CHAPTER 8
Jurisdiction and Admissibility in
Proceedings under the ICSID Convention
and the ICSID Additional Facility Rules

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§8.01 INTRODUCTION

Jurisdiction and admissibility are two legal concepts that, despite their frequent application by arbitral tribunals, have lent themselves to a certain amount of confusion. The present contribution aims to clarify the use of these concepts with specific regard to arbitral proceedings under the ICSID Convention and the ICSID Additional Facility Rules. It starts by discussing the notion of jurisdiction on the basis of the relevant provisions in the ICSID Convention, the ICSID Arbitration Rules, and the ICSID Additional Facility Rules (§8.02), before addressing the general criteria that distinguish jurisdiction from admissibility (§8.03). The contribution proceeds to outline the main jurisdictional requirements in arbitral proceedings under the ICSID Convention and the ICSID Additional Facility Rules (§8.04). It then addresses a number of specific preliminary objections frequently raised by respondents with a view to clarifying their character (§8.05), before concluding (§8.06).

1. The present contribution does not address conciliation proceedings under the auspices of ICSID or the ICSID Additional Facility.
§8.02 THE NOTION OF JURISDICTION

In a general sense, jurisdiction might be defined as ‘the power of the tribunal to hear the case’.2 In international arbitration, where the term of ‘competence’ is often used synonymously with the notion of jurisdiction,3 the jurisdiction of a tribunal is generally based on the consent of the disputing parties.4

Objections to jurisdiction might be described as relating to the ‘conditions affecting the parties’ consent to have the tribunal decide the case at all’.5 The ICSID Convention and the ICSID Arbitration Rules on one hand [A] and the ICSID Additional Facility rules on the other hand [B] contain somewhat different provisions in this regard.

[A] ICSID Convention and the ICSID Arbitration Rules

The ICSID Convention refers to the terms of ‘jurisdiction’ and ‘competence’ in several provisions. In particular, Article 25(1) of the ICSID Convention states:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

This provision is complemented by Article 36(3) of the ICSID Convention, which states as follows:

The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre.

In addition, Article 41 of the ICSID Convention 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.

This provision is complemented by Rule 41 of the ICSID Arbitration Rules (‘Preliminary Objections’), stating, in the relevant part, as follows:

2. See Waste Management v. Mexico, [ICSID Case No. ARB(AF)/98/2], Dissenting Opinion of Keith Hight of 8 May 2000 to Award of 2 June 2000, para. 58.
4. Id., 201. The same is true for the jurisdiction of international courts and tribunals, see Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment on Preliminary Objections of 25 March 1948, ICJ Reports 15 (1948).
(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.

(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. …

(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.

Finally, Rule 42(4) of the ICSID Arbitration Rules (‘Default’) contains the following provision:

The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.

This terminology in the English version of the ICSID Convention and of the ICSID Arbitration Rules suggests a distinction between the ‘jurisdiction of the Centre’, on one hand, and the ‘competence of the Tribunal’, on the other. While the Spanish version of the two instruments similarly distinguishes between competencia and jurisdicción, this differentiation is not reflected in the French version, which indiscriminately speaks of compétence, both when referring to the Centre and in relation to an arbitral tribunal. This has been seen as an indication that ICSID terminology allows for the terms ‘jurisdiction’ and ‘competence’ to be used interchangeably, and that the important

6. See e.g., Art. 41(1) of the ICSID Convention, according to which ‘[e]l Tribunal resolverá sobre su propia competencia’ and Art. 41(2), stating in relevant part that ‘[t]oda alegación de una parte que la diferencia cae fuera de los límites de la jurisdicción del Centro, o que por otras razones el Tribunal no es competente para oírla, se considerará por el Tribunal’.


8. See Gerold Zeiler, Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings, in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer 79 (Christina Binder et al. eds., Oxford University Press 2009). For a different view, associating the notion of ‘competence’ more closely with the concept of admissibility and arguing that ‘admissibility and competence are in fact two sides of one and the same conceptual coin’,
distinction is between the qualifiers ‘of the Centre’ and ‘of the Tribunal’. In conformity with such an understanding, ICSID tribunals simply tend to issue a decision on ‘jurisdiction’, without separately addressing questions of ‘competence’. The notion of ‘jurisdiction of the Centre’ has been said to correspond to a concept of ‘general jurisdiction’, which defines ‘the objective range and outer limits of the ambit for all cases’ in accordance with the ICSID Convention. By contrast, the ‘competence of the Tribunal’ can be seen as referring to a concept of ‘special jurisdiction’, which defines ‘the subjective range and limits of the ambit of jurisdiction of the organ in a particular case, according to the specific jurisdictional title bearing the consent of the parties’. Whilst the ‘jurisdiction of the Centre’ is primarily determined by the ICSID Convention, any additional requirements in relation to the ‘competence of the Tribunal’ will typically follow from the arbitration agreement. Since the parties to a dispute can restrict the special jurisdiction of the forum deciding their dispute beyond the objective limits imposed by the ICSID Convention, the fact that a dispute falls within the general ‘jurisdiction of the Centre’ does not imply that it also falls within the ‘competence of the Tribunal’.

ICSID Additional Facility Rules

In the context of proceedings under ICSID’s Additional Facility, the mirror provision to Rule 41 of the ICSID Arbitration Rules is Article 45 of the Arbitration (Additional Facility) Rules (‘Preliminary Objections’), which provides as follows:

(1) The Tribunal shall have the power to rule on its competence. For the purposes of this Article, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included.

‘viewed from a different viewpoint – one from the perspective of the tribunal (competence), the other from the perspective of a claim (admissibility); see Veijo Heiskanen, Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration, 29 ICSID Review – Foreign Investment Law Journal 231, 243 (2014). Against this view see Steingruber, according to whom ‘[t]he fact that a competent Tribunal … has also to deal with inadmissible claims … shows us that “competence” and “admissibility” can hardly be “two sides of one and the same conceptual coin”’, Steingruber, supra n. 7, 680.

10. See Heiskanen, supra n. 8, 233.
11. Steingruber, supra n. 7, 678.
13. Steingruber, supra n. 7, 678.
15. See also Steingruber, supra n. 7, 688.
16. Ibid.
(2) Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possible after the constitution of the Tribunal …

(3) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within its competence.

(4) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(5) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (2) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(6) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. …

(7) If the Tribunal decides that the dispute is not within its competence or that all claims are manifestly without legal merit, it shall issue an award to that effect.

In addition, Article 48(3) of the Arbitration (Additional Facility) Rules (‘Default’) contains the following provision:

After the expiration of the period of grace or when, in accordance with paragraph (2) of this Article, no such period is granted, the Tribunal shall examine whether the dispute is within its jurisdiction and, if it is satisfied as to its jurisdiction, decide whether the submissions made are well-founded in fact and in law.

The reference to a tribunal’s competence in Article 45 and a tribunal’s jurisdiction in Article 48(3) of the Arbitration (Additional Facility) Rules appears to indicate that these two terms are used interchangeably.

§8.03 THE NOTION OF ADMISSIBILITY AND ITS DISTINCTION FROM THE NOTION OF JURISDICTION

In contradistinction to the notion of jurisdiction, the concept of admissibility has variously been described as dealing with the question of ‘whether it is appropriate for the tribunal to hear [the case]’ or ‘the suitability of the claim for adjudication on the merits’. In the words of Brownlie, ‘[a]n objection to the admissibility of a claim

18. See Waste Management v. Mexico, Dissenting Opinion, para. 58. See also Waibel, noting that ‘admissibility concerns the power of a tribunal to decide a case at a particular point in time in view of possible temporary or permanent defects of the claim’. Michael Waibel, Investment Arbitration: Jurisdiction and Admissibility, in International Investment Law 1213 (Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch eds., Nomos 2015).

invites the tribunal to dismiss (or perhaps postpone) the claim on a ground which, while it does not exclude its authority in principle, affects the possibility or propriety of its deciding the particular case at the particular time.\(^{20}\)

Unlike the terms ‘jurisdiction’ and ‘competence’, the notion of admissibility is not mentioned in either the ICSID Convention or the ICSID Arbitration Rules,\(^{21}\) and the ICSID Arbitration (Additional Facility) Rules are similarly silent in this regard. This silence can arguably be explained by the fact that the answers to questions of admissibility will typically have to be found outside of the ICSID Convention.\(^{22}\) There is, however, little doubt that arbitral tribunals have the power to decide on objections to admissibility both in proceedings under the ICSID Convention and in proceedings under the ICSID Additional Facility Rules.\(^{23}\)

What the concepts of jurisdiction and admissibility have in common is that a lack of either of them must lead to a claim being dismissed irrespective of its merits. At the same time, there is a clear difference between the concepts in that an objection to admissibility constitutes ‘a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits’, whereas an objection to jurisdiction can be seen as ‘a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim’.\(^{24}\) The question of jurisdiction therefore logically precedes the question of admissibility, which can only be decided once jurisdiction has been affirmed.\(^{25}\) In addition, it is frequently pointed out that jurisdiction concerns ‘the arbitration agreement’\(^{26}\) or ‘the scope of the State’s consent to arbitrate’,\(^{27}\) whereas ‘admissibility is related to a specific claim or counterclaim’.\(^{28}\)

\(^{20}\) Crawford, supra n. 5, 693.
\(^{21}\) See also Heiskanen, supra n. 8, 232; Zeiler, supra n. 8, 76; Ian A. Laird, A Distinction Without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in Salini v. Jordan and Methanex v. USA, 204, in International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Todd Weiler ed., Cameron May 2005).
\(^{22}\) See Steingruber, supra n. 7, 688.
\(^{23}\) See e.g., The Rompetrol Group N.V. v. Romania, (ICSID Case No. ARB/06/3), Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility of 18 April 2008, para. 112. For a different view with regard to proceedings under the UNCITRAL Rules see Methanex v. US, para. 126. See also Laird, supra n. 21, 91.
\(^{24}\) See G. Fitzmaurice, The Law and Procedure of the International Court of Justice 438 (Cambridge University Press 1995). The term ‘admissibility’ is expressly mentioned in Art. 79(1) of the Rules of the ICJ, providing that ‘[a]ny 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’.
\(^{25}\) See also Steingruber, supra n. 7, 680.
\(^{26}\) Steingruber, supra n. 7, 681.
\(^{27}\) Heiskanen, supra n. 8, 242.
\(^{28}\) Steingruber, supra n. 7, 681. See also Heiskanen, supra n. 8, 242; Veijo Heiskanen, Jurisdiction v. Competence: Revisiting a Frequently Neglected Distinction, 5 Finnish Yearbook of International Law 1, 23 (1994). It has also been suggested that a jurisdictional objection would usually address the tribunal rather than the claim, whereas the addressee of an admissibility rule would be the claimant, see Steingruber, supra n. 7, 684.
Despite these clear theoretical distinctions, arbitral practice shows that tribunals occasionally struggle with delimitating the two concepts and are not always clear in their use of the relevant terminology. Objections to jurisdiction and admissibility are often addressed simultaneously as ‘preliminary objections’ in a first phase of the proceedings before dealing with the merits of a dispute. As a consequence, tribunals sometimes leave explicitly open the question of whether a particular issue relates to jurisdiction or admissibility.

The failure to clearly distinguish between the two concepts can, however, be problematic in an international arbitration context. This is because, contrary to proceedings before domestic courts and international forums such as the ICJ, the scope of review in international arbitrations typically depends on whether an objection falls within one or the other category. In particular, both pursuant to Article 52 of the ICSID Convention and under the law of the seat of the arbitration, a party will

29. See also Waibel, supra n. 18, 1214. With regard to the use of the notion of ‘arbitrability’ by the US Supreme Court as encompassing both matters of jurisdiction and admissibility, see Jan Paulsson, Jurisdiction and Admissibility, in Global Reflections on International Law, Commerce and Dispute Resolution 611 (Gerald Aksen et al. eds., ICC Publishing 2005).

30. See e.g., Burlington Resources Inc. v. Ecuador, (ICSID Case No. ARB/08/5), Decision on Jurisdiction of 2 June 2010, paras 315–318, 336–340. Similarly, in a number of cases, tribunals have allowed claimants to remedy their noncompliance with certain procedural prerequisites after the arbitration had already started, see e.g., Pope and Talbot Inc. v. Canada (UNCITRAL), Decision on Preliminary Motion by Canada of 24 February 2000, para. 18; Western NIS Enterprise Fund v. Ukraine, (ICSID Case No. ARB/04/2), Order of 16 March 2006; Teinver v. Argentina, (ICSID Case No. ARB/09/1), Decision on Jurisdiction of 21 December 2012, para. 135; Philip Morris v. Uruguay, (ICSID Case No. ARB/10/7), Decision on Jurisdiction of 2 July 2013, para. 148. It is not clear whether these decisions were based on the understanding that the relevant prerequisites related to admissibility or if the tribunals took the view that jurisdictional requirements would only have to be met at the time of their decisions.

31. The possibility of bifurcating the proceedings with regard to preliminary objections is specifically acknowledged in Art. 41(2) of the ICSID Convention and Rule 41(3) of the ICSID Arbitration Rules, as well as in Art. 45(4) and (5) of the Arbitration (Additional Facility) Rules.

32. See e.g., Mondeo International v. US, (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, paras 46, 92; Beyindir v. Pakistan, (ICSID Case No. ARB/03/29), Decision on Jurisdiction of 14 November 2005, para. 87; Philip Morris v. Uruguay, para. 142.

33. The distinction seems less relevant in domestic court proceedings, where both questions of jurisdiction and admissibility will often in principle be subject to appeal. The same is true for proceedings before the ICJ, which will typically have the final say with regard to both matters of jurisdiction and admissibility. As a consequence, commentators have cautioned against uncritically adopting the delimitation criteria developed by the ICJ or national courts, see Paulsson, supra n. 29, 603.

34. See Art. 52(1) of the ICSID Convention, stating that ‘either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: ... (b) that the Tribunal has manifestly exceeded its powers’. The failure to exercise an existing jurisdiction may constitute a manifest excess of powers within the meaning of this provision, see e.g., Vivendi v. Argentina, (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, para. 115; Micula v. Romania, (ICSID Case No. ARB/05/20), Decision on Annulment of 26 February 2016, para. 126.

35. See Art. 34(2)(iii) of the UNCITRAL Model Law, providing in relevant part that an arbitral award may be set aside if ‘the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration’.
normally be in a position to challenge an award based on the tribunal’s lack of jurisdiction, but not where a tribunal wrongly rejected an objection to admissibility.\footnote{36} From a policy viewpoint, the rationale for this distinction may be seen in that ‘[o]nce it is established that the parties have consented to the jurisdiction of a particular tribunal, there is a powerful policy reason … to recognise its authority to dispose conclusively of other threshold issues’.\footnote{37}

In addition, according to Rule 41(2) of the ICSID Arbitration Rules,\footnote{38} a tribunal may at its own initiative consider its competence at any stage of the proceedings.\footnote{39} By contrast, it is frequently assumed that objections based on the inadmissibility of claims need in principle be raised by the respondent.\footnote{40} As a consequence, the qualification of a preliminary objection as jurisdictional or going to admissibility is often of more than theoretical interest.\footnote{41}

As a simple test for ascertaining whether a particular objection relates to jurisdiction or to admissibility, one may ask whether the objecting party is taking aim at the tribunal (in which case the objection must be qualified as jurisdictional) or at the claim (in which case the objection goes to admissibility).\footnote{42} In addition, one should look at the rationale for sustaining the objection. If the reason for doing so is that ‘the claim could not be brought to the particular forum seized’\footnote{43} and that ‘it is inappropriate for the tribunal to exercise its adjudicative power in any circumstances’,\footnote{44} the issue is jurisdictional. By contrast, if the reason is that ‘it is inappropriate for the tribunal to rule upon the specific claim or counterclaim on the merits’\footnote{45} and that ‘the claim should not be heard at all (or at least not yet)’,\footnote{46} the issue should properly be characterized as relating to admissibility. These principles provide useful guidance that will be relied upon in the context of dealing with specific preliminary objections later on.\footnote{47}

\footnote{36. See Douglas, supra n. 19, para. 307; Paulsson, supra n. 29, 601.}
\footnote{37. See Paulsson, supra n. 29, 617. This being said, the last word regarding the qualification of a preliminary objection as jurisdictional or relating to admissibility will usually lie with the forum reviewing the arbitral tribunal’s decision, see also Waibel, supra n. 18, 1277.

\footnote{38. Rule 41(2) of the ICSID Arbitration Rules provides that ‘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’. Article 45(3) of the Arbitration (Additional Facility) Rules contains a similar provision.

\footnote{39. For a different view, see Steingruber, who suggests that ‘jurisdictional conditions’ should not be taken into account by a tribunal of its own accord, but only when raised by a party in accordance with Rule 41(1) of the ICSID Arbitration Rules, Steingruber, supra n. 7, 687.

\footnote{40. See Steingruber, supra n. 7, 681.

\footnote{41. For a list of additional reasons why the distinction between the two categories may be relevant, see Waibel, supra n. 18, 1274 et seq.

\footnote{42. Paulsson, supra n. 29, 616. See also Douglas, supra n. 19, para. 311.

\footnote{43. Paulsson, supra n. 29, 617.

\footnote{44. Douglas, supra n. 19, para. 311. See also Steingruber, supra n. 7, 683.

\footnote{45. Douglas, supra n. 19, para. 311.

\footnote{46. Paulsson, supra n. 29, 617.

\footnote{47. See section §8.05 below.}
§8.04 JURISDICTIONAL REQUIREMENTS IN ARBITRAL PROCEEDINGS UNDER THE ICSID CONVENTION AND THE ICSID ADDITIONAL FACILITY RULES

Both in proceedings under the ICSID Convention and in proceedings under the ICSID Additional Facility Rules, a tribunal needs to convince itself of the existence of a number of requirements that are undisputedly of a jurisdictional nature. In ICSID proceedings, these include in particular the requirements for the jurisdiction of the Centre under Article 25 of the ICSID Convention [A]. For arbitrations under the auspices of ICSID's Additional Facility, Articles 2 and 4 of the ICSID Additional Facility Rules provide for a modified version of the jurisdictional requirements under Article 25 of the ICSID Convention [B]. In addition, in both ICSID and ICSID Additional Facility arbitrations a number of other jurisdictional requirements resulting from the arbitration mechanism have to be verified [C].

[A] Jurisdiction of the Centre under Article 25 of the ICSID Convention

Article 25 of the ICSID Convention lists the requirements with regard to the jurisdiction of the Centre ratione materiae [1] and ratione personae [2]. It also specifies that the jurisdiction of the Centre requires the consent of the disputing parties [3].

[1] Jurisdiction Ratione Materiæ

According to Article 25(1) ICSID, the jurisdiction of the Centre only extends to 'legal dispute[s] arising directly out of an investment'. The main requirements for the subject matter jurisdiction of the Centre can therefore be summarized as the existence of a dispute of a legal nature [a] and the existence of an investment [b].

[a] Existence of a Dispute of a Legal Nature

As a first requirement for the jurisdiction of the Centre, there must be a 'legal dispute' between the parties, meaning that there must be a disagreement regarding 'the existence or scope of a legal right or obligation, or the nature or extent of the reparation

48. The need for a dispute to arise 'directly' out of an investment is sometimes mentioned as an additional requirement for the Centre's jurisdiction, see e.g., Christoph Schreuer et al., The ICSID Convention: A Commentary, Art. 25 para. 85 (2d ed., Cambridge University Press 2009). It has been acknowledged that, whilst the criterion requires a 'reasonably' close connection between the investment and the dispute, '[i]t is impossible to draw a precise line in general terms between disputes arising directly and those arising only indirectly out of investments', see Schreuer, Art. 25 paras 93 et seq., with references. In addition, Art. 25(4) ICSID gives signatory States the possibility to notify the Centre of certain classes of disputes that they 'would not consider submitting to the jurisdiction of the Centre'. However, such notifications are for information purposes only and do not have a direct bearing on jurisdiction, see Schreuer, Art. 25, paras 925, 935.
to be made for breach of a legal obligation’. The dispute needs to raise ‘legal issues in relation with a concrete situation’ rather than general grievances, and the determination of these issues by the tribunal must have ‘some practical and concrete consequences’. Tribunals have, however, interpreted the requirement in a fairly broad manner, holding in particular that ‘the allegation of a breach is not a constitutive element of the notion of a legal dispute’.

[b] Existence of an Investment

The other main requirement with regard to the subject matter jurisdiction of the Centre is the existence of an investment. While the ICSID Convention does not define the notion of ‘investment’, it has long been argued on the basis of the Convention’s negotiating history that the term needs to be given an autonomous meaning. ICSID tribunals therefore frequently assess the existence of certain criteria thought to be inherent to the notion of ‘investment’ when examining their jurisdiction.

These criteria, which are often referred to as the ‘Salini test’, have been described as follows: (a) a commitment of resources to the host State’s economy; (b) a certain duration of this commitment; (c) the assumption of risk and the expectation of profit; and (d) a contribution to the host State’s economic development. Some tribunals have dismissed the fourth criterion of a contribution to the host State’s economic development as irrelevant. Others have sought to add further criteria to the Salini catalogue, in particular the need for an investment to have been made in good faith. Recent decisions have often expressed the view that the Salini criteria should be

50. See AES Corp. v. Argentina, (ICSID Case No. ARB/02/17), Decision on Jurisdiction of 26 April 2005, para. 44. See also Maffezini v. Spain, (ICSID Case No. ARB/97/7), Decision on Objections to Jurisdiction of 25 January 2000, para. 94; Tokios Tokeles v. Ukraine, (ICSID Case No. ARB/02/18), Decision on Jurisdiction of 29 April 2004, para. 106; Achmea v. Slovak Republic (UNCITRAL, PCA Case No. 2013-12), Award on Jurisdiction and Admissibility of 20 May 2014, para. 168; Schreuer, supra n. 48, Art. 25 para. 67.
53. See Salini Costruttori v. Morocco, (ICSID Case No. ARB/00/4), Decision on Jurisdiction of 23 July 2001, para. 52. The criteria were first relied upon in Fedax v. Venezuela, (ICSID Case No. ARB/96/3), Decision on Jurisdiction of 11 July 1997, para. 43.
54. See e.g., Phoenix Action v. Czech Republic, (ICSID Case No. ARB/06/5), Award of 15 April 2009, para. 85; Saba Fakes v. Turkey, para. 111; KT Asia Investment Group v. Kazakhstan, para. 171.
applied with some flexibility and suggested that not all of them necessarily need to be fulfilled for there to be an investment. 56


In terms of ratione personae jurisdiction, Article 25(1) of the ICSID Convention requires that the dispute be ‘between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by the State) and a national of another Contracting State’. Article 25(2) of the ICSID Convention defines the term ‘national of another Contracting State’ as encompassing both natural and juridical persons. With regard to natural persons, Article 25(2)(a) specifically excludes dual nationals with the nationality of the respondent State. In terms of juridical persons, Article 25(2)(b) extends the Centre’s jurisdiction to foreign-controlled juridical persons with the nationality of the State that is a party to the dispute, provided that there is a specific agreement in this regard. It bears noting that Article 25(2) of the ICSID Convention only defines the outer bounds of who may be a ‘national of another Contracting State’ and that, within these bounds, each signatory State is free to determine who its nationals are. 57

With regard to the Centre’s jurisdiction in relation to constituent subdivisions or agencies of a Contracting State, Article 25 ICSID specifies two cumulative requirements. These are the designation of the subdivision or agency by the relevant State in accordance with para. 1, 58 and the State’s approval of the sub-division’s or agency’s consent to arbitration (or the State’s waiver of the need for such approval) in accordance with paragraph 3.

[3] Consent with Regard to Submission to ICSID

In addition to the ratione materiae and ratione personae jurisdiction requirements discussed above, Article 25 of the ICSID Convention requires the consent of the parties

56. See Biwater Gauff v. Tanzania, (ICSID Case No. ARB/05/22), Award of 24 July 2008, paras 316–318; Malaysian Historical Salvors v. Malaysia, (ICSID Case No. ARB/05/10), Decision on Annulment of 16 April 2009, para. 80; Panentechniki v. Albania, ICSID Case No. ARB/07/21, Award of 30 July 2009, paras 43–48; Alpha v. Ukraine, (ICSID Case No. ARB/07/16), Award of 8 November 2010, para. 314; Imaris v. Ukraine, (ICSID Case No. ARB/08/8), Decision on Jurisdiction of 8 March 2010, paras 129–131; Abaclat et al. v. Argentina, (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility of 4 August 2011, para. 364; Ambiente Ufficio and others v. Argentina, (ICSID Case No. ARB/08/9), Decision on Jurisdiction of 8 February 2013, para. 479; Philip Morris v. Uruguay, para. 206. The tribunal in Salini already suggested that the various criteria ‘should be assessed globally’, see Salini Costruttori v. Morocco, para. 52. The tribunals in a number of recent decisions expressed doubts as to whether the Salini criteria should be given any relevance, see e.g., Philip Morris v. Uruguay, para. 203.

57. See David Williams, Jurisdiction and Admissibility, in The Oxford Handbook of International Investment Law 890 (Peter Muchlinski, Federico Ortino and Christoph Schreuer eds., Oxford University Press 2008).

to submit their dispute to the Centre.\textsuperscript{59} This consent will usually be provided through the parties’ arbitration agreement, and reference can therefore be made to the section addressing this issue further below.\textsuperscript{60}

**[B] Jurisdictional Requirements under the ICSID Additional Facility Rules**

Article 2 of the ICSID Additional Facility Rules limits their application to arbitrations ‘for the settlement of legal disputes’ ‘which are not within the jurisdiction of the Centre’\textsuperscript{61} within the meaning of Article 25 of the ICSID Convention, either because one of the investor’s home State and the respondent State is not an ICSID Contracting State or because they ‘do not arise directly out of an investment’. The provision therefore effectively establishes a modified version of the jurisdictional requirements under Article 25 of the ICSID Convention.\textsuperscript{62} In particular, where the jurisdictional requirements under Article 25 ICSID are fulfilled, this excludes the jurisdiction of a tribunal under the ICSID Additional Facility Rules.\textsuperscript{63}

In addition, Article 4 of the ICSID Additional Facility Rules provides that any arbitration agreement referring a dispute to the ICSID Additional Facility ‘requires the approval of the Secretary-General’, specifying that this shall only be granted if ‘the underlying transaction has features which distinguish it from an ordinary commercial transaction’. The Secretary General of ICSID is therefore entrusted not only with monitoring the jurisdictional requirements under Article 2 of the ICSID Additional Facility Rules, but also with ensuring that, if the underlying transaction does not have the characteristics of an investment, it is nevertheless different from ‘an ordinary commercial transaction’. The latter requirement has been described as involving a long-term relationship or commitment of substantial resources as well as a special importance to the economy of the host State.\textsuperscript{64}

Article 4 of the ICSID Additional Facility Rules suggests that without the approval of the Secretary General of ICSID an arbitration agreement referring to the ICSID Additional Facility Rules is invalid. This effectively makes the Secretary General’s approval of the arbitration agreement another requirement for the jurisdiction of a tribunal in proceedings under the Additional Facility Rules.

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\textsuperscript{59} See also Williams, supra n. 57, 871.
\textsuperscript{60} See below section §8.04[C]. Whilst Art. 26 ICSID provides that ‘[a] Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention’, Guatemala is the only ICSID signatory maintaining such a requirement. See Mark Friedmann, Treaties as Agreements to Arbitrate – Related Dispute Resolution Regimes: Parallel Proceedings in BIT Arbitration, in International Arbitration: Back to Basics? 557 (Albert Jan van den Berg ed., ICCA Congress Series No. 13 (Montreal 2006), Kluwer Law International 2006).
\textsuperscript{61} See also Art. 3 of the ICSID Additional Facility Rules.
\textsuperscript{62} See Schreuer, supra n. 48, Art. 25 para. 31.
\textsuperscript{63} See Schreuer, supra n. 48, Art. 25 paras 205, 234.
\textsuperscript{64} See Schreuer, supra n. 48, Art. 25 paras 31, 204.
Apart from the requirements regarding the jurisdiction of the Centre in ICSID proceedings under Article 25 of the Convention, the main jurisdictional requirement in both ICSID and ICSID Additional Facility arbitrations is the existence of an agreement referring the dispute to arbitration under the relevant set of rules. In contract-based arbitrations, such an agreement typically results from an arbitration clause in the contract.\(^\text{65}\) By contrast, in treaty-based arbitrations, the arbitration agreement is formed when the investor accepts the host State’s offer to arbitrate contained in the dispute resolution clause of the relevant IIA, usually by filing a notice of arbitration.\(^\text{66}\)

In treaty-based arbitrations, tribunals have frequently held that an investor also needs to show the existence of a prima facie case regarding a breach of the relevant treaty as an additional jurisdictional requirement.\(^\text{67}\)

### §8.05 SPECIFIC PRELIMINARY OBJECTIONS

Given the breadth and diversity of the spectrum of potential preliminary objections, it is not possible to provide a comprehensive assessment in this regard.\(^\text{68}\) Some preliminary objections are likely to raise little contention when it comes to their classification as relating to jurisdiction or admissibility.\(^\text{69}\) For instance, issues of standing,\(^\text{70}\) limitation periods regarding the assertion of claims,\(^\text{71}\) and principles aiming to avoid multiple proceedings such as lis pendens, forum non conveniens, or res judicata,\(^\text{72}\) all clearly relate to the admissibility of a claim. The same is arguably true with regard to the admissibility of claims.

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\(^{66}\) See e.g., *Eureko v. Slovak Republic* (UNCITRAL), Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 223. Given that the host State’s offer to arbitrate is made only to protected investors, an investor needs to show that he is protected under the treaty. For a systematic overview of the requirements in this regard see Hanno Wehland, *Investment Treaty Arbitration, in International Commercial Arbitration* 158, paras 11–30 (Stephan Balthasar ed., Beck Hart 2016). A similar mechanism is at play where the arbitration agreement is based on the investor’s acceptance of a jurisdictional offer in the domestic legislation of the host State, see Wehland, supra n. 65, para. 3.33.

\(^{67}\) See e.g., *Salini Construttori v. Jordan*, (ICSID Case No. ARB/02/13), Decision on Jurisdiction of 29 November 2004, para. 151; *Achmea v. Slovak Republic*, paras 206–220 with further references. The appropriateness of such a requirement has been questioned with regard to broad dispute resolution clauses allowing the submission of ‘any’ or ‘all’ disputes relating to investments, see Zeiler, supra n. 8, 87.

\(^{68}\) For a list of objections that may be raised in the context of treaty-based arbitrations, see Steingruber, supra n. 7, 680.

\(^{69}\) A number of clearly jurisdictional requirements have already been addressed earlier, see above section §8.04.

\(^{70}\) See Waibel, supra n. 18, 1284.

\(^{71}\) See Paulsson, supra n. 29, 616; Steingruber, supra n. 7, 687; Zeiler, supra n. 8, 83. Time limitations regarding the possibility to assert a claim must, of course, not be confounded with limitations regarding the *nativum temporis* jurisdiction of a tribunal, see also Paulsson, supra n. 29, 614.

\(^{72}\) See Waibel, supra n. 18, 1219. Where the principle of res judicata has conclusive rather than preclusive effect, it merely prevents the relevant forum from deciding the conclusively determined issue differently, but does not affect the admissibility of the claim, see Wehland, supra n.
questions of whether several investors can jointly invoke a treaty dispute resolution mechanism to have their claims heard in a single set of proceedings, and also whether they can base a tribunal’s jurisdiction on several arbitration agreements simultaneously.

Possibly less clear is the situation where an investor brings claims under a treaty’s investor-State dispute resolution mechanism, whilst previously having concluded a contract referring disputes to a different forum. In this regard, the tribunal in *SGS v. Philippines* took the view that the contractual forum selection clause did not affect its jurisdiction under the treaty mechanism, but rather the admissibility of the claims before it. Such an approach will usually be correct, at least as far as treaty claims are concerned. By contrast, when it comes to contractual claims, a contractual forum selection clause may have to be regarded as a waiver of the forum selection option that would otherwise be available to the investor under the treaty. Where the option is waived, the consequence will be that the treaty-based forum does not have jurisdiction with regard to the investor’s contractual claims.

The remainder of this section focuses on the characterization of preliminary objections that arise from a claimant’s noncompliance with certain prerequisites specifically mentioned in the investor-State dispute resolution clause of an IIA. Investment treaties frequently require investors to undertake certain steps before they can initiate arbitral proceedings under the treaty mechanism. In particular, investors may be required to attempt, for a certain period of time, to solve their dispute through amicable negotiations [A] or proceedings in the courts of the host State [B].

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65. para. 6.91. For a different view with regard to the principle of lis pendens (considering that it relates to jurisdiction), see Zeiler, supra n. 8, 81.
74. The tribunal in *Noble Energy* even considered this to be ‘a purely procedural issue covered by Art. 44 of the ICSID Convention’. See *Noble Energy v. Ecuador*, (ICSID Case No. ARB/05/12), Decision on Jurisdiction of 5 March 2008, para. 188. For a detailed review of the arbitral jurisprudence regarding the permissibility of this type of *ex-ante* consolidation in the absence of consent by the host State see Wehland, supra n. 65, paras 4.24–4.36.
75. See *SGS v. Philippines*, (ICSID Case No. ARB/02/6), Decision on Objections to Jurisdiction of 29 January 2004, paras 154–155. The tribunal appeared to extend its findings both to the investor’s contractual claims (which it held could in principle be brought under the treaty’s generic dispute resolution clause) and to his claims under the treaty’s umbrella clause.
76. A contractual forum selection clause will normally not affect a tribunal’s jurisdiction over an investor’s treaty claims, including claims under an umbrella clause. See Wehland, supra n. 65, para. 3.116. To the extent where the *SGS v. Philippines* tribunal considered that it could not decide the investor’s claim under the treaty’s umbrella clause before the contractual forum had determined the underlying contractual issues, this could therefore only be a matter of admissibility.
77. See Wehland, supra n. 65, para. 3.112.
78. See also James Crawford, Treaty and Contract in Investment Arbitration, 6 Transnational Dispute Management 13 (2009). In the *SGS v. Philippines* case, the option under the treaty mechanism could arguably not have been waived since the treaty had been concluded after the investor-State contract, see *SGS v. Philippines*, (ICSID Case No. ARB/02/6), Dissenting Opinion of Antonio Crivellaro to Decision on Objections to Jurisdiction of 29 January 2004, para. 2.
79. Similar considerations apply in the rare instances of a procedural requirement for investors to exhaust local remedies before submitting claims to international arbitration. See e.g., Art. 4(3) of the 1989 Ghana-Romania BIT, Art. 9(1) of the Jamaica-UK BIT; Art. 7(2) of the Romania-Sri
are also frequently required to waive any rights they might have to pursue claims based on the same host State measure in other forums, so as to limit the possibility of multiple proceedings [C].

A similar function is fulfilled by so-called fork-in-the-road provisions, which limit the possibility of investors to invoke the treaty’s dispute resolution mechanism once proceedings have been started elsewhere [D]. All these requirements can give rise to the question of whether they relate to jurisdiction or admissibility, which will be addressed at the end of this section [E].

[A] Cooling-Off Periods

The dispute resolution clauses in some IIAs provide that, before submitting a dispute to international arbitration, investors need to attempt to settle the dispute through amicable negotiations with the host State for a certain period of time. Article 7(2) of the Argentina-US BIT, for instance, states that ‘the parties to the dispute should initially seek a resolution through consultation and negotiation’, with Article 7(3)(a) adding that ‘provided that … six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration’.

Similarly, Article 26(1) and (2) of the ECT provide that an investor-State dispute regarding the alleged breach of an obligation under the ECT ‘shall, if possible, be settled amicably’, and that it is only if the dispute cannot be settled amicably within a period of three months ‘the investor may choose to submit it for resolution’ either ‘to the courts or administrative tribunals’ of the respondent State, or ‘in accordance with any applicable, previously agreed dispute settlement procedure’, or in accordance with the arbitration mechanism specified in the ECT itself.

Arbitral tribunals have differed in their approaches to these ‘cooling-off’ periods, with some finding that disregarding their requirements should not prevent investors

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Lanka BIT. Guatemala is the only country requiring the exhaustion of local remedies as a precondition for its consent to ICSID jurisdiction pursuant to Art. 26 ICSID, see above n. 60. With regard to the exhaustion of local remedies as a substantive requirement in the context of denial of justice claims see below section 8.05[B].

80. Wehland, supra n. 65, para. 3.159.

81. Wehland, supra n. 65, paras 3.119–3.158.

82. Other specific requirements often referred to in investor-State dispute resolution mechanisms include legality clauses (see e.g., Heiskanen, supra n. 8, 242; Zachary Douglas, The Plea of Illegality in Investment Treaty Arbitration, 29 ICSID Review – Foreign Investment Law Journal 155 (2014)) and denial of benefits clauses (see e.g., Steingruber, supra n. 7, 682). Their qualification as relating to jurisdiction or admissibility will similarly depend on the exact formulation of the relevant provision. Where an investor is required to exhaust local remedies before submitting its claims to international arbitration, it is necessary to differentiate depending on the basis for the requirement. In those rare instances where an investment treaty contains an explicit exhaustion of local remedies requirement, this will typically be a condition for the host State’s consent to arbitration under the treaty mechanism, see Abaçlat et al. v. Argentina, Dissenting Opinion, para. 24; Steingruber, supra n. 7, 685. By contrast, in the context of a claim for denial of justice, the exhaustion of local remedies is a substantive requirement that affects the merits of the claim, see Waibel, supra n. 18, 1284. For a different view (suggesting the requirement relates to the admissibility of the claim), see Zeiler, supra n. 8, 83.
from filing claims under the relevant treaty mechanism.\textsuperscript{83} Even those tribunals finding that the failure to comply with a cooling-off period should have consequences have taken different views as to whether these must relate to the jurisdiction of the tribunal\textsuperscript{84} or the admissibility of the investor’s claims.\textsuperscript{85}

\[B\] Prior Recourse to Courts Requirements

Some IIAs stipulate that investors can only resort to international arbitration after having sought relief before the national courts or administrative authorities of the host State for a certain period of time. Article 10(2) of the Argentina-Netherlands BIT, for instance, provides that disputes shall, in the first place, be submitted ‘to the administrative or judicial organs of the Contracting Party in the territory of which the investment has been made’, with Article 10(3) specifying that ‘[i]f within a period of eighteen months from submissions of the dispute to the competent organs … these organs have not given a final decision or if the decision of the aforementioned organs has been given but the parties are still in dispute, then the investor concerned may resort to international arbitration’.

As with cooling-off periods, tribunals have occasionally assumed that prior recourse to courts requirements do not serve any useful purpose and can therefore effectively be disregarded.\textsuperscript{86} The prevailing view, however, is that these provisions constitute a modification of the exhaustion of local remedies rule and in principle need to be complied with before any arbitral proceedings can be instituted under the treaty mechanism.\textsuperscript{87} Yet here again tribunals have disagreed as to whether noncompliance

\begin{thebibliography}{99}
\bibitem{83} See \textit{e.g.}, Ethyl Corporation \textit{v.} Canada (UNCITRAL), Award on Jurisdiction of 24 June 1998, para. 83; \textit{Lauder \textit{v.} Czech Republic} (UNCITRAL), Award of 3 September 2001, para. 187; \textit{Biwater Gauff \textit{v.} Tanzania}, para. 343; \textit{Abaclat et al. \textit{v.} Argentina}, para. 565. There is agreement that investors do not need to seek negotiations with a host State if such negotiations would obviously be futile, see \textit{Occidental Petroleum \textit{v.} Ecuador}, (ICSID Case No. ARB/06/11), Decision on Jurisdiction, 9 September 2008, para. 94; \textit{Teinver \textit{v.} Argentina}, (ICSID Case No. ARB/09/01), Decision on Jurisdiction of 21 December 2012, para. 126.
\bibitem{85} See \textit{e.g.}, Alps Finance \textit{v.} Slovakia (UNCITRAL), Award of 5 March 2011, para. 200.
\bibitem{86} See \textit{Hochtief \textit{v.} Argentina}, (ICSID Case No. ARB/07/31), Decision on Jurisdiction of 24 October 2011, para. 51; \textit{Plama Consortium \textit{v.} Bulgaria}, para. 224.
\bibitem{87} See \textit{Maffezeni \textit{v.} Spain}, para. 36; \textit{BG Group \textit{v.} Argentina} (UNCITRAL), Award of 24 December 2007, para. 146; \textit{Wintershall \textit{v.} Argentina}, (ICSID Case No. ARB/04/14), Award of 8 December 2008, para. 147; \textit{Impregilo \textit{v.} Argentina}, (ICSID Case No. ARB/07/17), Award of 21 June 2011, para. 94; \textit{ICS Inspection and Control Services \textit{v.} Argentina} (UNCITRAL, PCA Case No. 2010-9), Award of 10 February 2012, para. 262; \textit{Daimler Financial Services \textit{v.} Argentina}, (ICSID Case No. ARB/05/1), Award of 22 August 2012, para. 193; \textit{Kliç İnşaat \textit{v.} Turkmenistan}, (ICSID Case No. ARB/10/11), Award of 2 July 2013, paras 6.2.9, 6.3.15; \textit{Dede \textit{v.} Romania}, ICSID Case No. ARB/10/22, Award of 5 September 2013, para. 225.
\end{thebibliography}
with a prior recourse to courts requirement gives rise to a jurisdictional objection\textsuperscript{88} or affects the admissibility of an investor’s claims.\textsuperscript{89}


Many modern IIAs, in particular those involving Canada and the US, include clauses that are usually referred to as ‘waiver’ provisions. Article 1121 NAFTA, for instance, provides that an investor may submit a claim under the NAFTA dispute settlement mechanism ‘only if’ he waives his ‘right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party’.\textsuperscript{90} Here again, tribunals have disagreed as to whether the failure of an investor to declare the required waiver affects the jurisdiction of a treaty-based tribunal\textsuperscript{91} or rather the admissibility of the claims before it.\textsuperscript{92}


As an alternative to a waiver provision, some IIAs require investors not to previously have brought the same dispute in another forum, including the domestic courts of the host State. Article 7(3)(a) of the Argentina-US BIT, for instance, states:

\begin{quote}
Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) [referring to the domestic courts and a previously agreed dispute settlement procedure respectively] … the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration.
\end{quote}

Clauses such as Article 7(3)(a) of the Argentina-US BIT have usually been held to restrict an investor’s possibility to bring claims under a treaty mechanism only where the previous proceedings before the other forum related to the very same claims\textsuperscript{93} and

\begin{thebibliography}{99}
\bibitem{88} See e.g., Wintershall v. Argentina, para. 156; Murphy Exploration and Production Company v. Ecuador, (ICSID Case No. ARB/08/4), Award of 15 December 2010, para. 156; Impregilo v. Argentina, para. 94; ICS Inspection and Control Services v. Argentina, para. 326; Daimler Financial Services v. Argentina, para. 194. See also Abaclat et al. v. Argentina, Dissenting Opinion, para. 24.
\bibitem{89} See Abaclat et al. v. Argentina, para. 496; Hochtief v. Argentina, para. 96.
\bibitem{90} Virtually identical provisions can be found in Art. 26(2) of the 2012 US Model BIT, Art. 26(1)(e) of the 2004 Canada Model BIT, and Art. 10.18(2)(b) of the Central America Free Trade Agreement (CAFTA).
\bibitem{91} See Waste Management v. Mexico, (ICSID Case No. ARB(AF)/98/2), Award of 2 June 2000, para. 31. See also Waste Management v. Mexico, Dissenting Opinion, para. 59, suggesting that investor behaviour inconsistent with a previously declared waiver might give rise to an objection to admissibility.
\bibitem{93} See Middle East Cement v. Egypt, (ICSID Case No. ARB/99/6), Award of 12 April 2002, para. 71; CMS Gas Transmission v. Argentina, (ICSID Case No. ARB/01/8), Decision on Objections to Jurisdiction of 17 July 2003, para. 80; Occidental Exploration v. Ecuador (UNCITRAL, LCIA Case
\end{thebibliography}
were conducted between the exact same parties. Whilst tribunals have, as a consequence, typically found fork-in-the-road provisions to be inapplicable, the objections to which these clauses give rise have, in principle, been qualified as jurisdictional. By contrast, the sole arbitrator in one well-known case where the respondent successfully invoked a fork-in-the-road provision considered the objection to be a matter of admissibility.

[E] Evaluation

Whilst there are significant differences between these various types of clauses and their requirements, what they have in common is that a useful answer to the question of whether they relate to jurisdiction or admissibility cannot be given in the abstract, but only by looking at the wording of a specific clause. This wording will usually indicate whether the requirement affects the consent of the host State to arbitration under the treaty mechanism (in which case the requirement must be characterized as jurisdictional), or rather the investor’s possibility to bring claims arising under the treaty, irrespective of the forum and the host State’s consent to treaty-based arbitration (in which case the requirement will relate to admissibility).

Most clauses are formulated in a way that links their application to the investor’s invocation of the specific arbitration mechanism under the treaty. For instance, the six months cooling-off requirement in the Argentina-US BIT only applies where the investor wishes ‘to consent … to the submission of the dispute for settlement by binding arbitration’ pursuant to Article 7(2)(c) and (3) of the treaty, but not where the investor initiates proceedings in the courts of the host State or in accordance with a previously agreed dispute resolution mechanism as envisaged by Article 7(2)(a) and (b). With regard to the latter two possibilities, Article 7(2) merely states that ‘the parties to the dispute should initially seek a resolution through consultation and negotiation’, without however envisaging any consequences in the event where they fail to do so. Article 7(2) of the Argentina-US BIT therefore suggests that where an investor does not seek an amicable resolution of the dispute before starting proceedings in the courts of the host State or under a contractual mechanism, this does not affect either the jurisdiction of the relevant forum or the admissibility of the investor’s
Where the investor wishes to accept the host State’s offer to arbitrate under the treaty mechanism, the requirement in Article 7(3) of the BIT is jurisdictional, since the failure to observe the six months cooling-off period affects the very possibility to accept the host State’s offer to conclude an arbitration agreement. Such failure does not affect, however, the investor’s possibility to bring claims in the host State’s domestic courts or under a previously agreed mechanism – always under the condition, of course, that the relevant forum already has jurisdiction irrespective of the treaty mechanism.  

The situation is similar with regard to prior recourse to courts requirements such as Article 10(2) of the Argentina-Netherlands BIT. These requirements only apply where an investor seeks to invoke the arbitration mechanism under the treaty, but not where the relevant claims are being submitted to a forum that has jurisdiction independently of the treaty mechanism. In fact, these clauses rather presuppose that claims can be submitted to the domestic courts without the need for any prior recourse. As a consequence, their requirements relate to the jurisdiction of treaty-based tribunals rather than to the admissibility of the claims.

Similarly, waiver requirements will usually also be of a jurisdictional nature. Article 1121 NAFTA, for instance, by providing that an investor ‘may submit a claim … to arbitration only if’ he waives his ‘right to initiate or continue before any administrative tribunal or court … or other dispute settlement procedures’ any proceedings with respect to the same measure, relates to the formation of the arbitration agreement under the treaty mechanism. Again, therefore, Article 1121 NAFTA does not prevent an investor from submitting claims to the domestic courts without having provided a waiver, but rather presumes such a possibility. It follows that the requirement does not concern the admissibility of the claims, but rather the jurisdiction of the treaty forum.

The analysis of a fork-in-the-road provision such as Article 7(3)(a) of the Argentina-US BIT leads to a similar result. Article 7(3)(a) does not prevent investors from submitting a claim that has already been submitted elsewhere, but merely from accepting the offer to conclude an arbitration agreement under the treaty mechanism once this has been done.

99. Of course, not all procedural prerequisites in international investment treaties necessarily affect the jurisdiction of a forum or the admissibility of the claims brought before it. In the case of Art. 7(2) of the Argentina-US BIT, the lack of a sanction with regard to the failure to seek an amicable settlement is further confirmed by the non-mandatory character of the provision as indicated by the use of the term ‘should’.

100. With regard to the notion of forum selection options, see Wehland, supra n. 65, paras 3.35–3.85.

101. See also Laird, supra n. 21, 206.

102. This is also confirmed by the heading of Art. 1121, ‘Conditions Precedent to Submission of a Claim to Arbitration’.

103. The objection based on the failure to comply with a waiver requirement must obviously be distinguished from the objection that might result from the actual declaration of a waiver. The latter will typically relate to the admissibility of a claim (see also Paulsson, supra n. 29, 616) or (where the waiver extinguishes the claim as a matter of substantive law) to the merits.

104. A different conclusion seems possible with regard to Art. 8(2) of the Argentina-France BIT, which provides: ‘Une fois qu’un investisseur a soumis le différend soit aux juridictions de la
This being said, it is possible for requirements under an IIA to relate to admissibility rather than jurisdiction, namely where they affect not the consent of the host State to arbitration under the treaty mechanism but rather the permissibility of adjudicating claims arising under the treaty.

The cooling-off provision in Article 26(2) ECT, for instance, suggests that the three months waiting period in relation to claims brought under the ECT needs to be complied with irrespective of whether the investor submits the dispute to the ‘courts or administrative tribunals’ of the respondent State, in accordance with a ‘previously agreed dispute resolution mechanism’, or in accordance with the dispute resolution mechanism specified in the ECT itself. Here the cooling-off requirement is not linked to the investor’s faculty to accept the host State’s offer to arbitrate under the treaty mechanism, but rather to the admissibility of the claims, irrespective of the forum in which they are being brought.

As a consequence, due consideration must be given to the wording of the specific requirement in an investor-State dispute resolution clause in order to determine whether it relates to jurisdiction or admissibility.

§8.06 CONCLUSION

In sum, jurisdiction and admissibility are concepts of considerable relevance in both proceedings under the ICSID Convention and proceedings under the ICSID Additional Facility Rules. Whilst tribunals may be tempted to avoid deciding whether a particular preliminary objection relates to jurisdiction or admissibility with the argument that both types of objections prevent an examination of the merits of a case, the different scope of review in relation to the concepts often makes it necessary to distinguish between them. Fortunately, delimitating the two concepts is possible by following a few guiding principles, the application of which is straightforward in most cases.

Both the ICSID Convention and the ICSID Additional Facility Rules establish a number of requirements that are undoubtedly of a jurisdictional nature. Preliminary objections arising from requirements outside of these instruments can usually be identified as jurisdictional or relating to admissibility by applying the relevant principles. In particular, when it comes to requirements under IIAs, those affecting the host

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105. Article 26(2) ECT provides: ‘If such disputes [between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III] can not be settled according to the provisions of para. (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this Article’.

106. This reading is further confirmed by the wording of Art. 26(3) ECT, according to which the ‘unconditional consent to the submission … to international arbitration … in accordance with the provisions of this Article’ is ‘[s]ubject only’ to the subparas of para. 3 (but not para. 2).
State’s consent to arbitration under the treaty mechanism relate to jurisdiction, whilst those generally addressing the possibility to assert claims arising under the treaty relate to admissibility. The wording of the relevant provision therefore always needs to be the starting point of the analysis.