

Elgar Encyclopedia of International Economic Law

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 **Edward Elgar**
PUBLISHING

Cheltenham, UK • Northampton, MA, USA

always clearly distinguished in practice.⁵³ In particular, the term 'jurisdiction' is sometimes used in a broad sense to cover both admissibility and, in particular, competence.⁵⁴ If upheld by an international court or tribunal, all three objections generally preclude an examination of the claim on the merits.

Distinguishing questions of admissibility from questions of jurisdiction

While an objection to jurisdiction relates to the scope of the treaty under which the dispute has arisen, an objection to admissibility relates to the claim. Objections to admissibility are therefore often more closely linked to the merits of the case than objections to jurisdiction, and may not be capable of being resolved as preliminary issues. Consequently, they are often examined after the examination of objections to jurisdiction and may also be joined to the merits. However, this is a matter of practice rather than legal rule and as such subject to exercise of judgement by an international court or tribunal. Similarly, while an objection to competence in a strict conceptual sense relates to the question of whether a particular dispute falls within the scope of the arbitration agreement (rather than the broader question of whether it falls within the scope of the treaty as a whole, which is an issue of jurisdiction), they are in practice often framed as objections to jurisdiction or admissibility.⁵⁵ Investment

II.58 Admissibility in International Arbitration

Admissibility is a category of preliminary objections, or pleas in bar, that may be raised by a party in response to an international claim. Objections to admissibility are closely related to objections to jurisdiction and objections to competence, and the three categories are not

⁵³ Thus, e.g., Article 41 of the International Centre for Settlement of Investment Disputes (ICSID) Convention distinguishes between the 'jurisdiction of the Centre' and the 'competence of the Tribunal,' but does not mention the term 'admissibility.' Nonetheless, objections to the admissibility of the claim are frequently raised in ICSID arbitration.

⁵⁴ Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (eds), *The ICSID Convention* (2nd edn, CUP 2010) 532 (suggesting that 'the distinction [between jurisdiction and competence] is of little consequence ... The terms are frequently used interchangeably.').

⁵⁵ Thus the question of whether the claim is a treaty claim or a contract claim, or whether the respondent State is the proper party to the dispute because the alleged breach is not attributable to the State, may be said to be conceptually objections to 'competence' rather than 'jurisdiction.' For discussion of the concept of competence, see, e.g., Gerald Fitzmaurice, 'The Law and Practice of the International Court of Justice: International

treaty jurisprudence on the meaning and effect of the three concepts remains unsettled, and there have been few attempts by investment treaty tribunals to characterize the relationships between them.

Objections to admissibility

Similarly to objections to jurisdiction or competence, objections to admissibility may be raised in terms of time (*ratione temporis*), person (*ratione personae*) and subject matter (*ratione materiae*).

Timeliness

An objection to admissibility of the claim *ratione temporis* relates to the *timeliness* of the presentation of the claim. Thus a claim may be considered inadmissible *ratione temporis* if its presentation is either premature or overdue. The presentation of the claim may be considered premature if it is not yet ripe for exercise of international jurisdiction, e.g., for failure to exhaust local remedies or to comply with the procedural steps in the applicable dispute resolution clause in the relevant treaty or *compromis*.⁵⁶ On the other hand, although there is no specific time bar for raising claims in international law, a claim may be found overdue and as such inadmissible *ratione temporis* if the claimant has not met the specific deadline for raising claims under the treaty.

Nationality

An objection to the admissibility of the claim *ratione personae* relates to the *nationality* of the claim. Thus a claim may be considered inadmissible *ratione personae* if it has been presented by a party that is merely the nominal or formal owner of the claim, and if the claim is in fact beneficially or otherwise in substance owned by a national of a third State.⁵⁷ An objection to

admissibility may also be based on the claimant's failure to meet the relevant nationality requirements either on the date the claim arose, or on the date it was presented to the international court or tribunal, or because it was not continuously owned by a qualifying national between these dates.⁵⁸ The jurisprudence of investment treaty tribunals is unsettled as to the extent to which the rules relating to the nationality of claims continue to apply in investment treaty arbitration.

Subject matter

An objection to the admissibility of the claim *ratione materiae* relates to the *subject matter* of the claim. Thus a claim may be considered inadmissible *ratione materiae* if it is tainted by international illegality or is otherwise contrary to international or transnational public policy. State parties to an investment treaty may also agree that an investor must comply with the host State's law when making or operating an investment, in order to qualify for protection under the treaty.⁵⁹ A preliminary objection on the basis that such a requirement has not been complied with may be also characterized as an objection to the admissibility of the claim *ratione materiae*. There is an emerging trend in investment treaty jurisprudence to uphold objections to admissibility *ratione materiae* in circumstances where the claim raises serious issues of illegality or international or transnational public policy, even if the applicable investment treaty does not contain a legality clause.

officially or otherwise in substance owned by a national of the host State is more appropriately classified as an objection to competence rather than admissibility as it focuses on the scope of the arbitration agreement rather than the nature of ownership of the claim.

⁵⁸ By contrast, a preliminary objection raised on the basis that the claimant does not have the nationality of the home State at all, on any of the relevant dates, would be an objection to jurisdiction *ratione personae*.

⁵⁹ A preliminary objection raised on the basis that there is no investment in the first place would be an objection to jurisdiction *ratione materiae*. For further discussion see Zachary Douglas, 'The Plea of Illegality in Investment Treaty Arbitration' (2014) 29 *ICSID Review – Foreign Investment Law Journal* 155.

Organizations and Tribunals' (1952) 29 *Brit YB Int'l L* 1, 40–41; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–1954: Questions of Jurisdiction, Competence and Procedure' (1954) 34 *Brit YB Int'l L* 1, 8–9.

⁵⁶ By contrast, a preliminary objection to the effect that the claim relates to a dispute that arose before the entry into force of the treaty in question would be an objection to jurisdiction *ratione temporis*.

⁵⁷ An objection on the basis that the claim is ben-

Consequences of admissibility determination

The classification of a preliminary objection as an objection to jurisdiction or admissibility is not purely conceptual but has legal consequences. If an objection to jurisdiction in the strict sense of the term is upheld, an arbitral tribunal has no discretion and the claim must be dismissed for lack of jurisdiction. The same is true for objections to competence (thus, for instance, if the tribunal determines that the alleged breach is not attributable to the respondent State, the claim must be dismissed as the dispute is not governed by the arbitration agreement). However, because objections to admissibility relate to the claim rather than the scope of the treaty or of the arbitration agreement, arbitral tribunals have a measure of discretion to determine whether to admit or dismiss the claim in the circumstances of the case (or, e.g., whether to suspend it when its presentation is premature).

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