody seeking to enter the battleground of preliminary questions to survey the deployment of litigation tactics. Issues of jurisdiction and admissibility, combined, provide the respondent State with a powerful strategic tool to stall the process by seeking bifurcation. While the possibility of bifurcation responds to considerations of efficiency and judicial economy, its management by tribunals might affect the fairness of the proceedings.⁴² Tribunals are used to weighing all the possible contingencies to assess whether the more efficient scenarios (bifurcation and no merits; no bifurcation and merits) are more likely to occur than the less efficient ones (bifurcation and merits stage; no bifurcation with procedural objection upheld).

The interesting point, however, is not so much whether the procedural objections are likely to succeed, since tribunals are careful not to prejudge their determination on jurisdiction in their decisions on bifurcation. Rather, it is instructive to observe the tribunals' prognosis regarding how the determination of jurisdictional matters might require, and depend on, the full analysis of the merits. In this sense, whilst an inquiry into the alleged failure to notify a dispute before arbitration would be severable from the analysis of the merits – thus making bifurcation more reasonable –, a preliminary objection regarding the investor's violation of domestic law might be inextricably linked to the defense on the merits and advise against granting a request of bifurcation.

⁴² For an analysis of the implications on fairness of the tribunals' practice regarding bifurcation applications in inter-State arbitration at the PCA, see Brooks W. Daly and Hugh Meighen, "Procedural Fairness in International Arbitration Involving States", in A. Sarvarian et al (eds.), *Procedural Fairness in International Courts and Tribunals* (2015), 264-269.

The focus of Eirik Bjorge's article is the role of EU law in arbitration raised under intra-EU investment agreements. More specifically, the author looks into the Commission's contention that these investment treaties are terminated by virtue of the Lisbon Treaty. Since the competence of the tribunals is based on these treaties, this argument seeks to found a powerful jurisdictional objection. For all the Commission's effort – and possibly without prejudice to the Member States' responsibility for infringing EU law in some respect – tribunals have held that the BITs remain valid and their application is not displaced by the mere existence of EU law regulating the same subject-matters.

Bjorge's discussion on disconnection clauses is particularly topical in relation to the yet ongoing debate over the EU Commission's assertion of an "implicit disconnection clause for intra-EU relations". Whereas the analysis is confined to purely treaty issues, the issue offers yet another test bed of the direct versus derivative theory of investors' rights. If one accepted that investors are the recipient of actual rights under the treaties, at least with respect to the procedural right to invoke the protections therein, it would be difficult to accept that they lose such rights simply through the operation of a *lex posterior* situation. The point proceeds from the substantive question whether the EU law is in conflict, *vel non*, with the ECT or the intra-EU BITs.⁴³ If the answer were in the negative, investors would retain their right to trigger arbitration and tribunals would be expected to confirm their jurisdiction thereupon.

Mary Footer's analysis discusses how States shape their arbitration offers so as to expand arbitral jurisdiction beyond the substantive reach of an investment treaty, in particular over contract-based claims. Competence over claims that do not assert the breach of a treaty standard could occur through application of an umbrella clause or through widely worded arbitration provisions, making arbitration available over "any dispute relating to the investment". Several complications concerning umbrella clauses still require parsing, and chiefs among them are the

⁴³ *Ibid.*, para. 438-439.

doubts as to whether 1) some conduct *jure imperii* is needed and 2) the umbrella-based jurisdiction of the tribunal operates only in cases of contractual privity between investor and host State.

With respect to the former point, whereas the majority of awards does not consider it necessary, still some tribunals use the *El Paso* test, which rejects the automatic treaty-fication of contractual claims when sovereign powers are not deployed.⁴⁴ With respect to the latter problem, it is still unclear whether an umbrella clause covers only contracts between the investor and the host State⁴⁵ or, more loosely, contracts involving investor's subsidiaries or State-owned entities.⁴⁶ The *Supervision v. Costa Rica* tribunal has had the opportunity, recently, to elaborate on this point, using the wording of the specific applicable umbrella clause as the hinge of its analysis, as follows:

‘the protection of [the umbrella clause] goes beyond the simple direct contractual relationship between the investor and the host State, because such provision establishes that the State shall comply with the obligations undertaken “...related to investments by investors of the other Contracting Party ...”. Such drafting is sufficiently broad to interpret that the obligations contracted by Costa Rica with Riteve, a company controlled by the Claimant and created exclusively to hold the rights of the Contract, are included under the scope of protection of the Treaty. As a result, the Tribunal has jurisdiction *ratione materiae* over the dispute’.⁴⁷

It is worth emphasising how the tribunal came to this conclusion noting that the critical element of consent - i.e., whether the State Parties had consented to arbitration with respect to non-treaty claims - was not given solely “with respect to the investor”, but also “with respect to *its*

⁴⁴ *El Paso Energy International Company v. Republic of Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction of 27 April 2006, para. 82. See, for instance, *Supervision v. Costa Rica supra* note 22, 282.

⁴⁵ As suggested, for example, in *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (formerly *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*), Decision on Liability of 14 December 2012, para. 220.

⁴⁶ For a case in which there was absolutely no privity, the contract being concluded between a company participated by the Claimant and a State-owned company, see *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award of 29 January 2016, para. 305.

⁴⁷ *Supervision v. Costa Rica supra* note 22, para. 287, emphasis in the original.

investments”, including its subsidiaries.⁴⁸ This decision illustrates the familiar circumstance of tribunals using the Vienna Convention paradigm and giving prevalence to literal interpretation to construe the investment treaties.

Giulio Cortesi’s article analyses the obverse scenario. Instead of the interplay between the investor’s subsidiary and the host State, his focus is on the relationship between the investor and State-owned entities (SoE). His careful reconstruction of the law and the case-law revolves around two main themes, namely the jurisdiction of tribunals over claims made against SoE and the attribution of their actions to the host States. Cortesi shows how these two themes are not distinct, unless artificially so. In his view, the issue of attribution must be examined at a preliminary stage. This would avoid cases in which the State is not genuinely involved from advancing to the merits just because the State was the formal addressee of the claim and the tribunal postponed the analysis of attribution to the merits stage.

His suggestions ring true in light of a case like *Tenaris v. Venezuela*.⁴⁹ In this case, the tribunal was satisfied of its jurisdiction simply because the claim was addressed to the host State, even if the underlying dispute regarded, in part, the performance of a contract concluded between a company participated by the Claimant and a State-owned company. In fact, the tribunal addressed the issue of attribution during its analysis of the merits, and ultimately denied the possibility of attributing the acts of the SoE to the host State:

‘The Tribunal accepts Venezuela’s case that [the SoE] had not been specifically empowered by the law of the State of Venezuela to distribute pellets, and that its corporate purpose was the marketing of iron ore, pellets and fines, which are activities of a private and commercial nature. Moreover, its obligations in the context of Matesi were obligations entered into pursuant to the Supply Contract, which was a commercial contract. To the extent that the actions of its principal shareholder [another SoE] might be said to be relevant, there is nothing in the evidence to

⁴⁸ *Ibid.*, para. 289.

⁴⁹ *Tenaris v. Venezuela supra* note 47.

suggest that its oversight of [the SoE] went beyond the exercise of general supervision of a kind which international tribunals have determined would be insufficient for the purposes of attribution'.⁵⁰

Whereas the distinction between jurisdiction and attribution holds some taxonomic value, it is interesting to see this artificial two-step analysis, especially in a case in which there was no bifurcation. The impression is that, for the purpose of jurisdiction, the claimant's characterisation of the defendant is the only relevant criterion.

In his article, Andrea Gattini delves on the application *ratione temporis* of investment treaties and the connected temporal scope of tribunals' jurisdiction. His study praises the tribunals' close adherence to the canons of treaty interpretation and consent-based jurisdiction. It also observes that, when at stake is not so much the existence of consent but the conditions of its exercise, tribunals can act pragmatically, for instance enforcing overlooked cooling-off periods *during* the arbitral proceedings, rather than rejecting the claim altogether.

D *Urbaser*: A New Front Opened Up

The ICSID tribunal in the *Urbaser v. Argentina* dispute, which handed down its final award on 8 December 2016, might have opened another front of the jurisdictional battleground.

The remarkable part of the award is not so much the finding against the host State, which led to no compensation, but the finding that the tribunal had jurisdiction over the Respondent's counterclaim against the investor, relating to an alleged breach of the human right to water in the performance of the State concession concerning water distribution.⁵¹

The investor had opposed the counterclaim, invoking the one-sided nature of investor-State arbitration.⁵² The Tribunal rejected this argument, referring to the neutral wording of the arbitration clause of the BIT, which simply referred to "disputes arising between a Party and an

⁵⁰ *Tenaris v. Venezuela supra* note 46, para. 417.

⁵¹ *Urbaser v. Argentina supra* note 39, Award of 8 December 2016, para. 1154-1155.

⁵² *Ibid.*, para. 1120.

investor of the other Party in connection with investments”⁵³ and to the possibility for “either party to the dispute”⁵⁴ to launch arbitration. Indeed, Article 46 of the ICSID Convention tasks the tribunal with the determination of “counterclaims arising directly out of the subject-matter of the dispute provided that they are *within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.*”⁵⁵

The tribunal held that the alleged breaches – i.e. the failure to perform sufficient investments under the concession and subsequent breach of the right to access to water of the population - were connected to the factual matrix of the investment, and that the BIT’s clause on the applicable law was wide enough to warrant the application of other instruments of international law, including human rights treaties.⁵⁶

The tribunal also overcame the crucial investor’s objection that human rights treaties, even if applicable in the dispute, could not create obligations for private entities. The arbitrators made the point that “the human right for everyone’s dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights”.⁵⁷ In the specific case of the right to water, however, the tribunal observed that its enforcement “represents an obligation to perform” that could only fall on States.⁵⁸ The counterclaim, therefore, was rejected on the merits.

The decision raises more questions than it answers. Could the investor, to avoid counterclaims, accept the standing offer to arbitrate disputes in the treaty and, contextually, carve out certain subject-matters from the acceptance? Is the *Urbaser* scenario only possible when 1) the arbitration clause is not reserved to the investor; 2) it is not confined to claims relating to the treaty; and 3) the fulfilment of a human right happens to be connected to the activities of the

⁵³ Article X(1) of the Spain-Argentina BIT.

⁵⁴ *Ibid.*, Article X(3)

⁵⁵ Emphasis added.

⁵⁶ See *Urbaser v. Argentina supra* note 51, para. 1188, referring to Article X(5) of the Spain-Argentina BIT.

⁵⁷ *Ibid.*, para. 1199.

⁵⁸ *Ibid.*, para. 1210.

investment at stake in the dispute? Is the tribunal's conclusion – that the international obligation to provide water binds only the State – distinguishable with respect to other human rights, or with other modes of compliance? Does the tribunal's reference to "an obligation to abstain"⁵⁹ suggest that a duty to respect – as opposed to a duty to provide – might be binding on individuals? If all these conditions are met, could the State just bring the same claim against the investor in the first place, as a principal claim instead of a counterclaim?

Allegation of human rights abuses are routinely raised as a defense by the respondent State, to challenge the jurisdiction of the tribunal or the claim's admissibility, to rebut the claim on the merits or, at least, to influence the degree of liability that the tribunal use as benchmark to calculate compensation. In light of *Urbaser*, however, States might be tempted to explore the possibility of counterclaims or even direct claims, if the treaty text allows and the violations are sufficiently linked with the operation of an investment.

E. Final Remarks

Maybe this Special Issue manages, as Reinisch wishes in his concluding remarks, to shed some light on the elusive concepts of jurisdiction and admissibility. At least, it maps the reasons for the confusion and, waiting for better definitions, takes stock of selected trends of their application in the practice.

The *Urbaser* development is just one example of the complications that tribunals encounter when they need to determine the existence and the extent of the parties' consent to arbitration. A recurring theme of the articles that compose this issue is the reliance on the secondary rules of public international law. In case of doubt, it is through the diligent routine of treaty interpretation that tribunals reach a decision – or at least provide the reasoning behind a decision reached otherwise. In spite of the similarity between the procedures of commercial and investment arbitration, investment tribunals are well aware of their capacity as international

⁵⁹ *Ibid.*

legal trustees and the limits of their jurisdiction. Their handling of preliminary objections constantly reveals the tribunals' concern not to overstep what is, ultimately, the exercise of a conferred jurisdiction (*compétence d'attribution*).⁶⁰

The editors hope that you will enjoy the reading of this Issue. Whether or not you agree with each of these articles in full, we hope that they can serve as a source of information and intellectual stimulation.

⁶⁰ *ST-AD GmbH v. Republic of Bulgaria*, Award on Jurisdiction, Award on Jurisdiction of 18 July 2013, para. 362.