Jurisdiction and admissibility: are we any closer to a line in the sand?

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ABSTRACT

While the distinction between the concepts of jurisdiction and admissibility in investment arbitration did not appear particularly significant to the first tribunals faced with the question, a review of several recent awards reveals that in the past few years, certain investment tribunals have referred to and acknowledged the importance of the distinction. In this context, this article aims to analyse whether a consistent approach to the application of the distinction has been adopted, and discusses the practical implications that the distinction (and any inconsistencies in its application) may have.

KEY REFERENCES

- Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskiaia Ur Partzuergoa v The Argentine Republic, ICSID Case No. ARB/07/26, Decision on Jurisdiction (2012)
- Antoine Goetz & Others and SA Affinage des Metaux v Republic of Burundi, ICSID Case No. ARB/01/2, Award (2012)
- Hochtief AG v The Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction (2011)
- Abacat and Others v Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (2011)
- SGS Société Générale de Surveillance SA v Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (2004)
- Enron Corporation and Ponderosa Assets LP v Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction (2004)
- SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (2003)
- Methanex Corporation v United States of America, UNCITRAL, Partial Award (2002)

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International investment arbitration has developed significantly in the past 15 years, and several issues have emerged regarding the applicability in this field of some concepts derived from public international law and/or domestic litigation, among them the distinction between jurisdictional and admissibility objections.

A few years ago, it was suggested that practitioners and arbitrators should draw a clear distinction between the concepts of jurisdiction and admissibility in international arbitration, despite the existence of a ‘twilight zone’ between both types of preliminary objections. This suggestion was particularly directed to investment arbitration, where it was rare for arbitral tribunals to draw such a distinction. It was noted that the few investment awards expressly dealing with jurisdictional and admissibility requirements had either treated them in a flexible and overlapping way, seeing no real need to distinguish between the two, or had used improper and confusing terminology.

Yet, over the past six years, various investment tribunals have referred to the distinction between jurisdictional and admissibility grounds when deciding upon the dismissal of a claim.

In this context, this article aims to provide an overview of how the distinction between jurisdiction and admissibility has been treated in investment arbitration, including how recent arbitral tribunals have dealt with the theoretical issues raised by the ‘twilight zone’ between both concepts, and to identify developments in this area. Such an analysis is relevant as this distinction appears to have significant practical implications: a tribunal’s decision to decline jurisdiction can in principle be challenged, whereas a finding of inadmissibility, being considered a question of merits, is not subject to review. An extensive interpretation of the grounds for inadmissibility would therefore provide arbitral tribunals with wide discretion as to which claims they should or should not hear, while a broad interpretation of the grounds leading to a lack of jurisdiction would extend the scope of review of their findings.

After addressing the difficulties that appear to have initially led some tribunals to question the relevance of the distinction between jurisdictional and admissibility requirements in the area of investment arbitration (Section 1), we will show that, in recent years, various tribunals have referred to such a distinction. However, the distinction remains unclear and is still subject to divergent analyses by tribunals and practitioners, which may not be without practical consequences (Section 2).


2 Case No. ARB/01/3 Enron Corporation and Ponderosa Assets, LP v Argentine Republic [2004] ICSID, Decision on Jurisdiction. Note that the Final Award of 22 May 2007 was subsequently annulled by an ad hoc Committee (Decision on Annulment, 30 July 2010) on the grounds that the arbitral tribunal had manifestly exceeded its powers by failing correctly to apply the principle of necessity raised as a defence by Argentina.

3 See J Paulsson (n 1) 607.

4 The distinction between jurisdiction and inadmissibility is also a highly topical issue, having been widely discussed by scholars and practitioners in the recent months. In 22 November 2013, Joint IAI - CIDS - UNCITRAL Conference, for instance, Zachary Douglas relied on the concept of admissibility to argue that shareholders’ claims in respect of any damage caused to the company by the host state leading to a diminution in value of their shares, should be kept within certain limits ‘Concurrent Proceedings in Investment Disputes – Treaty Arbitrations Brought by Shareholders’ (Join IAI - CIDS – UNCITRAL Conference, Paris, 22 November 2013).
JURISDICTION AND ADMISSIBILITY: A RELEVANT DISTINCTION IN
THE AREA OF INVESTMENT ARBITRATION?

From a theoretical perspective, a distinction can be drawn between the requirements related to the jurisdiction of a tribunal and those regarding the admissibility of a claim (Section 1.1). Nevertheless, the relevance of the distinction has been questioned in the area of investment arbitration (Section 1.2).

1.1 The theoretical distinction between jurisdiction and admissibility

In his dissenting opinion in Waste Management, Inc v United Mexican States, the late Keith Higgin distinguished the two concepts as follows: '[j]urisdiction is the power of the arbitral tribunal to hear the case, admissibility is whether the case itself is defective – whether it is appropriate for the arbitral tribunal to hear it.'

Following this logic, commentators have defined jurisdiction as the legal power of an arbitral tribunal to adjudicate a case (Section 1.1.1) and admissibility as relating to the appropriateness of a claim for adjudication (Section 1.1.2).

1.1.1 Jurisdiction: the existence and scope of the adjudicative power

In accordance with the definition given by Keith Higgin in Waste Management, Inc v United Mexican States, objections to jurisdiction have been defined as relating, on the one hand, to the existence of an arbitral tribunal’s adjudicative power and, on the other, to the scope of the tribunal’s adjudicative power.

Accordingly, with respect to the existence of an adjudicative power, the following two conditions have been considered as jurisdictional requirements in the area of investment treaty arbitration: the existence of valid consent to arbitration by the host state and the existence of an ‘investment’ made pursuant to the terms of the relevant investment treaty. Regarding the scope of the tribunal’s adjudicative power, ‘the categories of parties and disputes in relation to which the arbitral tribunal can adjudicate’ have been regarded as matters of jurisdiction.

In light of these parameters, commentators have considered that the jurisdiction of an investment arbitral tribunal will generally depend on the following four jurisdictional requirements:

i. Whether the tribunal has jurisdiction ratione voluntatis (ie whether there is consent to arbitrate);

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5 Case No. ARB(AF)/00/3 Waste Management, Inc v United Mexican States [2000] ICSID, Dissenting Opinion of Keith Higgin, para 58.
7 Ibid para 297. Investment treaties often contain definitions of the term ‘investment’. These definitions are usually introduced by a general description followed by a non-exhaustive list of typical rights that generally include shares, property, and contracts. Moreover, investment cases are frequently submitted to ICSID tribunals under provisions of investment treaties containing an offer of ICSID arbitration. Art 25 of the ICSID Convention limits the jurisdiction of ICSID tribunals to legal disputes arising ‘directly out of an investment’. Therefore, the jurisdiction of an investment tribunal is often subject to the determination of the existence of an ‘investment’ under two instruments: the relevant investment treaty and the ICSID Convention.
8 Douglas (n 6).
ii. Whether the tribunal has jurisdiction *ratione materiae* (ie whether there is an investment under the treaty and whether the subject matter of the claim is within the scope of the treaty);  

iii. Whether the tribunal has jurisdiction *ratione personae* (whether there is a protected investor under the treaty); and  

iv. Whether the tribunal has jurisdiction *ratione temporis* (whether the treaty is in force).

1.1.2 Admissibility: the appropriateness of a claim for adjudication  

In contrast, issues of admissibility have been defined as issues dealing with the appropriateness of a specific claim for adjudication, ie whether the ‘tribunal can exercise its adjudicative power in relation to specific claims submitted to it’.\(^\text{10}\) Objections based on admissibility have therefore been considered as ‘alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such’\(^\text{11}\).  

Therefore, according to this definition, the distinction between jurisdiction and admissibility lies in whether the objection is directed at the tribunal or at the claim. In other words, as indicated by the tribunal in *Hochtief v Argentina*, ‘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’\(^\text{12}\).  

Accordingly, in the context of investment treaty arbitration, it has been argued that denial of benefits,\(^\text{13}\) timeliness issues,\(^\text{14}\) contentions of extinguitive prescription,\(^\text{15}\) as well as contractual choice of forum\(^\text{16}\) are all matters of admissibility.

1.2 The difficulty in distinguishing between the two concepts in investment arbitration  

Notwithstanding this theoretical distinction, in the absence of a textual basis for the distinction in the area of investment arbitration (Section 1.2.1) the relevance of the distinction between the two concepts has been questioned, in particular by some of the first investment tribunals that were faced with the question (Section 1.2.2).

1.2.1 The absence of a textual basis for the distinction in the area of investment arbitration  

The distinction between jurisdiction and admissibility is well established under international law. In particular, it is expressly recognized by Article 79 of the Rules of the

\(^{10}\) Douglas (n 6).

\(^{11}\) Paulsson (n 1) 617.

\(^{12}\) Case No. ARB/07/31 *Hochtief AG v The Argentine Republic* [2011] ICSID, Decision on Jurisdiction, para 90.

\(^{13}\) Douglas (n 6) para 312.


\(^{15}\) J Paulsson (n 1) 616.

\(^{16}\) Douglas (n 6) para 312.
International Court of Justice (the ICJ Rules of Court)\textsuperscript{17} and has been the subject of extensive treatment in the jurisprudence of that court.

In contrast, the distinction does not appear in the legal instruments commonly applied in investment arbitration proceedings. Neither does the Convention on the settlement of investment disputes between States and nationals of other States (the ICSID Convention), the ICSID Arbitration Rules, nor the Arbitration Rules of the United Nations Commission on International Trade Law (the UNCITRAL Arbitration Rules) contain a provision expressly providing for such a distinction. Similarly, the distinction does not seem to appear in investment treaties.\textsuperscript{18}

Nevertheless, without necessarily referring to the concepts of admissibility and jurisdiction, investment treaties do provide several requirements that must be met for a case to proceed. In this context, commentators have observed that distinguishing between jurisdiction and admissibility might be very difficult.\textsuperscript{19} In particular, it has been suggested that the boundary between the two concepts will shift depending upon the wording of the relevant treaty. As noted by Professor Santulli:

In international proceedings, the substantive distinction between jurisdiction and admissibility is not stable. Indeed, as soon as an admissibility requirement is used to identify the scope of a tribunal’s remit (i.e. the type of disputes which are to come before a tribunal) it becomes a jurisdictional requirement. The effect of this is that the same requirement can be an admissibility requirement in one instance and a jurisdictional requirement in another, depending on the wording of the agreement under which the tribunal is constituted. Such shifts suggest that the identification of admissibility requirements logically presupposes the determination of jurisdictional requirements, as admissibility requirements can only be considered as such if they are not, in fact, jurisdictional requirements.\textsuperscript{20}

\textsuperscript{17} art 79 (1) of the ICJ Rules of Court provides that:

Any objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial. Any such objection made by a party other than the respondent shall be filed within the time-limit fixed for the delivery of that party’s first pleading. (Emphasis added).

\textsuperscript{18} See eg NAFTA and the ECT.

\textsuperscript{19} Newcombe (n 9) 192; Paulsson (n 1).

\textsuperscript{20} C Santulli, \textit{Droit du contentieux international} (Montchrestien 2005) para 255. Original in French:

Dans le procès international, la répartition matérielle entre compétence et recevabilité n’est pas stable. En effet, dès qu’une exigence de recevabilité est utilisée pour identifier l’étendue de l’attribution de la juridiction (i.e. la catégorie de différend soumis à la juridiction) elle devient une condition de compétence. Il en résulte que, suivant les termes des engagements juridictionnels, la même exigence est une condition de recevabilité ici, et une condition de compétence là. Ces glissements conduisent à conclure que l’identification des conditions de recevabilité suppose logiquement la détermination des conditions de compétence, puisque celles-là sont telles seulement si elles ne sont pas incluses dans celles-ci.
1.2.2 The rejection of the distinction by some investment tribunals

In the absence of a textual basis for distinguishing between the concepts of jurisdiction and admissibility in the area of investment arbitration, the relevance of the distinction was initially questioned by various investment tribunals.

In particular, it was noted that some tribunals had adopted a flexible application of the two concepts, considering that once particular requirements were contained in the provisions of a treaty, it was simpler to term them broadly as ‘jurisdictional requirements’ or to refer to the treaty in general. The reasoning followed by the tribunal in Enron v Argentina seems particularly illustrative of this approach. In this case the tribunal considered 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 rejecting a claim for reasons connected with the 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 to claim will arise from this determination. This is the situation that specifically needs to be discussed under the Treaty irrespective of whether it is labelled a question of admissibility or otherwise.

A similar reluctance to clearly separate out the two concepts can be seen in the Consorzio Groupement L.E.S.L.-DIPENTA v Algeria case, where the tribunal held that a finding of inadmissibility of a particular claim could amount to a lack of jurisdiction of the arbitral tribunal under the ICSID Convention:

In short, the Claimant is not the holder of the rights and obligations of the Contract under which the investment was made, which means that its Request for arbitration is inadmissible, and that, consequently, it cannot claim to be an investor within the meaning of article 25(1) of the Convention. Further, under the provisions of the Convention, inadmissibility of the Request for arbitration amounts to a lack of jurisdiction of the arbitral Tribunal, which can only adjudicate claims by investors within the meaning of the Convention.

23 Case No. ARB/03/08 Consorzio Groupement L.E.S.L.- DIPENTA v République algérienne démocratique et populaire [2005] ICSID, Award, para 40. The original French reads:

En définitive, la Demanderesse n’étant pas titulaire des droits et obligations du Contrat par lequel l’investissement a été réalisé, il en résulte que sa Requête d’arbitrage est irrecevable, et qu’en conséquence elle ne peut prétendre être un investisseur au sens de l’article 25(1) de la Convention. De ce fait, l’irrecevabilité de la Requête d’arbitrage se double, en
The tribunal in the *Methanex* case also seems to have called into question the distinction in the area of investment arbitration by stating that, in the absence of an express provision on the subject, the arbitrators lacked the power to dismiss claims on the basis of inadmissibility:

Article 21(1) of the UNCITRAL Arbitration Rules does not accord to the Tribunal any power to rule on objections relating to admissibility. There is no express power; and it is not possible to infer any implied power.\(^{24}\)

Critics have, however, argued that '[n]otwithstanding the absence of an express reference to the concept of admissibility in arbitration rules, investment treaty tribunals, as creatures of public international law, should be viewed as having inherent or incidental jurisdiction to find that claims are inadmissible.\(^{25}\) This perspective seems to have been gaining support in recent investment arbitration awards and a new trend recognizing the need to distinguish between jurisdiction and admissibility in this area may be emerging.

2. THE RECOGNITION OF THE DISTINCTION BETWEEN JURISDICTION AND ADMISSIBILITY IN RECENT AWARDS: A MOVE TOWARDS A CONSISTENT APPROACH?

In the past few years, various arbitral tribunals have referred to the distinction between jurisdiction and admissibility,\(^{26}\) and have emphasized the importance of such a distinction to resolve several issues arising in investment treaty arbitration. However, the overall approach appears inconsistent and the distinction between the two concepts remains unclear (Section 2.1). Yet, because of the practical importance such a distinction may have in investment arbitration, these inconsistencies may not be without implications (Section 2.2).

2.1 The discrepancies in the recent application of the distinction

Although several recent arbitral awards have discussed the distinction between jurisdiction and admissibility, the identification of certain requirements as jurisdictional or admissibility issues does not appear to have given rise to a consensus, showing that the line between both concepts is still unclear (Section 2.1.1). Similarly, there also seems to be discrepancies as to the admissibility grounds that may potentially justify the refusal to hear a claim, as illustrated by the 'umbrella clause saga' discussed in further details below (Section 2.1.2).

\(^{24}\) *Methanex Corporation v United States of America* [2002] UNCITRAL, Partial Award, para 123.

\(^{25}\) Newcombe (n 9) 194.

\(^{26}\) For instance, the arbitral tribunal in *Ioan Micula v Romania* found that '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.' (Case No. ARB/05/20 Ioan Micula, Viorul Micula, S.C. European Food SA, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania [2008] ICSID, Decision on Jurisdiction and Admissibility, para 63.) See also Case No. ARB/07/S Ahaclat and Others v the Argentine Republic [2011] ICSID, Decision on Jurisdiction and Admissibility and Case No. ARB/07/31 Hochtief AG v the Argentine Republic [2011] ICSID, Decision on Jurisdiction.
2.1.1 Inconsistency as to where to draw the line between jurisdiction and admissibility

Differing views on where to draw the distinction between jurisdiction and admissibility can be seen in recent decisions regarding the ability to bring mass claims in investment arbitration (Section 2.1.1.1), the application of most favoured nation clauses (MFN clauses) to dispute settlement provisions (Section 2.1.1.2), and the ability of a state to bring a counterclaim (Section 2.1.1.3).

2.1.1.1 The ability to bring mass claims in investment arbitration. Abaclat and Others v the Argentine Republic. In Abaclat and Others v the Argentine Republic, thousands of Italian claimants initiated ICSID arbitration proceedings against Argentina under the Bilateral Investment Treaty (BIT) between Italy and Argentina on account of Argentina’s default on various sovereign bonds.27

As the arbitral tribunal had to decide whether an ICSID tribunal could actually entertain mass claims, it drew a clear distinction between jurisdiction and admissibility,28 highlighting the importance of such a distinction in light of the different nature and practical consequences of each concept.29 The majority gave the following guideline to distinguish issues of jurisdiction from issues of admissibility in this case:

If there was only one Claimant, what would be the requirements for ICSID’s jurisdiction over its claim? If the issue raised relates to such requirements, it is a matter of jurisdiction. If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction.30

The majority considered that the ‘mass’ aspect of the proceedings was not an obstacle to the Tribunal’s jurisdiction over the claims. It found that this was, rather, a question of admissibility, as it related to the modalities and implementation of the ICSID proceedings and not to the question of whether the respondent consented to ICSID arbitration. Adopting a purposive approach to the interpretation of the ICSID Convention’s silence as to mass claims, it concluded that the ‘mass’ aspect of the claim was not an impediment to its admissibility.31

The conclusion reached by the Abaclat tribunal has not been unanimously welcomed. In his dissenting opinion, Professor Georges Abi-Saab rejected the majority’s view by considering that the ‘mass’ aspect of the claims was an obstacle to the

27 ibid Abaclat and Others.
29 Abaclat and Others (n 26) paras 246–7.
30 ibid para 249.
31 ibid para 492.
tribunal’s jurisdiction. According to him, Argentina’s objection was linked to the limits of Argentina’s consent to arbitrate and was therefore a matter of jurisdiction:

[]Jurisdiction is first and foremost a power, the legal power to exercise the judicial or arbitral function. Any limits to this power, whether inherent or consensual, i.e. stipulated in the jurisdictional title (consent within certain limits, or subject to reservations or conditions relating to the powers of the organ) are jurisdictional by essence . . . The preliminary objection of Argentina draws precisely upon this category of limits to jurisdiction as a power, maintaining that Argentina’s consent cannot be interpreted to cover the power of the Tribunal to hear collective mass claims actions requiring resort to atypical or abnormal procedures.32

Since, in his view, Argentina’s consent to arbitrate could not be construed as extending to collective mass actions, he concluded that the tribunal lacked jurisdiction. Professor Abi-Saab’s dissenting opinion has been supported by a number of commentators who have noted, inter alia, that presuming the host state’s consent to a procedure of which it was unaware at the time it gave its consent creates the risk of emergence of a new form of consent to arbitrate, i.e. consent by default.33

These different views illustrate the difficulty of investment tribunals in drawing a clear line between jurisdiction and admissibility. They also raise the question of the circumstances under which a tribunal may find that an admissibility requirement has been used by the host state as a limit to the scope of its consent to ICSID arbitration, and has therefore become a jurisdictional requirement.

2.1.1.2 The application of MFN clauses to dispute resolution provisions. Hochtief AG v the Argentine Republic. In Hochtief AG v the Argentine Republic34 the tribunal considered the distinction between jurisdiction and admissibility when dealing with the topical issue of the application of MFN clauses to dispute resolution provisions in investment arbitration.

The claim arose from a dispute concerning a concession awarded to Hochtief (a German company) and a consortium of construction companies for the construction, maintenance, and operation of a toll road and several bridges in Argentina.

33 See E Onguene Onana, ‘Chronique des sentences arbitrales’, JDJ, no 1, January 2012:

si l’existence d’un consentement est primordiale, les limites de ce consentement doivent également être prises en compte . . . Prsumer du consentement de cet Etat à une procédure qui était inconnue de lui au moment de l’émission de ce consentement tendrait à faire émerger un principe selon lequel l’Etat consent à des procédures incertaines ou éventuelles.

For an opinion approving the majority’s decision, see Newcombe (n 28): ‘The majority of the Tribunal’s approach to mass claims is correct in principle and practical, objective and fair-minded in practice’.

34 Hochtief AG (n 26).
Hochtief initiated arbitration proceedings under the ICSID Convention, claiming that it suffered harm caused by Argentina’s breach of the Germany–Argentina BIT.

The Germany–Argentina BIT provided that a dispute concerning investments could only be submitted to an international arbitral tribunal if no final decision had been rendered by the competent national courts in the 18 months following the initiation of the process, or if the parties were still in dispute after a decision. Hochtief claimed that, by virtue of the MFN clause in the BIT, it did not have to comply with this 18-month period as such a requirement did not exist in the Argentina–Chile BIT. The respondent objected that the MFN clause could not create jurisdictional rights as such a clause ‘applies only to substantive protections under the BIT, which do not include the clauses on dispute resolution’.  

The tribunal’s reasoning in deciding such an issue distinguished between jurisdiction and admissibility concluded that the 18-month litigation period was covered by the MFN clause as it was ‘a provision going to the admissibility of the claim rather than the jurisdiction of the Tribunal’. The tribunal therefore decided it had jurisdiction under the Germany–Argentina BIT and that the MFN provision allowed Hochtief to benefit from the more favourable admissibility requirement of the Chile–Argentina BIT.

The identification of a waiting period as an admissibility requirement has however given rise to some criticism. In her dissenting opinion in Impregilo S.p.A., Professor Brigitte Stern regarded those provisions as relating to the scope of the host state’s consent and concluded that a claimant could therefore not rely on an MFN clause to benefit from more favourable pre-arbitration requirements provided for in another BIT. A similar view was recently adopted by the majority in the Daimler case that (as in the Hochtief case) considered the Germany–Argentina BIT. It found that ‘all BIT-based dispute resolution provisions . . . are by their very nature jurisdictional’ and concluded:

Since the 18-month domestic courts provision constitutes 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.

35 ibid para 20.
36 ibid para 96.
37 ibid para 99.

All the conditions – whether a waiting period or a condition of exhaustion of local remedies, whether a restriction of consent to a certain type of arbitration, whether a restriction on the scope of the arbitration – are jurisdictional conditions to the State’s consent to arbitration, that cannot be displaced by an MFN clause.

39 Case No. ARB/05/1 Daimler Financial Services AG v the Argentine Republic [2012] ICSID, Award, para 193.
40 ibid para 194. However, CN Brower dissented, expressly stating that the majority (Pierre Marie Dupuy as the President and Domingo Bello Janeiro as Co-Arbitrator) ‘should have adopted the very cogent reasoning of the recent Hochtief Award’, Dissenting Opinion of Judge CN Brower, para 13.
2.1.1.3 Counterclaims in investment arbitration. Antoine Goetz and others v Republic of Burundi. The award rendered in Antoine Goetz and others v Republic of Burundi41 is the first example of an analysis of a counterclaim in which a tribunal has distinguished its jurisdiction and the admissibility of the counterclaim. The main claim was based on an indirect expropriation in breach of the relevant BIT through interference with the activities of a bank. Burundi’s counterclaim was for damages for breach of the terms of an operating certificate issued to that bank by the state.

Without expressly setting out the reasoning for its approach, the tribunal framed its analysis in two parts, first its jurisdiction and secondly the admissibility of the counterclaim.42 This two-stage analysis was apparently based on drawing out two limbs of the wording of Arbitration Rule 40 (which in turn reflects the wording of Article 46 of the ICSID Convention). This rule provides that ‘a party may present … [a] counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre’. The Goetz tribunal set out the test it applied as (i) whether the counterclaim was within the scope of the Centre’s jurisdiction and in particular, whether it was covered by the parties’ consent (which it treated as a jurisdictional question), and (ii) whether it arose directly from the subject matter of the dispute (which it treated as a question of admissibility).43 In the event, the tribunal found that it had jurisdiction over the counterclaim and that it was admissible, but dismissed it on the merits.

In contrast with the two-stage approach used in Goetz, previous decisions had regarded the ability of a tribunal to entertain state counterclaims—including the aforementioned condition relating to the subject matter of the dispute—as a question regarding the jurisdiction of the tribunal. In its decision on jurisdiction over the Czech Republic’s counterclaim, the tribunal in Saluka found that: ‘the disputes which have given rise to the Respondent’s counterclaim are not sufficiently closely connected with the subject-matter of the original claim put forward by Saluka to fall within the Tribunal’s jurisdiction …’.44

While the awards rendered in Abaclat, Hochtief and Goetz show investment tribunals’ increasing interest in examining the distinction between jurisdiction and admissibility, there seems yet to be no consensus as to where the line between the two concepts falls.

2.1.2 Inconsistency as to the potential grounds of inadmissibility: the ‘umbrella clause saga’

Arbitration awards have also shown discrepancies in identifying the potential grounds of inadmissibility in investment arbitration. What may be termed the ‘umbrella clause saga’ is illustrative of these divergent approaches. Although they were dealing with essentially the same issue, namely the ability of a tribunal under a BIT to entertain contract claims on the basis of an ‘umbrella clause’ notwithstanding the

41 Case No. ARB/01/2 Antoine Goetz & Others and S.A. Affinage des métaux v Republic of Burundi [2012] ICSID, Award. The arbitral tribunal in this case was composed of Gilbert Guillaume (as the President) and Jean-Denis Bredin and Ahmed El-Kosheri (as Co-Arbitrators).
42 ibid paras 267–87.
43 ibid para 275.
44 Saluka Investments B.V. v The Czech Republic [2004] Decision on Jurisdiction over the Czech Republic’s Counterclaim, UNCITRAL, para 81.
existence of a specific contractual forum selection clause, (i) the SGS v Philippines tribunal found the claim was inadmissible and stayed the proceedings, (ii) while the tribunal in SGS v Paraguay rejected the view that the existence of a contractual forum selection clause was an impediment to the admissibility of the claim.

2.1.2.1 SGS v Philippines. The interpretation of the SGS v Philippines tribunal\(^{45}\) of an umbrella clause and its potential effects has long been compared with that followed by the tribunal in SGS v Pakistan.\(^{46}\)

The issues that arose in both cases were similar, namely the ability of an ICSID tribunal to entertain claims arising out of a contract when, on the one hand, the BIT contains an umbrella clause and, on the other, the contract between the investor and the state confers jurisdiction upon another forum.

While the tribunal in SGS v Pakistan simply found that it lacked jurisdiction over purely contractual claims regardless of the umbrella clause and without even referring to the concept of admissibility, the tribunal in SGS v Philippines distinguished between jurisdiction and admissibility to decide on this issue. It held that both the broadly-worded treaty—which encompassed both treaty and contract claims—and the existence of an umbrella clause gave it jurisdiction over SGS’s claims. The tribunal decided, however, that the contract claim was inadmissible until the Philippine court had rendered a judgment, and thus stayed the proceedings.\(^{47}\)

2.1.2.2 SGS v Paraguay. Although the tribunal in SGS v Paraguay\(^{48}\) also referred to the concepts of jurisdiction and admissibility, it reached a completely different conclusion from the tribunal in SGS v Philippines.

The facts of the case were, again, very similar. The claimant alleged that Paraguay had failed to observe its contractual obligations with SGS under a contract for pre-shipment inspection services of imported goods. It argued that the ICSID tribunal could entertain such a claim as Paraguay’s contractual commitments fell within the ‘umbrella clause’ contained in the Switzerland–Paraguay BIT. In objecting to the tribunal’s jurisdiction, Paraguay invoked the existence of a forum selection clause in the contract that gave jurisdiction to a Paraguayan court.\(^{49}\)

The tribunal held that it had ‘little difficulty’\(^{50}\) in finding jurisdiction over SGS’s claims under the umbrella clause as such a clause contained no textual limitations and therefore included all kinds of commitments. However, in contrast with SGS v Philippines, the tribunal in SGS v Paraguay considered that the forum selection clause

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\(^{45}\) Case No. ARB/02/6 SGS Société Générale de Surveillance S.A. v Republic of the Philippines [2004] ICSID, Decision of the Tribunal on Objections to Jurisdiction.

\(^{46}\) Case No. ARB/01/13 SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan [2003] ICSID, Decision of the Tribunal on Objections to Jurisdiction.

\(^{47}\) SGS Société Générale de Surveillance S.A. (n 45) para 154.

\(^{48}\) Case No. ARB/07/29 SGS Société Générale de Surveillance S.A. v the Republic of Paraguay [2010] ICSID, Decision on Jurisdiction (affixed to the award on the merits published on 10 February 2012).

\(^{49}\) ibid para 126.

\(^{50}\) ibid para 167.
in the contract was not an impediment to the admissibility of the claim.\textsuperscript{51} It found that:

\[O\]ne reason to read Article 11 [the umbrella clause] as providing jurisdiction over contractual claims is to give purpose and effect to that provision . . . . It would be incongruous to find jurisdiction on this basis, but then to dismiss the greater part of all Article 11 claims on admissibility grounds – because the effect would be, once again, to divest the provision of its core purpose and effect, to the same extent as if we had denied jurisdiction outright.\textsuperscript{52}

Clearly, the cases discussed above are illustrative of the discrepancies that may arise between tribunals when faced with the question of the distinction between jurisdiction and admissibility. Not only are there inconsistencies as to where to draw the line between the two concepts but also as to what admissibility grounds may justify the refusal to hear a case. It has, however, been observed that it is highly important to establish a clear distinction between the two concepts because of the practical consequences of such a distinction.

2.2 The practical importance of the distinction in investment arbitration

The distinction between jurisdiction and admissibility has been considered of practical importance in investment arbitration for the review of awards in investment arbitration (Section 2.2.1). Additionally, recent awards have indicated further practical consequences of such a distinction (Section 2.2.2).

2.2.1 Importance of the distinction for the review of awards in investment arbitration

Most decisions of arbitral tribunals are subject to the review of controlling bodies, but the modern trend is that awards can only be reviewed on the basis of limited grounds and that a review of the merits is excluded.

In the context of investment arbitration, depending on the circumstances, awards can be reviewed by different controlling authorities.

Awards rendered outside the ICSID framework are reviewable before the courts of the seat of the arbitration as well as before the courts of the place of enforcement of the award. Notably, arbitral awards may be invalidated where an arbitral tribunal fails to respect its jurisdictional limits.

Awards rendered within the framework of ICSID cannot be reviewed before national courts but can nevertheless be the subject of annulment proceedings before an ad hoc committee established pursuant to Article 52 of the ICSID Convention. Article 52(1) of the ICSID Convention refers to a 'manifest excess of power' by the arbitral tribunal as a ground for annulment. Instances that have been held to amount to a manifest excess of power include lack of jurisdiction, failure to exercise jurisdiction, and failure to apply the proper law.

In light of this, it has been considered that the scope of review of awards in investment arbitration depends on how issues are classified, whether as going to the

\textsuperscript{51} ibid paras 171–85.

\textsuperscript{52} ibid para 176.
jurisdiction of the tribunal or the admissibility of the claim. According to this approach, a party can seek review of a tribunal’s decision on its own jurisdiction, but not of a decision on the admissibility of the claim since admissibility concerns the merits of the case. Accordingly, a leading author concludes that distinguishing between the two concepts is of great practical importance because ‘[m]istakenly classifying issues of admissibility as jurisdictional may therefore result in an unjustified extension of the scope for challenging awards, and frustrate the parties’ expectation that their dispute be decided by the chosen neutral tribunal.’

The importance of the distinction with respect to the scope of review of an arbitral award has been recognized by several decisions. For instance, although not in the context of an investment arbitration, the Paris Court of Appeal held in September 2010 that the admissibility of claims, including the question of whether they should be precluded by operation of the *res judicata* doctrine, was a question for the arbitral tribunal only, and as such could not constitute a ground for annulment before the French courts. Similarly, in the *Abaclat* case, the tribunal noted that ‘[w]hereby a decision refusing a case based on a lack of arbitrable jurisdiction is usually subject to review by another body, a decision refusing a case based on a lack of admissibility can usually not be subject to review by another body.’ However, the recent award rendered in *Urbaser v Argentina* seems to have rejected the potential practical consequences of the distinction between both concepts as underscored by the tribunals in *Abaclat* and *Hochtief*. In particular, it pointed out 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.

2.2.2 Other practical consequences of the distinction

Further practical consequences of the distinction between jurisdiction and admissibility have recently been highlighted by arbitral tribunals ruling under the ICSID Convention.

2.2.2.1 Impact on the parties’ ability to re-submit the claim. When discussing the distinction between both concepts, the tribunal in *Abaclat* considered that a lack of

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53 Pau1sson (n 1) 601.
55 *Abaclat and Others* (n 26) para 247.
57 ibid para 117.
admissibility meant that the claim was ‘neither fit nor mature for judicial treatment’. It deduced from this assertion that:

whereby a final refusal based on a lack of jurisdiction will prevent the parties from successfully re-submitting the same claim to the same body, a refusal based on admissibility will, in principle, not prevent the claimant from re-submitting its claim, provided it cures the previous flaw causing the inadmissibility.59

Thus, according to the Abaclat majority, the distinction between jurisdiction and admissibility has consequences if a party wants to re-submit a claim to ICSID arbitration.

2.2.2.2 Impact on the tribunal’s ability to act on its own motion. Referring to the practice of the International Court of Justice, the tribunal in Hochtief seems to have identified a further consequence of such a distinction.

According to the tribunal, even if the parties decide not to raise jurisdictional objections, this will not preclude the tribunal from finding on its own motion that it does not have jurisdiction.60 Conversely, if the parties do not raise admissibility objections, the tribunal will proceed to hear the case and will not raise the matter proprio motu.61

In other words, if the disputing parties do not raise admissibility objections, ‘they will have acquiesced in any breach of the requirements of admissibility and that acquiescence will “cure” the breach . . . Defects in admissibility can be waived and cured by acquiescence: defects in jurisdiction cannot’.62

CONCLUDING REMARKS

While the relevance of the distinction between jurisdiction and admissibility was initially called into question by some tribunals, thinking on this point has moved forward, and various investment tribunals have referred to such a distinction.

However, the distinction between the two concepts remains unclear as it is still subject to divergent analyses. Inconsistencies remain as to where to draw the line between jurisdiction and admissibility, as well as to the potential grounds of inadmissibility.

Yet, a coherent and consistent approach would be desirable given the practical consequences that the distinction may have—in particular on the scope of review of awards. Given the current divergence of approaches, parties to investment arbitration should be mindful of the practical impact of classification of an issue as going to jurisdiction or to admissibility, and take particular care in formulating their preliminary objections.

58 Abaclat and Others (n 26) para 247.
59 Abaclat and Others (n 26) para 247.
60 The r 41 (2) of the ICSID Arbitration Rules states that ‘[t]he Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.’ See, however, Santulli (n 20) para 263.
61 Hochtief AG (n 26) paras 94–5.
62 Hochtief AG (n 26) paras 93–5.
In light of this lack of consistency and clarity for parties and tribunals, the formulation by the relevant institutions of a precise rule or approach to follow in this area might be the way forward. Among other things, the distinction between admissibility and jurisdiction could be the subject of further analysis and discussion within specialized research organizations (such as the International Law Association or UNCITRAL's Working Group on Arbitration), so as to explore how the matter is dealt with in domestic law and could be transposed into international arbitration as well as to propose a framework for development of a consistent approach.