

NOTE

Ménage à trois? *Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*

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I. INTRODUCTION

It would not be fair to say that investment treaty tribunals have struggled with the distinction between jurisdiction and admissibility. They have rather often tended to avoid it, just as they have tended to avoid dealing with the related but somewhat obscure concept of ‘competence’—a term mentioned in Article 41 of the ICSID Convention and Article 41 of the ICSID Arbitration Rules, but not defined in either document and rarely analysed by ICSID tribunals or academics.² The leading commentary on the ICSID Convention goes so far as to suggest that ‘the distinction [between jurisdiction and competence] is of little consequence . . . The two terms are frequently used interchangeably.’³

The pragmatic approach adopted by treaty tribunals to the distinction between jurisdiction and admissibility is reflected in statements such as the following by the

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² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (‘ICSID Convention’) art 41 provides:

(1) The Tribunal shall be the judge of its own *competence*. (2) Any objection by a party to the dispute that that dispute is not within the *jurisdiction* of the Centre, or for other reasons is not within the *competence* of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute (emphasis added).

Similarly, the ICSID Rules of Procedure for Arbitration Proceedings (‘ICSID Arbitration Rules’) (April 2006) r 41, provides, in relevant part:

(1) Any objection that the dispute or any ancillary claim is not within the *jurisdiction* of the Centre or, for other reasons, is not within the *competence* of the Tribunal shall be made as early as possible. . . . (2) The 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*. . . . (6) If the Tribunal decides that the dispute is not within the *jurisdiction* of the Centre or not within its own *competence*, or that all claims are manifestly without legal merit, it shall render an award to that effect (emphasis added).

³ Christoph H Schreuer and others, *The ICSID Convention* (2nd edn, CUP 2009) 532. See also Gerold Zeiler, ‘Jurisdiction, Competence and Admissibility of Claims in ICSID Arbitration’ in Christina Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) (arguing that jurisdiction and competence are ‘truly synonymous’, while suggesting that in the context of the ICSID Convention, the term ‘jurisdiction’ has a special meaning as it refers to the authority of the administering authority, the Centre.)

Tribunal in *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*:

...[T]here is no need to go into the possible—and somewhat controversial—distinction between jurisdiction and admissibility. Whatever the labelling, the parties have presented their case on the basis of the six objections raised by the Respondent.⁴

Similarly, in *Bayindir Insaat Turizm Ticaret ve Sanayi AS v Islamic Republic of Pakistan*, the Tribunal noted Pakistan's several objections to the admissibility of the claims and went on to examine each of these objections in turn, 'without distinguishing between objections to the jurisdiction of the Tribunal and objections to the admissibility of the claims'.⁵

Such a pragmatic approach may be justified in the context of the Convention for the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') since neither the Convention nor the ICSID Arbitration Rules make any mention of the term 'admissibility'. However, other ICSID tribunals have ruled that objections based on admissibility are available in ICSID arbitration and may in certain circumstances lead to a dismissal of the claim. Thus, in *SGS Société Générale de Surveillance SA v Republic of the Philippines*, where the Tribunal was concerned with the effect of a forum selection clause in the relevant contract, requiring that all disputes arising out of the contract be referred to the competent local court, the tribunal specifically raised the issue of whether 'this affect[ed] the Tribunal's jurisdiction or the admissibility of the claim'.⁶ The Tribunal concluded that the effect of such a clause was a matter of admissibility rather than jurisdiction:

In the Tribunal's view, this principle [ie the principle requiring an international tribunal to give effect to a choice of forum clause] is one concerning admissibility of the claim, not jurisdiction in the strict sense.⁷

The Tribunal went on to hold that SGS's claim was premature so long as the contractual dispute settlement proceedings were not exhausted, noting that 'the

⁴ *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, ICSID Case No ARB/03/13, Decision on Preliminary Objections (27 July 2006) para 54.

⁵ *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) para 87. See also *Total SA v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Objections to Jurisdiction (25 August 2006) (Argentina raising six preliminary objections, two of which were specifically raised as objections to admissibility; the tribunal dealt with all of these as preliminary objections); *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction (17 July 2003) para 41 (dealing with all of Argentina's preliminary objections, whether characterized as objections to jurisdiction or admissibility); *Duke Energy International Peru Investments No 1 Ltd v Republic of Peru*, ICSID Case No ARB/03/28, Decision on Jurisdiction (1 February 2006) (dealing with all objections to jurisdiction and admissibility); *Camuzzi International SA v Argentine Republic*, ICSID Case No ARB/03/2, Decision on Objections to Jurisdiction (11 May 2005) para 98 (noting that when inadmissibility 'becomes evident in the jurisdiction phase it will be possible to resolve it at that point'); *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Objections to Jurisdiction (30 April 2004) para 46 ['As agreed by the parties, the objections of the Respondent to the jurisdiction of the Centre or, for other reasons, the competence of the Tribunal, are to be decided as a preliminary question (Article 41 of the ICSID Convention and Rule 41 of the Arbitration Rules). Whilst the parties have advanced many arguments, including those pertaining to the merits, the Tribunal will consider hereafter only those that are relevant to its decision regarding the objections of Respondent to admissibility and jurisdiction.']

⁶ *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/06, Decision on Objections to Jurisdiction (29 January 2004) para 149.

⁷ *ibid* para 154.

analogous rule of exhaustion of local remedies is normally a matter concerning admissibility rather than jurisdiction in the strict sense'.⁸ Other tribunals have adopted a similar approach and confirmed that objections to admissibility are indeed available in ICSID arbitration—although there appears to be no language in the ICSID Convention or in the ICSID Arbitration Rules to support the practice.⁹

The term 'competence' has been analysed even less frequently than admissibility by investment treaty tribunals. Indeed, the terminology adopted in Article 41 of the ICSID Convention and Article 41 of the ICSID Arbitration Rules (to the effect that ICSID tribunals have to consider not only objections to the 'jurisdiction' of the Centre, but also to their own 'competence') has been reversed in arbitral practice; instead of speaking of their own 'competence' and the 'jurisdiction' of the Centre, investment treaty tribunals tend to speak of their own 'jurisdiction' and issue decisions and awards on 'jurisdiction' (rather than 'competence'), without making any determinations on 'competence'.¹⁰

As this practice is well established and appears to provide a pragmatic solution to a potentially complex conceptual issue, is there anything to be gained from yet another attempt to analyse these concepts and their relationships?¹¹ Should one not simply settle on the pragmatic view that jurisdiction and competence are effectively synonymous, and that although admissibility may become an issue in certain circumstances, it is a form of preliminary objection that is often linked to the merits of the case and should therefore ordinarily be joined to the merits phase—a consequence that considerably reduces its practical relevance as a preliminary issue of legal principle?¹²

While the professional instincts (and a healthy scepticism) of a practising lawyer might counsel otherwise, this note suggests that a closer look at the distinctions and conceptual relationships among jurisdiction, admissibility and competence may indeed produce some, even if modest, intellectual gains, at least from a pedagogical, if not from a strictly professional, point of view. In other words, while

⁸ *ibid* para 154 fn 84.

⁹ See eg the cases referred to in n 32 below. See also *Pantechniki v Albania*, where the tribunal applied a fork in the road provision in the applicable bilateral investment treaty to rule that a claim which had already been submitted to a domestic court was inadmissible. While the tribunal in the case did not expressly use the term 'inadmissible' in the text of the decision—indeed, the tribunal simply ruled that '[h]aving made the election to seize the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID'—it is clear from the *dispositif* that the Tribunal considered this as a matter of admissibility: 'all other claims are either dismissed as inadmissible (to the extent that they are subsumed by the Claimant's election to seize the Albanian courts) or rejected on the merits'. See *Pantechniki SA Contractors & Engineers v Republic of Albania*, ICSID Case No ARB/07/21, Award (30 July 2009) paras 50–68, 105.

¹⁰ See eg the decisions cited in n 5 above.

¹¹ For earlier contributions by arbitration scholars and practitioners, see eg Jan Paulsson, 'Jurisdiction and Admissibility' in Gerald Aksen et al (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (International Chamber of Commerce 2005) 601; Ian Laird, 'A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v. Jordan* and *Methanex v. USA*' in Todd Weiler (ed), *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA and Customary International Law* (Cameron May Ltd 2005) 201; David Williams, 'Jurisdiction and Admissibility' in Peter Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 868; Zeiler (n 3).

¹² See eg Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 475 ('In normal cases the question of admissibility can only be approached when jurisdiction has been assumed, and issues as to admissibility, especially those concerning the nationality of the claimant and the exhaustion of local remedies, may be closely connected to the merits of the case.') However, in certain circumstances, tribunals have dismissed a claim as inadmissible if it is *prima facie* clear that it cannot have any merit. See eg *Occidental Exploration and Production Company v Ecuador*, LCIA Case No UN3467, Final Award (1 July 2004) para 80 ('A claim of expropriation should normally be considered in the context of the merits of a case. However, it is so evident that there is no expropriation in this case that the Tribunal will deal with this claim as a question of admissibility.')

an enhanced understanding of the relationships between these three concepts may not be outcome-determinative in the context of arbitral decision-making, it may nonetheless inform the way in which we approach our respective tasks as counsel and arbitrator.

II. JURISDICTION VERSUS COMPETENCE

It appears that international arbitration scholars and practitioners have not addressed at all, or at least not at any length, the distinction between jurisdiction and competence.¹³ However, it has attracted some—albeit limited—attention among public international law scholars.

The most sophisticated treatment of the distinction between jurisdiction and competence undertaken to date is undoubtedly contained in Sir Gerald Fitzmaurice's celebrated essays on the law and procedure of the International Court of Justice, published in the *British Yearbook of International Law* in the 1950s and later, in 1986, in book form.¹⁴ Characterizing it as a 'frequently neglected distinction', Fitzmaurice embarked on an analysis of the implications of the two terms when addressing the Dissenting Opinion of Dr Igor Daxner, the Albanian *ad hoc* judge on the Court in the *Corfu Channel Case*.¹⁵ Dr Daxner had taken the following view:

In my opinion, the word 'jurisdiction' has two fundamental meanings in international law. This word is used:

- (1) to recognize the Court as an organ instituted for the purpose *jus dicere* and in order to acquire the ability to appear before it;
- (2) to determine the competence of the Court, i.e., to invest the Court with the right to solve concrete cases.

...

[T]he acceptance of the jurisdiction of the Court is a *preliminary* condition to be able to appear before the Court. By this act (declaration), the competence of the Court is not of course yet established. The condition for the establishment of the competence of the Court is a special agreement (*compromis*) or the acceptance of the compulsory jurisdiction in treaties or conventions (Article 36(1) and 36(2) of the Statute). Accordingly, a State not a party to the Statute which recognizes the jurisdiction of the Court by this fact acquires the juridical position of all other States parties to the Statute. In particular, such a State has the right to present a preliminary objection on the ground of 'the inadmissibility of the application', because the recognition of the jurisdiction, in order to acquire the ability to appear before the Court, does not involve *ipso facto* recognition of the Court's competence.¹⁶

¹³ See, however, Zeiler (n 3). For an earlier (tentative) treatment of this subject, see Veijo Heiskanen, 'Jurisdiction v. Competence: Revisiting a Frequently Neglected Distinction' (1993) 5 *Fin YB Intl L* 1. The discussion below is adapted from this paper.

¹⁴ Gerald Fitzmaurice, 'The Law and Practice of the International Court of Justice: International Organizations and Tribunals' (1952) 29 *Brit YB Intl L* 1; Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-54: Questions of Jurisdiction, Competence and Procedure' (1954) 34 *Brit YB Intl L* 1.

¹⁵ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Dissenting Opinion by Judge *ad hoc* Daxner) [1948] ICJ Rep 15, 33.

¹⁶ *ibid* 39-40 (emphasis in original).

Fitzmaurice pointed out that the distinction made by Dr Daxner was ‘in itself perfectly valid’ and went on to consider Dr Daxner’s remarks ‘as illustrative of the distinction between jurisdiction or competence in the general sense, and as existing or not in a particular case’.¹⁷ Fitzmaurice noted that, although it was in practice sometimes difficult to say which term was the appropriate one in the circumstances, ‘[t]hese two terms represent concepts which are theoretically quite distinct’. He went on to state:

Alternatively, one of these terms may be held to be a special case of another; but whichever view be taken there are two aspects of jurisdiction or competence. There is first the general *field* in which a court exercises and is entitled to exercise its functions, as for instance when it is said that courts are competent (or have jurisdiction) to hear and determine legal questions, but not political questions; or if it is said that a tribunal is set up under a treaty to decide disputes regarding its interpretation and application has competence (or jurisdiction) to hear cases arising on that treaty, but not cases arising on some other treaty. Next there is the question of the competence of a court to hear and determine a particular case belonging to the category to which its jurisdiction relates. Thus a court may be competent to deal with a certain class of case, but only if certain conditions are fulfilled in the individual case, e.g. the parties must consent, or some preliminary procedure such as an attempt to settle the dispute by recourse to diplomatic methods must have been gone through.¹⁸

Fitzmaurice did not draw any further conclusions from his analysis at this stage. However, six years later, he reverted to the issue in another commentary on the Court’s jurisprudence. Referring to his earlier analysis, he stated:

On the basis of certain remarks made by Dr Daxner, acting as Albanian judge *ad hoc* in that case [i.e., the Corfu Channel Case], it was suggested that there is a distinction between jurisdiction and competence, and that although these terms are often used interchangeably, they ought probably each to be confined to a particular aspect of the matter. No doubt this distinction is one which, as a matter of terminology, appears mainly in the English rather than in, for example, the French language. But that merely means that in French the term *compétence* is often used in two senses so that the distinction of substance remains. There is the question of the general class of case in respect of which a given tribunal has jurisdiction—the tribunal’s jurisdictional field, whether *ratione materiae*, *personae*, or *temporis*, and there is the question of its competence to hear and determine a particular individual case—e.g., the case may not fall *ratione materiae*, within the tribunal’s general field; or, even if it does, may be excluded on grounds arising *ratione personae* or *ratione temporis*. A tribunal may have jurisdiction in the ‘field’ sense, yet lack competence as regards the particular case. . . . Want of jurisdiction in the ‘field’ sense, on the other hand, necessarily involves incompetence to determine the particular case.¹⁹

The results of Fitzmaurice’s analysis, which was no doubt merely preliminary and not intended to be exhaustive, can be summarized in terms of two conclusions:

- (i) ‘Jurisdiction’ is a general concept; it refers to the tribunal’s jurisdictional ‘field’ *ratione temporis*, *personae* or *materiae*, whereas ‘competence’ is a

¹⁷ Fitzmaurice, ‘The Law and Practice’ (n 14) 41, fn 2.

¹⁸ *ibid* 40–1.

¹⁹ Fitzmaurice, ‘The Law and Procedure’ (n 14) 8–9.

particular or specific concept; it refers to the tribunal's competence in a particular case.

- (ii) The relationship between the two concepts is asymmetric in the sense that, while competence requires a prior finding of jurisdiction, a finding of jurisdiction does not necessarily entail competence.

This is where legal scholars tend to leave us: jurisdiction is a more abstract concept than competence, and accordingly the relationship between jurisdiction and competence is asymmetric in the sense that while competence implies jurisdiction, the reverse is not necessarily true—a tribunal that has jurisdiction may also be competent, but this is not necessarily the case.²⁰

While preliminary, Fitzmaurice's analysis sheds useful light on the distinction made in Article 41 of the ICSID Convention and Article 41 of the ICSID Arbitration Rules between the 'jurisdiction of the Centre' and the 'competence of the Tribunal'. Indeed, at the time when the ICSID Convention was drafted, investment treaty arbitration was hardly known as a concept, and certainly not as an established practice, as another paradigm of foreign investment—one based on arm's length investment contracts between the State and the foreign investor (State contracts)—prevailed.²¹ Accordingly, it would not have been surprising if the drafters assumed that the 'jurisdiction' of the Centre, in the 'field' sense of this term, would be defined in the ICSID Convention—once a member State had ratified the Convention, it had consented to the jurisdiction of the Centre in the field of foreign investment, as a matter of principle—whereas the 'competence' of the tribunal would be created by the arbitration clause included in the relevant investment contract. In this conceptual scheme, the existence of ICSID jurisdiction would not be sufficient to establish the 'competence' of a tribunal operating under the auspices of the Centre—this would require a further and a more specific consent, included in the relevant investment contract.²² For the purposes of this note, which focuses on investment treaty arbitration rather than investment contract arbitration, it is not necessary to delve further into this issue, other than to note that this understanding of the distinction would not necessarily be the end of the matter in the context of investment contract arbitration either.²³

²⁰ See also Shabtai Rosenne, *The Law and Practice of the International Court* (2nd rev edn, Martinus Nijhoff Publishers 1985) 301–2 ('While the question of terminology may not be of major importance, and indeed the maintenance of some flexibility even desirable, it is suggested that, in so far as concerns the Court, "jurisdiction" is a stricter concept than "competence". Jurisdiction relates to the capacity of the Court to decide a concrete case with a binding force. "Competence", on the other hand, is more subjective, including both jurisdiction and the element of the propriety of the Court's exercising its jurisdiction.'). Schreuer et al (n 3) 531 (noting that 'competence' concerns 'the narrower issues confronting a specific tribunal, such as its proper composition or *lis pendens*.') Paulsson considers Schreuer's assertion 'mysterious' and notes that in failing to explore the matter further, he effectively 'throws up his hands'. Paulsson (n 11) 608, fn 18.

²¹ For discussion, see Veijo Heiskanen, 'Forbidding Dépeçage: The Law Governing Investment Treaty Arbitration' (2009) 32 *Suffolk Transnatl L Rev* 367.

²² See the ICSID Convention (n 2) art 25(1) (providing that the jurisdiction of the Centre requires that the parties 'consent in writing' to submit their dispute to the Centre). Consequently, in a particular case, even if the host State and the home State of the investor were parties to the ICSID Convention, this is not sufficient to establish the tribunal's 'competence'. From this perspective, an international court's or tribunal's *Kompetenz-Kompetenz* is not a conceptual tautology; it involves the court's or the tribunal's jurisdiction to determine its own competence in a concrete case.

²³ This is because the distinction between jurisdiction and competence (like arguably any other conceptual distinction) is 'regressive' in the sense it could be repeated *ad infinitum*, in each new context. Thus, it could be said that the further and more specific consent, given in an investment contract, would in turn establish the 'jurisdiction' of the tribunal under the contract (its jurisdictional 'field'); whether or not the tribunal would in fact be 'competent' to resolve a particular concrete dispute arising under the contract would be another, and a more complex, matter. Indeed, in such a context, the term 'competence' may be understood to refer to the tribunal's 'legal' competence to

III. JURISDICTION VERSUS ADMISSIBILITY

The distinction between jurisdiction and admissibility is made more commonly in investment treaty arbitration than that between jurisdiction and competence; it is also a topic that arbitration scholars and practitioners have been more willing to tackle.²⁴ A typical way to explain this distinction is to say that, whereas jurisdiction is about the scope of the *tribunal's authority*, based on the State's consent to arbitrate, admissibility is about the particular *claim* raised by the claimant.²⁵ Stated differently, while jurisdiction is about the scope of the State's consent to arbitrate, admissibility is about whether the claim, as presented, can or should be resolved by an international tribunal, which otherwise has found jurisdiction.

The concept of jurisdiction is well established and is generally understood in terms of a field having three aspects or dimensions.²⁶ Thus, an investment treaty typically defines a tribunal's jurisdictional field in terms of time (*ratione temporis*) by providing that only disputes arising after a particular date (whether the date on which the treaty entered into force, or any other date) are governed by the treaty, and/or by establishing a time period during which claims may be brought after the

resolve any conflicts of laws that may arise under an investment contract. The possibility of such conflicts is recognized in article 42(1) of the ICSID Convention, which envisages that, in the absence of any agreed rules of law between the parties, disputes submitted to an ICSID tribunal are to be decided on the basis of two different laws—the law of the Contracting State party to the dispute and the relevant rules of international law:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

The language of article 42—inasmuch as it refers to 'such rules of law as may be agreed by the parties'—reflects the State contract paradigm. It is implicit in the language of the provision that there may be conflicts not only between the law of the host State and the law chosen by the parties (if any), but also between the law of the host State and the terms of the investment contract. The 'international law' referred to in article 42 of the ICSID Convention may be understood, in the context of investment contract arbitration, as a reference to the quasi-international or transnational conflict rules that govern and may be applied to resolve such conflicts. (Such rules may be appropriately characterized as 'quasi-international' or 'transnational' in the sense that the consent of one of the parties—the investor—is governed by the personal domestic law of that party.) The conflict rules applicable in such a quasi-international or transnational context are, by definition, not part of any domestic law and accordingly constitute a regime of conflict rules that is separate from private international law. For further discussion, see Heiskanen (n 21). See also Veijo Heiskanen, *International Legal Topics* (Finnish Lawyers' Publishing Co 1992) 103–24 (setting out how such transnational conflict rules have historically developed into a legal regime applicable to resolve conflicts between the law applicable to the contract and the laws of the host State; such conflict rules may be characterized as rules of international 'competence' in the sense that they established international law as a professional practice separate from domestic legal practice). The above is not to suggest that the wording of article 42 of the ICSID Convention is not operative in the context of investment treaty arbitration; on the contrary, as article 42 also envisages that, in the absence of an agreement on the applicable law between the parties, two different laws—the law of the host State and international law—may apply, it also applies in the context of investment treaty arbitration, where typically there are no 'rules of law as may be agreed by the parties'; the only applicable laws are international law (specifically the investment treaty).

²⁴ See n 11.

²⁵ See eg Brownlie (n 12) 475 (noting that '[o]bjections to jurisdiction, if successful, stop all proceedings in the case since they strike at the competence of the tribunal to give rulings as to the merits or admissibility of the claim. An objection to the substantive admissibility of a claim invites the tribunal to reject the claim on a ground distinct from the merits . . .') For case law adopting this approach, see eg *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177, para 48 (noting that 'in determining the scope of the consent expressed by one of the parties, the Court pronounces on its jurisdiction, not on the admissibility of the application.');

HOCHTIEF Aktiengesellschaft v Argentine Republic, ICSID Case No ARB/07/31, Decision on Jurisdiction (24 October 2011) para 90 ('Jurisdiction is an attribute of a tribunal and not of a claim, whereas as admissibility is an attribute of a claim but not of a tribunal.')

²⁶ Sometimes four or even five aspects are identified—in addition to jurisdiction *ratione temporis*, *ratione personae* and *ratione materiae*, reference may be made to *ratione voluntatis* and *ratione loci*. The latter two are arguably either redundant (jurisdiction in international law is by definition based on consent so there is no need for a separate concept of *ratione voluntatis*) or mistaken (international jurisdiction exists outside territorial jurisdiction so it is conceptually not a place—*locus*—but rather a space).

expiry or termination of the treaty.²⁷ Similarly, investment treaties typically define a tribunal's jurisdictional field in terms of person (*ratione personae*) by providing that only disputes arising between one of the State parties (the host State) and a national of the other State (as defined in the treaty) are governed by the treaty, and excluding disputes between the host State and nationals of third States. Third, an investment treaty typically defines the tribunal's jurisdictional field in terms of subject matter (*ratione materiae*) by providing that only investments, as defined in the treaty, and not any other matters, are governed by the treaty.

Complications tend to arise when one attempts to apply these jurisdictional rules in practice. This is in part because, just as jurisdiction is defined in terms of time (*ratione temporis*), person (*ratione personae*) and subject matter (*ratione materiae*), admissibility may be defined in these same terms: a claim brought before an international court or tribunal may be found inadmissible on grounds of *ratione temporis*, *ratione personae* or *ratione materiae*.

A. Admissibility *ratione temporis*

A typical example of a claim that may be found inadmissible *ratione temporis* is where a claimant has failed to exhaust local remedies. Such a claim is not yet ripe for international jurisdiction; it remains a local or a *domestic* claim so long as there are still local remedies available. While investment treaties typically do not require exhaustion of local remedies,²⁸ there are claims, such as for denial of justice, that by definition require exhaustion of local remedies before they can be brought before an international court or tribunal; this is because a denial of justice claim is a systemic claim and arises only if the domestic justice system as a whole has failed to deliver or failed to correct a gross injustice.²⁹

The International Law Commission's Articles on State Responsibility specifically confirm that the rule requiring exhaustion of local remedies is a matter of admissibility. Article 44 ('Admissibility of claims') provides, in relevant part:

The responsibility of a State may not be invoked if:

...;

(b) The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.³⁰

In theory, a claim may be found inadmissible *ratione temporis* not only because of lack of ripeness, but also because of 'staleness', or undue delay in pursuing it.

²⁷ For further discussion, see eg Veijo Heiskanen, 'Entretemps: Is there a distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis*' in Emmanuel Gaillard and Yaz Banifatemi (eds), *Jurisdiction in Investment Treaty Arbitration* (Juris Publishing, forthcoming November 2013).

²⁸ See also the ICSID Convention (n 2) art 26 ('Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.') Consequently, the provision reverses the traditional rule of international law to the effect that a claim is admissible before an international jurisdiction only if local remedies have been exhausted.

²⁹ See eg *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, UNCITRAL, PCA Case No 34877, Partial Award on the Merits (30 March 2010) para 321 (the tribunal being 'amply satisfied that a requirement of exhaustion of local remedies applies generally to claims for denial of justice'.) For further discussion, see Jan Paulsson, *Denial of Justice in International Law* (CUP 2005) 8 (noting that '[e]xhaustion of local remedies in the context of denial of justice is ... not a matter of procedure or admissibility, but an inherent material element of the delict.')

³⁰ See also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 265, 264 (noting that '[o]nly those local remedies which are "available and effective" have to be exhausted before invoking the responsibility of a State.')

However, while there are treaties that set an outer time limit, there are no precise prescription rules in international law.³¹

Investment treaties may also contain other *ratione temporis* requirements, which usually relate to the timing of the commencement of the arbitration. Such requirements typically require that the foreign investor formally notify the host State of the dispute and/or the claims (notification requirement); that the parties first engage in negotiations before an international arbitration proceeding may be commenced ('cooling-off' period); or that the foreign investor first submit the dispute to the competent local court and only if no decision is obtained within a certain time period, recourse may be had to international arbitration (domestic litigation requirement). Such temporal requirements have prompted considerable debate among arbitration scholars and practitioners, as well as in case law, and there are conflicting views on whether they concern jurisdiction or admissibility.³²

B. Admissibility *ratione personae*

A typical example of a claim that may be found inadmissible *ratione personae* is a claim that is beneficially owned, or *de facto* controlled, by a national of the host State, even if nominally owned and brought before the tribunal by a party that is *prima facie* a national of the other State party to the treaty. Like the local remedies rule, the nationality of claims rule is reflected in Article 44 ('Admissibility of claims') of the Articles on State Responsibility promulgated by the International Law Commission. Article 44 provides, in relevant part:

The responsibility of a State may not be invoked if:

(a) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

....³³

Article 44(a) is consistent with the practice of the International Court of Justice and other international courts and tribunals, which have generally taken the view that the rules concerning the nationality of claims are rules of admissibility rather than jurisdiction. Thus, in the *Nottebohm Case* the Court dismissed as inadmissible

³¹ See eg the North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994) ('NAFTA') art 1117(2) ('An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have acquired, knowledge that the enterprise has incurred loss or damage.')

³² See eg *HOGHTIEF AG v Argentina* (n 25) paras 23–7; *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), paras 585–8; *TSA Spectrum de Argentina, SA v Argentine Republic*, ICSID Case No ARB/05/5, Award (19 December 2008) paras 112–13; *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award (8 December 2008) paras 160–72; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Jurisdiction (9 September 2008) paras 90–5; *Bivwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (24 July 2008) paras 347–8; *BG Group Plc v The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007) paras 234–40; *Bayindir v Pakistan* (n 5) paras 88–103; *Consortium Groupement LESI—DIPENTA v People's Democratic Republic of Algeria*, ICSID Case No ARB/03/8, Award (10 January 2005) para 32(iv); *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Objections to Jurisdiction (6 August 2003) para 184; *CMS Gas* (n 5) para 41; *ADF Group Inc v United States of America*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003) paras 127–35; *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award (11 October 2002) para 44; *Ronald S Lauder v Czech Republic*, UNCITRAL, Final Award (3 September 2001) para 190; *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000) para 69; *Ethyl Corporation v Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998) paras 77, 84–5, 90–2.

³³ For commentary see Crawford (n 30) 264–5.

a claim brought by Liechtenstein on behalf of Mr Nottebohm, a *prima facie* Liechtenstein national, finding that Mr Nottebohm's links with the respondent State (Guatemala) outweighed his links with the applicant State (Liechtenstein); in the circumstances, Guatemala was found to be under no obligation to recognize his Liechtenstein nationality:

[T]he Court must ascertain... whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.... These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala.... Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held inadmissible.³⁴

The Iran–United States Claims Tribunal famously adopted the dominant (or real) and effective nationality rule endorsed by the Court in *Nottebohm* in its celebrated decision in *Case No A/18*.³⁵ Under the Tribunal's decision, and in its subsequent practice, the dominant and effective nationality rule acquired two dimensions and was applied both as a jurisdictional and as an admissibility rule. The jurisdictional dimension of the rule was reflected in the Tribunal's interpretation of the term 'national' in the Claims Settlement Declaration, the international treaty governing the Tribunal's activities.³⁶ The Tribunal defined this jurisdictional aspect of the rule in the following terms:

Thus, the relevant rule of international law which the Tribunal may take into account for purposes of interpretation, as directed by Article 31, paragraph 3(c) of the Vienna Convention, is the rule that flows from the *dictum* of *Nottebohm*, the rule of real and effective nationality, and the search for 'stronger factual ties between the person concerned and one of the States whose nationality is involved'. In view of the pervasive effect of this rule since the *Nottebohm* decision, the Tribunal concludes that the references to 'national' and 'nationals' in the Algiers Declarations must be considered as consistent with that rule unless an exception is clearly stated.... For the reasons stated above, the Tribunal holds that it has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States.³⁷

³⁴ *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase: Judgment) [1955] ICJ Rep 4, 24, 26. See also Italian-United States Conciliation Commission, *Mergé* Claim, Decision No 55 of 10 June 1955, XIV UNRIIAA 236, at 246–47; Italian-United States Conciliation Commission, *Flegenheimer* Claim, Decision No 182 of 20 September 1958, XIV UNRIIAA 327, at 376.

³⁵ *Case No A/18* (6 April 1984) 5 Iran-US CTR 251.

³⁶ The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (20 January 1981) 20 ILM 224, art II(1) provided that the Tribunal was 'established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States'. *ibid*, art VII(1)(a) defines a 'national' of Iran or the United States as 'a natural person who is a citizen of Iran or the United States...'; see *Case No A/18*, *ibid*, 253–4.

³⁷ *Case No A/18* (n 35) 265 (footnote omitted).

The admissibility dimension of the dominant and effective nationality rule was reflected in the Tribunal's 'important caveat' to its decision:

In cases where the Tribunal finds jurisdiction based upon dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.³⁸

In *James M Saghi, Michael R Saghi, Allan J Saghi v The Islamic Republic of Iran*, the Tribunal had the opportunity to consider the implications of the *Case No A/18* caveat. The Tribunal confirmed that the caveat was relevant to the nationality of the claim and, by implication, its admissibility:

The Tribunal's awards have recognized that beneficial ownership is both a method of exercising control over property and a compensable property interest in its own right. This is consistent with the rule requiring continuity of nationality of State claim under public international law. That rule requires that a claim must have been continuously owned by a person (or series of persons) having the nationality of the State that presents the claim. . . . In applying that rule, it is the nationality of the beneficial owner of the claim, rather than that of the nominal owner, that determines the nationality of the claim.³⁹

Although the legal framework under which the Iran–United States Claims Tribunal operated (and continues to operate) is similar to a bilateral investment treaty, investment treaty tribunals have struggled with the applicability of the traditional nationality of claims rules, just as they have struggled with the issue of whether notification requirements, cooling-off periods and domestic litigation requirements relate to jurisdiction or admissibility. This is reflected in the apparently inconsistent arbitral jurisprudence on the issue.⁴⁰

C. Admissibility *ratione materiae*

A typical example of a claim that may be found inadmissible *ratione materiae* by an international court or tribunal is a claim which, even if related to an 'investment' as defined in the applicable investment treaty, thus falling under the tribunal's jurisdictional field *ratione materiae*, arises out of events or circumstances that are tainted by some sort of internationally recognized illegality or incompatibility with international or transnational public policy. In the context of investment treaty arbitration, such a finding typically involves a determination of whether the making of the investment in question or the circumstances out of which the claim arises were so tainted, and accordingly render the claim inadmissible. As the making of such determinations is often closely linked to the merits of the case, preliminary objections to admissibility *ratione materiae* are frequently joined to the merits.⁴¹

There are a number of investment treaty awards that may be understood in these terms, the most often cited perhaps being *Plama Consortium Limited v*

³⁸ *ibid* 265–6.

³⁹ *James M Saghi, Michael R Saghi, Allan J Saghi v The Islamic Republic of Iran*, Case No 298, Award No 544-298-2 (22 January 1993) 29 Iran–US CTR 20, para 26.

⁴⁰ See eg *The Loeven Group, Inc and Raymond L Loeven v United States of America*, ICSID Case No ARB(AF)98/3, Award (26 June 2003) para 223; *TSA Spectrum* (n 32) paras 145–6; *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction (29 April 2004) para 52; *Yukos Universal Limited v Russian Federation*, UNCITRAL, PCA Case No AA 227, Interim Award on Jurisdiction and Admissibility (30 November 2009) paras 411–17.

⁴¹ For discussion, see eg Heiskanen (n 21) 165–94.

Republic of Bulgaria. While the tribunal did not use the term ‘admissibility’, its ruling on whether the claimant was ‘entitled to the substantive protections offered by the [Energy Charter Treaty]’ is effectively a decision on admissibility *ratione materiae*:

Unlike a number of Bilateral Investment Treaties, the [Energy Charter Treaty or the ‘ECT’] does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law... The Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to law... The Tribunal finds that Claimant’s conduct is contrary to the principle of good faith which is part not only of Bulgarian law... but also of international law... The principle of good faith encompasses, *inter alia*, the obligation for the investor to provide the host State with relevant and material information concerning the investor and the investment. This obligation is particularly important when the information is necessary for obtaining the State’s approval of the investment... In consideration of the above and in light of the *ex turpi causa* defence, this Tribunal cannot lend its support to Claimant’s request and cannot, therefore, grant the substantive protections of the ECT.⁴²

Other investment treaty tribunals have adopted similar approaches in similar circumstances, although there is some controversy on whether decisions dealing with so-called ‘legality clauses’, or clauses requiring that an investment be made in accordance with the host State’s law in order to qualify for protection, concern jurisdiction (*ratione materiae*) or admissibility (*ratione materiae*).⁴³

Such a structural analogy between the concepts of jurisdiction and admissibility—both can be analysed in terms of time, person and subject matter, and in certain instances, such as in the case of legality clauses, may produce outcomes that are virtually indistinguishable—is remarkable and suggests that the two concepts are not really conceptual ‘opposites’. Rather, they focus on different aspects of arbitral decision-making: jurisdiction concerns the scope of the State’s consent to arbitrate—the tribunal’s jurisdictional ‘field’—whereas admissibility is about the claim and its temporal, personal and substantive dimensions. Furthermore, as admissibility depends on the particulars of the claim, it is also a more ‘concrete’ concept than jurisdiction, which refers to the tribunal’s general jurisdictional field. This in turn implies that its relationship to jurisdiction is similar to that of competence—which is also defined, as noted above, as a concept similar to, but more ‘concrete’ than, jurisdiction.

It is therefore worth looking at the third pair in this conceptual scheme—the distinction between admissibility and competence.

⁴² *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award (27 August 2008) paras 138–9, 144, 146.

⁴³ See eg *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award (2 August 2006) para 257 (finding that the Claimant’s investment ‘was made in a manner that was clearly illegal’ and concluding that ‘the disputes arising from it are not subject to the jurisdiction of the Centre’ and declaring itself ‘incompetent to hear the dispute before it’); *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006) para 157 (‘In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.’); *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5 (15 April 2009) para 101 [finding that the ‘conformity of the establishment of the investment with national laws... is implicit even when not expressly stated in the relevant (investment treaty).’]

IV. ADMISSIBILITY VERSUS COMPETENCE

The concepts of admissibility and competence are rarely compared or even discussed together, and there seems to be hardly any scholarly commentary or international jurisprudence dealing with the issue.⁴⁴ This is quite remarkable, given the amount of ink that has been spilled over the distinction between jurisdiction and admissibility, and given the distinction made in the ICSID Convention and in the ICSID Arbitration Rules (and elsewhere) between jurisdiction and competence.

What does this silence tell us about the distinction between admissibility and competence? It is suggested that it tells us something significant, even if perhaps more so in terms of theory or philosophy than professional practice. The preliminary analysis undertaken above suggests that there is an apparent conceptual hierarchy (or pyramid) between the three terms—jurisdiction, admissibility and competence—in the sense that jurisdiction is viewed as the dominant or privileged concept whereas admissibility and competence remain subordinated and limited to supporting the primacy of jurisdiction as the master concept in this three-member conceptual *ménage*. Are we not dealing with a conceptual *ménage à trois*?

Freudian or deconstructive considerations aside (however tempting they might be), the practically relevant legal point is somewhere else. Namely, there is arguably a simple reason for such a lack of interest in the distinction between admissibility and competence in international law: as the above analysis of the relationships between jurisdiction and competence, on the one hand, and between jurisdiction and admissibility, on the other, already suggests, the distinction between admissibility and competence does not call for any further analysis because there is no such distinction—admissibility and competence are in fact two sides of one and the same conceptual coin. Stated differently, they are one and the same concept, only viewed from a different viewpoint—one from the perspective of the tribunal (competence), the other from the perspective of a claim (admissibility). If a claim is not admissible before an international court or tribunal, whether in terms of time (*ratione temporis*), person (*ratione personae*) or subject matter (*ratione materiae*), this means that the court or tribunal is not *competent* to deal with the claim. Or more precisely, when taking a decision whether or not a purportedly international claim is admissible, whether *ratione temporis*, *ratione personae* or *ratione materiae*, an international court or tribunal is effectively taking a decision on its competence—and *vice versa*, when taking a decision on its competence, an international court or tribunal effectively determines whether the claim brought before it is admissible in terms of time, person or subject matter.

If a claim is found to be inadmissible *ratione temporis* because it is not yet ripe for international jurisdiction (as local remedies have not yet been exhausted, for instance), this effectively amounts to the determination that the court or tribunal is not *competent* to deal with the claim because it is not (yet) an international claim but a domestic claim—the claim does not (yet) fall within an international court's or tribunal's competence. Similarly, if a claim is found to be inadmissible *ratione*

⁴⁴ See also Zeiler (n 3). However, while Zeiler discusses the three concepts, he does not address the relationship between competence and admissibility.

personae before an international court or tribunal because it is not beneficially owned or *de facto* controlled by a foreign party but by a national of the host State (ie because there is no diversity of nationality), this effectively amounts to the determination that the court or tribunal is not *competent* to deal with the claim because the claim is, as a matter of fact, or in substance, not an international but a domestic claim. Finally, if a claim is found to be inadmissible *ratione materiae* before an international court or tribunal because it arises out of an internationally recognized illegality or suffers from another type of substantive infirmity such as incompatibility with international or transnational public policy, this effectively amounts to the determination that the court or tribunal is not *competent* to deal with the claim because it is, as a matter of law, not a claim that is cognizable under international law, even if it might be cognizable under the relevant domestic law.⁴⁵

That admissibility and competence are related concepts is hardly a novel idea. Fitzmaurice in his classic commentaries on the law and practice of the International Court of Justice appears to have said as much, albeit only in passing. When distinguishing between jurisdiction in the ‘field’ sense and competence in the sense of an international court’s or tribunal’s power to deal with a particular dispute, he suggested that the question of whether the parties have engaged in prior negotiations, as might be required by the applicable treaty, was a matter of competence:

Next [to the aspect of jurisdiction in the ‘field’ sense] there is the question of the competence of a court to hear and determine a particular case belonging to the category to which its jurisdiction relates. Thus a court may be competent to deal with a certain class of case, but only if certain conditions are fulfilled in the individual case, e.g., the parties must consent, or some preliminary procedure such as an attempt to settle the dispute by recourse to diplomatic methods must have been gone through.⁴⁶

As noted above, in investment treaty arbitration the question of whether the requirement to engage in prior negotiations—the ‘cooling-off’ period—is a matter of jurisdiction or admissibility has caused considerable debate. Fitzmaurice suggests that the issue that such requirements raise is a matter of competence (or admissibility) rather than jurisdiction in the strict sense.

This seems the better understanding of the apparent conceptual *ménage à trois* between jurisdiction, admissibility and competence: while jurisdiction and competence are related concepts in the sense that they can be understood as forming part of one, ‘extended’ concept of jurisdiction (ie jurisdiction in the broad sense, which covers both ‘jurisdiction’ and ‘competence’, as opposed to jurisdiction in the strict sense, which only covers ‘jurisdiction’ but not ‘competence’), admissibility and competence are effectively two sides of the same conceptual coin.⁴⁷ Both

⁴⁵ Thus, for instance, corruption may not be considered illegal under the law of the State in question, but this does not mean that an international tribunal may not find a claim arising out of established corruption as inadmissible *ratione materiae* if the claim arises directly out of circumstances that are tainted by corruption.

⁴⁶ See n 17 and accompanying text (emphasis added). Dr Daxner made a similar point in his Dissenting Opinion, stating that, in situations where the State has recognized the jurisdiction of the Court, it ‘has the right to present a preliminary objection on the ground of “the admissibility of the application”, because the recognition of the jurisdiction, in order to acquire the ability to appear before the Court, does not involve ipso facto recognition of the Court’s competence’. Dr Daxner thus specifically linked admissibility and competence. See *Corfu Channel* (n 15), and accompanying text.

⁴⁷ This implies that any attempt to assess whether international arbitral jurisprudence concerning the distinction between jurisdiction and competence is really inconsistent or only apparently so would require a careful analysis of each decision, in order to determine whether the tribunal in question has used the term ‘jurisdiction’ in a broad sense,

are fundamentally about one and the same issue: the relationship between international and municipal law.⁴⁸ They are about the criteria on the basis of which, in a concrete case, an international court or tribunal is able to determine whether it is dealing with an international claim, in terms of time (*ratione temporis*), person (*ratione personae*) or subject matter (*ratione materiae*), or whether the claim before it falls more properly within domestic jurisdiction. Shabtai Rosenne therefore certainly had a point when suggesting that competence is a more ‘subjective’ concept than jurisdiction, and that it includes ‘an element of the propriety of the Court’s exercising its jurisdiction’.⁴⁹ It is indeed a matter of propriety, in terms of professional competence, whether an international court or tribunal should deal with claims that are in substance domestic rather than international, whether in terms of time, person or subject matter. Consequently, a finding of incompetence (or inadmissibility), unlike a finding of lack of jurisdiction, is not conceptually mandatory, a matter of either/or—an implication which probably largely explains the continuing controversy about the applicability, or rather the scope of applicability, of admissibility rules in investment treaty arbitration.⁵⁰ Whether a claim is properly international (rather than domestic) can only be decided in a concrete context, on a case-by-case basis. Or, in other words (and somewhat plainly, if not self-evidently), disputes cannot be resolved *in abstracto*; they can only be resolved *in concreto*.

V. CONCLUSION

It turns out, upon closer analysis, that the conceptual triad of jurisdiction, admissibility and competence may be understood to consist of only two concepts—jurisdiction and competence/admissibility—or indeed of only one: jurisdiction in the broad sense (also comprehending competence/admissibility) or competence in the broad sense (also covering jurisdiction and admissibility). In any event, there is no substantive basis to draw a strict conceptual distinction between competence and admissibility—they are two sides of one and the same conceptual coin, viewed from two different perspectives, one internal to the tribunal (competence) and the other external (admissibility). Decisions on the admissibility of the claim are decisions on the tribunal’s competence—and *vice versa*.

What would be the conceptual gains, if any, if this were indeed the understanding of the three terms in the context of investment treaty arbitration? Such gains would, hopefully, be twofold: *first*, a better understanding of Article 41 of the ICSID Convention and Article 41 of the ICSID Arbitration Rules, which refer to the ‘jurisdiction’ of the Centre and the ‘competence’ of the tribunal—including that there is no need for a specific reference to admissibility in the Convention or the Arbitration Rules to allow ICSID tribunals to deal with

covering both jurisdiction and competence, or in the narrow ‘field’ sense of the term, as decisions may be said to be inconsistent only if they share the same conceptual framework. In the event the case raised not only issues of jurisdiction (in the narrow sense of the term), but also issues of competence or admissibility, such an attempt would also require a careful review of the whole file, including evidence and submissions, in order to see the precise legal and factual context in which the tribunal chose to assume, or chose not to assume, competence.

⁴⁸ For a suggestion to this effect, see Heiskanen (n 13).

⁴⁹ Rosenne (n 20).

⁵⁰ See nn 32 and 40 and accompanying text.

objections to admissibility; these are covered by the reference to ‘competence;’ and *second*, a better understanding of the structure and sensitivities of decision-making in investment treaty arbitration. While jurisdiction is indeed a ‘strict’ concept in the sense that a tribunal either has or does not have jurisdiction, competence is about something more ‘subjective’ or discretionary—it is about whether the claim, or the subject matter of the dispute, falls more properly within the competence of an international tribunal than that of a domestic jurisdiction. In other words, it is about the limits of the power that an international court or tribunal may—or indeed should—properly exercise. Not a matter of either/or but rather of more or less.