International Arbitration:

Some Reflections on Jurisdiction and Admissibility

by Nikita V. NOTA

The distinction between the concepts of jurisdiction and admissibility in international arbitration is one of those instances in which practitioners, arbitrators and academics are still looking for a common view.[1] Although the concepts of jurisdiction and admissibility received extensive treatment in the jurisprudence of the International Court of Justice[2], neither the provisions of national arbitration laws, nor the UNCITRAL Arbitration Rules, nor the BIT's, nor the ICSID Convention provide directly for objections to admissibility.

Nevertheless, it is still necessary to distinguish between objections to jurisdiction and objections to admissibility. As Paulsson cautions, practitioners should tread carefully on this conceptually confused terrain because a tribunal's decisions have consequences: whereas a decision by arbitral tribunals on jurisdiction is reviewable (by national courts or annulment committees), determinations of "admissibility" like merits determinations, are generally not reviewable. Thus, Paulsson concludes, "it is vital to understand the fundamental distinction between the two concepts. They are indeed as different as night and day. It may be difficult to distinguish the dividing line between the two. There is a twilight zone. But only a fool would argue that the existence of a twilight zone is proof that day and night do not exist."[3]

The decision on jurisdiction of the ICSID tribunal in SGS v. Philippines is of vital importance, since the tribunal directly addressed the distinction between concepts of jurisdiction and admissibility. In SGS v. Philippines two parties entered into a service contract containing a stipulation to the effect that disputes arising out of it should be referred to a Philippine court. The Philippines asserted that the ICSID tribunal had no jurisdiction given the fact that the jurisdictional clause in the contract required the matter at issue to be taken to a Philippine court and nowhere else. Although the tribunal concluded that it had jurisdiction, the claim was recognized as inadmissible. The ICSID tribunal indicated that the issue was the question of admissibility, as follows: "in the Tribunal's view, this principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense. The jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention. It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the states which are parties to those treaties under international law. Although under modern international law treaties may confer rights, substantive and procedural, on individuals, they will normally do so in order to achieve some public interest. Thus, the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by a contract. The question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as force majeure, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction."[4]

By contrast, the ICSID tribunal in Salini v. Jordan arrived at a different conclusion and did not separate the concepts of jurisdiction and admissibility.[5] Moreover, on several occasions the ICSID tribunal recognized that the concept of admissibility did not apply to the ICSID Convention as it

[1] Ian A. Laid, A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in Salini v. Jordan and Methanex v.USA, in International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (T. Weiler ed. 2005), P. 201.

[2] I. Brownlie, Principles of Public International Law, 5th ed. (1998), P. 479.

[3] Jan Paulsson, Jurisdiction and Admissibility, International Law, Commerce & Dispute Resolution: Liber Amicorum in Honour of Robert Briner 601 (2005), P. 603.

[4] SGS Societe Generale de Surveillance S.A. *v. Republic of the Philippines*, January 29, 2004 (Case N ARB/02/6), Para. 154.

[5] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction (ICSID Case No. ARB/02/13), Para. 137.

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deals only with jurisdiction and competence.[6] Specifically, in Enron the ICSID tribunal went on to find that "the 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. A successful admissibility objection would normally result in the rejection of a claim for reasons connected with merits. In the light of the Bilateral Investment Treaty the essential question is whether the claimant invoking the benefit of its provisions qualifies as a protected investor. The right of claim will arise from this determination. This is the situation that specifically needs to be discussed under the Treaty irrespective of whether it is labeled a question of admissibility or otherwise."[7] However, in Enron it was also confirmed that the ICSID tribunal may consider only claims within the ambit of the parties' consent, which should be thereby considered as admissible: "the Tribunal notes that while investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State. If consent has been given in respect of an investor and an investment, it can be reasonably concluded that the claims brought by such an investor are admissible under the treaty. If the consent cannot be considered as extending to another investor or investment, these other claims should then be considered inadmissible as being only remotely connected with the affected company and the scope of the legal system protecting that investment."[8]

In NAFTA arbitration the tribunal also recognized the distinction between objections to jurisdiction and objections to admissibility[9], but it refused to apply the concept of admissibility stating that "it follows from the text of Article 21(1) of the UNCITRAL Rules that the Tribunal has the express power to rule on objections that it has "no jurisdiction". This text, however, confers no separate power to rule on objections to "admissibility".[10] The tribunal, therefore, found that it had no express or implied power to reject claims based on inadmissibility.[11]

The jurisdiction/admissibility dichotomy is likely to appear in international commercial arbitration. The French Supreme Court has held that a claim is inadmissible *(irrecovable)* if it arises out of a contract stipulating that the parties must submit to a conciliation procedure before initiating legal action, and that condition precedent had not been fulfilled.[12]

It, therefore, can be concluded that in international arbitration questions of jurisdiction and admissibility are both part of the universe of preliminary questions that, while leaving the merits of the case untouched, have the potential to prevent or postpone a final judgment on merits. It reveals that objections to jurisdiction and objections to admissibility are similar in that they are both preliminary. They are analyzed before the merits and their intended effect is to avoid findings on the merits.

The distinction between matters of jurisdiction and admissibility stems from the distinction between the scope of a tribunal's decisional authority and the conditions governing the exercise of the specific action or process before the tribunal. Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case is defective — whether it is appropriate for the tribunal hear it.[13]

Moreover, qualifying an objection as a matter of jurisdiction or admissibility is important for the purpose of establishing the burden to raise such an objection. Lack of jurisdiction is an issue that a tribunal must examine at its own initiative. By contrast, the question of admissibility of claims normally has to be raised by the parties.[14] This distinction relates to the very nature of the lack of jurisdiction versus the inadmissibility of a claim. As lack of jurisdiction concerns the scope of the tribunal's authority to decide the issue, the tribunal must sort this out for itself, even if neither party raises the question.[15]

Consequently, objections as to jurisdiction are primarily directed to the authority of the tribunal to rule on the claims. Objections

[6] *CMS Gas Transmission Co. v. Republic of Argentine*, Decision of the Tribunal on Objections to Jurisdiction, July 17, 2003 (ICSID Case No.ARB/01/8), Para. 41; see also *Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentine*, 14 January 2004 (ICSID Case No. ARB/01/3), Para. 33.

[7] *Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentine*, 14 January 2004 (ICSID Case No. ARB/01/3), Para. 33.

[8] *Ibid.*, Para. 52.

[9] *Methanex Corporation v. United States of America*, First Partial Award, August 7, 2002, Paras. 107, 122-126.

[10] *Ibid.*, Paras. 107, 123.

[11] *Ibid.*, Para. 126.

[12] See Cass. Ch. Mixte, 14 February 2003, *Poiré v. Tripier et al, J.C.P. La Semaine Juridique Enterprise et Affaires* 810 (8 May 2003) cited in Jan Paulsson, Jurisdiction and Admissibility, International Law, Commerce & Dispute Resolution: Liber Amicorum In Honour Of Robert Briner 601 (2005), P. 613.

[13] Waste Management, Inc. v. United Mexican States, Dissenting Opinion of Keith Highet, June 2, 2000, (ICSID Case No. ARB (AF)/98/2), Para. 58.

[14] See Chittharanjan F. Amerasinghe, Jurisdiction of International Tribunals (2003), The Hague, London, New York: Kluwer Law International, P. 286.

[15] Joost Pauwelyn, Luiz Eduardo Salles, Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions, 42 Cornell International Law Journal 77, P. 96.

[16] William W. Park, Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law, 8 Nevada Law Journal 135, PP. 148-148.

[17] William W. Park, The Arbitrator's Jurisdiction to Determine Jurisdiction, 13 ICCA Congress Series 55, P. 75.

[18] Jan Paulsson, Jurisdiction and Admissibility, International Law, Commerce & Dispute Resolution: Liber Amicorum in Honour of Robert Briner 601 (2005), P. 617.

to admissibility, in contrast, are targeted at the conditions for the specific action or complaint. As a result, objections to admissibility often come into play only after the finding of jurisdiction.

A decision on inadmissibility does not acquire the full force of *res judicata* (final and is no longer subject to appeal) when the problem underlying the admissibility of the application may be cured. In contrast, a decision on jurisdiction cannot be cured unilaterally and to this extent does carry the force of *res judicata*. A decision of inadmissibility based, for instance, on the non-exhaustion of local remedies, does not influence further proceedings after local remedies have been exhausted. In this sense, a decision on inadmissibility would not have the force of *res judicata*.

To reduce the risk of simply presuming one's own conclusions about what is or is not jurisdictional, it might be helpful to suggest three common categories of defects in arbitral authority: (i) existence and validity of an arbitration agreement; (ii) scope of the arbitral tribunal's authority (substantive and procedural); (iii) public policy.[16]

In some instances, jurisdictional and admissibility questions may overlap. For example, a brokerage contract might be subject to rules that make an investor's claim ineligible for arbitration unless filed within six years after the allegedly inappropriate advice or trade. In addition, a statute of limitation might exist in the law applied to the merits of the dispute. The latter question (statute of limitations) would clearly fall to the arbitrators as part of their decision on the merits. The former (eligibility for arbitration) may or may not be for arbitrators, depending on the parties' intent as evidenced in the applicable arbitration rules.[17]

In this context, therefore, the distinctions between the time bar in a statute of limitation and a time restriction on arbitration eligibility is crucial. The statute of limitation (a matter of admissibility) bars recovery itself, whether before courts or arbitrators. By contrast, the jurisdictional limit, restricting eligibility for arbitration, states only that the case must be brought in a court rather than before an arbitrator.

Whereas the governing law of jurisdictional objections refers to the tribunal's jurisdictional field (ratione materiae or ratione personae), objections to admissibility are governed by principles and rules binding on the parties to the dispute and not necessarily incorporated in the clause or instrument granting the tribunal jurisdiction. As such, an objection to admissibility leaves untouched the jurisdiction of the tribunal to decide the case. In fact, if a tribunal refuses to examine substantive claims based on their inadmissibility, the arbitral tribunal is, by definition, exercising jurisdiction, albeit to decline to rule on the merits of the case. The tribunal thereby exercises its jurisdiction recognizing an inadmissibility of the claims and stopping the proceeding without findings on the merits.

It is argued[18] that in order to understand whether a challenge pertains to jurisdiction or admissibility, one should imagine that it succeeds: if the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is an ordinary one of jurisdiction and subject to further recourse; if the reasons would be that the claim should not be heard at all (or at least not yet), the issue is an ordinary one of admissibility and the tribunal decision is final.

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