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Arbitral Praeliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after *BG* v. *Argentina*

FRIEDRICH ROSENFELD*

Abstract
Arbitral tribunals have traditionally encountered difficulties in drawing the distinction between jurisdiction and admissibility. The various approaches range from the rejection of the concept of admissibility in arbitral proceedings to an overly expansive interpretation of the concept of admissibility so as to include aspects of jurisdiction. With *BG Group* v. *Republic of Argentina*, the US Supreme Court has further complicated the problem in what has become the first decision in its history on the interpretation of a bilateral investment treaty. The present article sets forth a test for distinguishing jurisdiction from admissibility which is in line with international jurisprudence and takes due account of the normative and institutional particularities of international investment arbitration proceedings.

Key words
arbitration; admissibility; jurisdiction; investment; international law

1. Introduction

Preliminary objections are a critical juncture of investment arbitration proceedings. If successful, they end arbitral proceedings at an early stage and prevent an arbitral tribunal from entertaining an action on the merits. For a respondent party, this may bring about efficiency gains and help to save significant amounts of time and money that would otherwise have to be spent in defense of an action. For a claimant party, this may stifle a claim at its outset and prevent access to an effective mechanism of dispute resolution.

Two forms of preliminary objections may be distinguished in investment arbitration proceedings. These are a plea of lacking jurisdiction on the one hand, and a plea of inadmissibility on the other. Arbitral tribunals have traditionally encountered difficulties in drawing the distinction between these two forms of preliminary objections. The various approaches range from the

* Dr. Friedrich Rosenfeld practices arbitration with Hanefeld Rechtsanwälte in Hamburg, Germany. He is also Global Adjunct Professor of Law at NYU Law in Paris, Visiting Professor at the International Hellenic University in Thessaloniki and Lecturer at Bucerius Law School in Hamburg [rosenfeld@hanefeld-legal.com]. The author wishes to thank Professor Franco Ferrari for most valuable comments on prior versions of this article. The standard disclaimers apply.

rejection of the concept of admissibility in arbitral proceedings[1] to an overly expansive interpretation of the concept of admissibility so as to include aspects of jurisdiction.[2]

With *BG* v. *Argentina*, the US Supreme Court has further complicated the problem in what has become the first decision in its history on the interpretation of a bilateral investment treaty (BIT).[3] The US Supreme Court developed a test, pursuant to which the concept of jurisdiction concerns the question *whether* there is a duty to arbitrate, whereas the concept of admissibility concerns the question *when* the duty to arbitrate arises. The US Supreme Court reached its decision in view of allegations that Argentina had prevented the satisfaction of conditions to arbitrate (see Section 2).

Taking the decision in *BG* v. *Argentina* as a starting point, the present article will set forth a different test for distinguishing jurisdiction from admissibility, which nevertheless allows taking due account of situations where a state prevents the satisfaction of conditions to arbitrate. This will be done in three analytical steps. First, it is submitted that the assessment of jurisdictional limitations is a matter of interpreting the consent to arbitrate. According to this proposition, conditions to consent, such as cooling off periods or local litigation requirements, must be interpreted as jurisdictional limitations. To the extent that states prevent the satisfaction of such condition, they may not invoke a lack of jurisdiction on this ground (see Section 3). Second, it will be submitted that the concept of admissibility concerns the question whether arbitral tribunals or courts may decline to render a decision on the merits for reasons other than a lack of jurisdiction. According to this proposition, the assessement of admissibility is a matter of discretion that is guided by considerations of judicial propriety and due administration of justice (see Section 4). In the third and final step, the test will be applied to the facts underlying the decision of the US Supreme Court in *BG* v. *Argentina*. It is submitted that the US Supreme Court erred in its analysis (see Section 5).

2. The decision in *BG* v. *Argentina*

The decision in *BG* v. *Argentina* resulted out of set-aside proceedings against an arbitral award that had been rendered under the UNCITRAL Arbitration Rules and the United Kingdom–Argentina BIT. In a nutshell, the US Supreme Court had to decide a very simple question: how shall one interpret a local litigation requirement

1 See, e.g., *In the Matter of an International Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between Methanex Corporation and USA*, Partial Award, 7 August 2002, para. 125. See also *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para.194. Arbitrator Brower dissented with the finding of the majority and emphasized that he considered the local litigation requirement to be an admissibility criterion. *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Dissenting Opinion of Judge Charles N. Brower, 15 August 2012, para. 13.

2 The arbitral tribunal in *Telefónica v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 93, for example, held that the failure of compliance with the local litigation requirement constituted a 'temporary lack of jurisdiction' that is equivalent to 'inadmissibility'. See also sub-subsection 3.2.2., *infra*.

3 *BG Group PLC v. Republic of Argentina*, 572 US 2014.

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in a BIT, pursuant to which arbitration proceedings may only be initiated after 18 months of litigation before Argentine courts? Is this a matter of admissibility that is ultimately decided by arbitral tribunals or is it a matter of jurisdiction that is subject to review by state courts?

In the arbitration proceedings giving rise to the set-aside application, the arbitral tribunal had ruled that compliance with the local litigation requirement is merely a matter of admissibility.[4] A circumstance that motivated the arbitral tribunal to reach this decision was the fact that Argentina had passed laws that made it impossible for BG to actually comply with the local litigation requirement and to take legal action in Argentina.[5] In light of this, the tribunal qualified the local litigation requirement as a matter of admissibility[6] and rendered an award in favour of BG.[7]

Following its success in the arbitration proceedings, BG sought to confirm the award under the New York Convention and the Federal Arbitration Act (FAA). Argentina, in turn, took action to vacate the award in the USA, being the seat of arbitration. The US District Court for the District of Columbia confirmed the award and denied the motion to vacate it.[8] On appeal, the US Court of Appeal for the District of Columbia reversed the orders and vacated the award.[9] On certiorari, the US Supreme Court concluded that the arbitrators' jurisdictional determinations were lawful and reversed the judgment of the Court of Appeals by majority decision.[10]

The majority held that the local litigation requirement in Article 8 of the United Kingdom–Argentina BIT was a matter of admissibility and not a jurisdictional requirement.[11] The majority reached this decision by using the framework developed for similar provisions in ordinary private contracts.[12] Under this framework, the majority held that one could presume that parties intend courts to decide disputes about arbitrability, and arbitrators to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration.[13] According to the majority, this led to the following distribution of responsibilities: courts would have the final say on *whether* there is a duty to arbitrate, whereas tribunals would have the final say on *when* the duty to arbitrate arises.[14]

The majority interpreted the text and structure of Article 8 of the United Kingdom-Argentina BIT so as to determine *when* a contractual duty to arbitrate arises and not

4 In proceedings pursuant to the Agreement between the Government of the United Kingdom and the Government of the Republic of Argentina for the Promotion and Protection of Investments, entered into on 11 December 1990, and the UNCITRAL Arbitration Rules: BG Group Plc. and The Republic of Argentina, Final Award, 24 December 2007, para. 3.
5 Ibid., paras. 148 et seq.
6 Ibid., para. 157.
7 Ibid., para. 466.
8 *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108 (DDC 2010); *Republic of Argentina v. BG Group PLC*, 764 F. Supp. 2d 21 (DDC 2011).
9 US Court of Appeals for the District of Columbia Circuit, Argued 10 November 2011, decided 17 January 2012, No. 11 – 7021, *Republic of Argentina, Appellant v. BG Group PLC, Appellee*, Appeal from the US District Court for the District of Columbia (No. 1:08-cv-00485).
10 US Supreme Court, *BG Group v. Argentina*, *supra* note 3, at 19.
11 Ibid., at 8.
12 Ibid., at 7.
13 Ibid.
14 Ibid.

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whether there is a contractual duty to arbitrate at all.[15] Accordingly, it characterized the local litigation requirement in Article 8 of the United Kingdom–Argentina BIT as a matter of admissibility and not as a jurisdictional requirement. Having reached this conclusion on the basis of domestic law analysis, the majority briefly examined whether the legal nature of the United Kingdom–Argentina BIT as a treaty made a difference to this analysis.[16] It answered this question in the negative given that there was no explicit language demonstrating that the parties had a different intent.[17]

The majority of the US Supreme Court hence developed a very simple test for distinguishing jurisdiction from admissibility.[18] It suggested that the concept of jurisdiction concerns the question *whether* there is a duty to arbitrate, whereas the concept of admissibility concerns the question *when* the duty to arbitrate arises. Below, it will be submitted that this test – while having the appeal of being easy to apply – is not in line with international law. However, as this article is not intended to be a mere case note, this assessment shall only be done after examining in more general terms the framework on jurisdiction and admissibility under international law.

3. Jurisdiction

3.1. General notion

The concept of jurisdiction designates the power of a court or tribunal to render a final and binding decision in a concrete case.[19] It presupposes a delegation of jurisdictional powers by an external authority to the court or tribunal. Such delegation of jurisdictional powers must effectively have occurred at the time of seisin.[20]

In the case of ICSID arbitrations, the foundational limits of jurisdiction are set forth in Article 25 of the ICSID Convention.[21] According to this provision:

> [t]he 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.[22]

15 Ibid.
16 Ibid., at 10.
17 Ibid., at 10 et seq.
18 The dissenting opinion will be addressed in the analysis in Section 5.
19 Y. Shany, 'Jurisdiction and Admissibility', in C.P. Romano, K.J. Alter and C. Avgerou, *The Oxford Handbook of International Adjudication*(2013), 779, at 781 et seq.; M. Waibel, 'Investment Arbitration: Jurisdiction and Admissibility', in Legal Studies Research Paper Series (February 2014), 2; S. Rosenne, *The Law and Practice of The International Court, 1920 – 1996*, Vol. II, (1997), 536; D.A.R. Williams, 'Jurisdiction and Admissibility', in P. Muchlinski, F. Ortino and C. Schreuer, *Oxford Handbook of International Investment Law* (2008), 868, at 919 et seq.; I. Brownlie, *Principles of Public International Law* (2003), 457. See also J.P. Hugues Arthur, 'The Legal Value of Prior Steps to Arbitration in International Law of Foreign Investment: Two (Different?) Approaches, One Outcome', (2015) 15 *Annuario Mexicano de Derecho Internacional* 449.
20 See Waibel, *supra* note 19, at 43.
21 On the distinction between foundational and specific jurisdiction see Y. Shany, *Assessing the Effectiveness of International Courts* (2014), 69 et seq.
22 Art. 25 of the ICSID Convention.

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The specific contours of jurisdiction, in turn, are further defined by the consent to arbitrate. This consent is typically formed through the offer to arbitrate as contained in a BIT or a similar instrument and the acceptance of this offer to arbitrate by the investor.[23]

While it is generally accepted that jurisdiction is subject to constraints in terms of time (jurisdiction *ratione temporis*), subject matter (jurisdiction *ratione materiae*) and persons (jurisdiction *ratione personae*),[24] there is less consensus on how to deal with additional conditions to arbitrate – be it cooling off periods, local litigation requirements or similar conditions. In the following, it will be submitted that such conditions must be interpreted as jurisdictional limitations (see Section 3.2). To the extent that states prevent the satisfaction of such condition, they may not invoke a lack of jurisdiction on this ground (see Section 3.3).

3.2. Conditions to arbitrate must be interpreted as jurisdictional limitations

Under the applicable rules of interpretation, conditions to arbitrate, such as cooling off periods, local litigation requirements or similar conditions, must be interpreted as jurisdictional limitations.[25] Support for this proposition can be found in the jurisprudence of the International Court of Justice (the ICJ) and the Permanent Court of International Justice (the PCIJ), which have consistently taken this approach (see Section 3.2.1). While the jurisprudence of investment tribunals is less uniform, a large number of arbitral tribunals have persuasively followed the ICJ and the PCIJ in interpreting conditions to consent as jurisdictional limitations (see Section 3.2.2).

3.2.1. Jurisprudence of the ICJ and PCIJ

The jurisprudence of the ICJ and the PCIJ provides clear support for the proposition that conditions to consent constitute jurisdictional limits. The case of *Armed Activities on the Territory of the Congo*[26] is a prominent example. Here, the Democratic Republic of Congo invoked Article 29 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) as basis for the ICJ's jurisdiction. According to Article 29 of the CEDAW, disputes regarding the interpretation or application of the CEDAW may be submitted to the ICJ provided that they cannot be settled by negotiations or if the parties are unable to agree on the organization of the arbitration.[27] Rwanda raised jurisdictional objections and contended that the preconditions for referral to the ICJ had not been fulfilled.

The ICJ endorsed Rwanda's position. It held that:

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23 See C. Schreuer et al., *The ICSID Convention: A Commentary* (2009), 190 et seq.

24 Ibid., at 82 et seq.

25 Shany, *supra* note 19, at 785. For a different view see V. Heiskanen, 'Ménage à trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration', (2013) ICSID Review 1, at 8 et seq.

26 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, [2006] ICJ Rep. 6.

27 Art. 29 of the CEDAW reads: 'Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.'

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> [w]hen … consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application.[28]

As the conditions set forth in Article 29 of the CEDAW had not been satisfied at the time of the seisin, the ICJ rejected this provision as basis for its jurisdiction.

The ICJ made a similar ruling in its judgment on the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*.[29] In this case, the ICJ had to decide whether its jurisdiction could be grounded on Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). According to Article 22 of the CERD, disputes that cannot be settled by negotiation or by the procedures provided for in the CERD may be referred to the ICJ.[30] The ICJ noted that a requirement to have resort to negotiations fulfills three distinct functions. First, it gives notice of the existence of a dispute and delimits the scope of the dispute and its subject matter. Second, it encourages settlements. And third, it indicates the limit of consent given by States. In this respect, the ICJ held that the requirement to have resort to negotiations or other procedures provided for in the CERD establishes a precondition to be fulfilled before the seisin of the Court.[31] As these requirements had not been satisfied, the ICJ's jurisdiction could not be founded on Article 22 of the CERD.[32] In sum, this judgment supports the proposition that conditions to consent constitute jurisdictional limits.[33]

3.2.2. Jurisprudence of investment tribunals

If one looks at the jurisprudence of investment tribunals, the result is less uniform. Many arbitral tribunals appear to have encountered difficulties in assessing

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28 *Armed Activities on the Territory of the Congo*, *supra* note 26, at 39, para. 88, with further references.

29 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary objections, Judgment of 1 April 2011, [2011] ICJ Rep.70. at 124, para. 131.

30 Art. 22 of the CERD reads: 'Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.'

31 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 29, at 128, para. 141.

32 Ibid., at 140, para. 184.

33 Numerous other cases lend further support to this proposition: *Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Merits, Judgment of 4 June 2008, [2008] ICJ Rep. 177, at 200, para. 48; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination, supra* note 29, at 124, para. 131; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary objections, Judgment of 21 December 1962, [1962] ICJ Rep. 319, at 344 et seq.; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and admissibility, Judgment of 20 December 1988, [1988] ICJ Rep. 69, at 88, paras. 42 et seq.; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary objections, Judgment of 27 February 1998, [1998] ICJ Rep. 16, paras. 16 et seq., and paras 39–40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Jurisdiction and Admissibility, Judgment of 26 November 1984, [1984] ICJ Rep. 392, at 427, paras. 81 et seq.; *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, PCIJ Rep Series A No 2, at 11 et seq.; *Interpretation of the Statute of the Memel Territory (United Kingdom and Italy v. Lithuania)*, PCIJ Rep Series A/B No 49, at 327 et seq.; *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, PCIJ Rep Series A/B No 77, at 78 et seq.

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conditions to consent to arbitrate.[34] And yet, a large number of arbitral tribunals have persuasively followed the ICJ and PCIJ in interpreting conditions to consent as jurisdictional limitations.

In *Tulip* v. *Turkey*, for example, the arbitral tribunal had to decide whether a requirement to give prior notice of a dispute and to have negotiations for a certain period before filing a claim was a matter of admissibility or a jurisdictional requirement. The arbitral tribunal confirmed the latter interpretation. In doing so, it explicitly endorsed the reasoning of the ICJ in the judgment on the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* and added that the notice and negotiation requirement gives the state party an opportunity to address a potential claimant's complaint before it becomes a respondent in an international investment dispute.[35] According to the arbitral tribunal, compliance was an 'essential element of Turkey's prospective consent to qualify its sovereignty to permit unkown future investors of the other contracting State to claim relief under the terms of the BIT against it in an international forum'.[36] This persuasive reasoning is exemplary for a large number of cases in which arbitral tribunals have reached similar conclusions.[37]

To the extent that arbitral tribunals have characterized conditions to consent as mere issues of admissibility, this has been done on the basis of erroneous definitions, unsupported assumptions or mere policy considerations. The following three examples illustrate this.

The arbitral tribunal in *Hochtief* v. *Argentina* qualified an 18-month waiting period as a matter of admissibility. It did so on the basis that jurisdiction can be altered by

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34 A considerable number of tribunals have simply evaded the intricacies of making a distinction between admissibility and jurisdiction and left the question open. See, e.g., *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para. 587; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 87; *Ambiente Ufficio S.p.A. and Others (case formerly known as 'Giordano Alpi and Others') v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 572. See also *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, and *BP America Production Company, Pan American Sur SRL, Pan American Fueguina SRL and Pan American Continental SRL v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, para. 54.

35 *Tulip Real Estate Investment and Development Netherlands B.V. and Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, para. 61.

36 Ibid., para. 72.

37 *Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Urugay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, paras. 53, 61; *In the Matter of an Arbitration Pursuant to the Agreement between the Government of the United Kingdom and the Government of the Republic of Argentina for the Promotion and Protection of Investments*, signed 11 December 1990, and the UNCITRAL Arbitration Rules 1976 between ICS Inspection and Control Services Limited (United Kingdom) and Argentine Republic, PCA Case No. 2010–9, Award on Jurisdiction, 10 February 2012, para. 262; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 88; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para.172; *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, paras. 156–7; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011, para. 94; *Mondev International Ltd. v. USA*, ICSID Case No. ARB(AF)/99/2, 11 October 2002, para. 43; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, 19 December 2012, para. 130; *Ambiente Ufficio S.p.A. and Others (case formerly known as Giordano Alpi and Others) v. Argentine Republic*, *supra* note 34, para. 10; *Abaclat and Others (case formerly known as 'Giovanna A Beccara and Others') v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion, Georges Abi-Saab, 28 October 2011, para. 23.

agreement of the states parties to the treaty, but not by the parties to the dispute.[38] A lack of admissibility, in contrast, could be cured by acquiescence of the parties. As the arbitral tribunal concluded that the failure to comply with the 18-month long period could be cured, it found that this period concerned the admissibility of the claim rather than the jurisdiction of the tribunal.[39] This reasoning is not convincing, as it was based on an erroneous definition. The possibility to cure a defect is not a distinguishing element of admissibility objections. A lack of jurisdiction may also be cured, e.g., by providing retroactively consent to arbitrate.

An example for a decision relying on unsupported assumptions is offered by the case of *SGS* v. *Pakistan*. In this case, the arbitral tribunal held that a consultation period merely impacts upon the admissibility of a claim and not upon jurisdiction. Instead of providing convincing reasons for this view, it merely observed that:

> [t]ribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.[40]

The arbitral tribunal hence grounded its conclusion on merely descriptive statements that were not sufficiently supported.

Finally, the arbitral award in *Lauder* v. *Czech Republic* simply adduced policy considerations in support of its view that the six month waiting period contained in Article VI(3)(a) of the BIT between the Czech Republic and the USA is not a jurisdictional provision.[41] It stated that it would be an 'unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties', if one were to assume that arbitration proceedings could not be commenced until six months after the notice of arbitration.[42] While one may show sympathy for this reasoning from a policy perspective, it hardly provides a legal blessing – let alone a convincing justification – for the conclusion reached by the arbitral tribunal.

The above examples – which are not intended to be an exhaustive list – illustrate that there is hardly persuasive authority for treating conditions to consent as limitations of admissibility. Instead, such conditions to consent must be interpreted as limitations to jurisdiction. This conclusion is subject to an important caveat; to the extent that states prevent the satisfaction of a condition in a compromissory

38 Hochtief AG and Argentine Republic, ICSID Case No. ARB/97/31, Decision on Jurisdiction, 24 October 2011, para. 90.

39 Ibid., para. 96.

40 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 184.

41 Final Award in the Matter of an UNCITRAL Arbitration between Ronald S. Lauder and Czech Republic, 3 September 2001, para. 187.

42 Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, available at www.state.gov/documents/organization/43557.pdf. Art. 6(3)(a) reads in relevant part: 'At any time after six months 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 conciliation or binding arbitration to the International Centre for the Settlement of Investment Disputes or to the Additional Facility of the Centre of pursuant to the Arbitration Rules of the United Nationals Commission on International Trade Law or pursuant to the arbitration rules of any arbitral institution mutually agreed between the parties to the dispute.'

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clause, they may not invoke a lack of jurisdiction on this ground. Below, this will be demonstrated in greater detail (see Section 3.3).

3.3. To the extent that states prevent the satisfaction of a condition in a compromissory clause, they may not invoke a lack of jurisdiction on this ground

As evidenced by the case of *BG* v. *Argentina*, it is unfortunately not uncommon that states prevent the satisfaction of a condition in a compromissory clause – be it that they undermine attempts at negotiations or that they prevent resort to courts that would otherwise be necessary in order to comply with a local litigation requirement. In these cases, it is not only a postulate of policy that states should not be entitled to invoke a lack of jurisdiction on this ground. Instead, there are various doctrinal approaches to justify such result.

One approach consists in interpreting the pertinent compromissory clause in accordance with Article 32 of the Vienna Convention on the Law of Treaties (VCLT) so as to contain an implicit futility exception. Various arbitral tribunals have endorsed this. The arbitral tribunal in *Occidental* v. *Ecuador*, for example considered that Occidental's failure to comply with the six-month waiting period had no impact upon the jurisdiction of the arbitral tribunal. It did so on the ground that attempts at reaching a negotiated solution had been futile.[43]

Second, the frustration of the satisfaction of a condition may be considered as a waiver of the respective condition. The arbitral tribunal in *BiwaterGauff* v. *Tanzania*, for example, held that Tanzania had waived a negotiation requirement contained in the pertinent compromissory clause. It did so on the ground that Tanzania's own actions had effectively precluded any possibility of negotiation between the parties.[44] In the alternative, the arbitral tribunal also invoked the above mentioned futility exception.[45]

Third, one may have resort to the principle of abuse of rights. The principle of abuse of rights has often been relied upon in situations where investors have engaged in a downstream structuring of their investments so as to get access to investment arbitration.[46] In the opposite situation where a state deliberately prevents the satisfaction of a condition to its consent to arbitrate so as to prevent access to investment arbitration, a similar *ratio* may be applied. Hence, it may be argued that the condition to consent must be deemed to have been satisfied.

Finally, some arbitral tribunals have allowed exceptions from the rule that jurisdictional requirements have to be fulfilled at the time of seisin. These tribunals have confirmed their jurisdiction in situations where the conditions to consent were satisfied subsequent to the time of instituting the proceedings, but prior to rendering their decision on jurisdiction. The tribunal in *Philip Morris* v. *Uruguay*, for example,

43 *Occidental Petroleum Corporation Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, para. 46.
44 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 348.
45 Ibid., para. 343.
46 See, e.g., *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 94–5.

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took this approach in deciding upon the relevance of claimant's failure to comply with an 18-month waiting period. It held that claimants were not required to start over and re-file the arbitration given that the 18-month waiting period had expired at the time of the decision. Otherwise, the arbitral tribunal held, one would risk a waste of time and resources.[47] The tribunal in *TSA Spectrum de Argentina S.A.* v. *Argentina* reached a similar decision.[48] Comparable approaches have already been taken in the jurisprudence of the ICJ[49] and the PCIJ.[50]

The author does not want to suggest that these four approaches are entirely unproblematic. One can, for example, have lengthy discussion on when a domestic litigation requirement becomes futile or when it can be considered to be waived. Without doubt, arbitral tribunal should not impose idiosyncratic views in this regard. However, the fact remains that there are doctrinal ways to deal with the situation that a state prevents the satisfaction of a condition to arbitrate. There is, hence, no need to confuse jurisdiction and admissibility and to give up the long-standing jurisprudence that conditions to arbitrate constitute jurisdictional limitations. Such understanding of the concept of jurisdiction does not render the concept of admissibility redundant, as will be shown below (see Section 4).

4. Admissibility

The concept of admissibility concerns the question whether a court or tribunal may decline to render a decision on the merits for reasons other than a lack of jurisdiction.[51] Such decision to dismiss a case as inadmissible is typically rendered on the basis of discretion.[52] It is guided by considerations of due administration of justice and judicial propriety. Support for this proposition can be found in the jurisprudence of the ICJ and the PCIJ (see Section 4.1). While the jurisprudence of the ICJ and the PCIJ may also be relied upon in the context of arbitration proceedings, the application of the concept of admissibility may lead to different outcomes. This is due to normative and institutional differences between proceedings before arbitral tribunals on the one hand, and courts on the other (see Section 4.2).

4.1. The concept of admissibility in proceedings before the ICJ and the PCIJ

Article 79 of the ICJ Rules governs the concept of admissibility for proceedings before the Court. According to this provision, the ICJ enjoys the authority to render

47 *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Urugay*, *supra* note 37, para. 148.

48 *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, 19 December 2008, para. 112.

49 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary objections, Judgment of 18 November 2008, [2008] ICJ Rep. 441, para. 87.

50 *Mavrommatis Palestine Concession*, *supra* note 33, at 34; *Electricity Company of Sofia and Bulgaria*, *supra* note 33, at 150 and 109, para. 24 (Judge van Eysinga, Dissenting Opinion).

51 See also J. Crawford, *Brownlie's Principles of Public International Law* (2012), 693, stating that an 'objection to the admissibility of a claim 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.' See also Williams, *supra* note 19, at 919 et seq.; Brownlie, *supra* note 19, at 457.

52 Shany, *supra* note 21, at 67 et seq.

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decisions on admissibility.[53] While Article 79 ICJ of the Rules does not explain the concept of admissibility in greater detail, its contours have been defined in the jurisprudence of the Court.

The most prominent dictum stems from Sir Gerald Fitzmaurice's Separate Opinion in the *Case Concerning the Northern Cameroons*.[54] Reflecting upon the difference between jurisdictional objections and objections to admissibility, Judge Fitzmaurice acknowledged that the two pleas are preliminary objections which may bring proceedings to an end, irrespective of a plaintiff state's ability to prove its case on the merits.[55] Judge Fitzmaurice further observed that questions of jurisdiction 'basically related to the competence of the Court to act at all', whereas questions of admissibility 'relate to the nature of the claim, or to particular circumstances connected with it'.[56] He explained that 'the real distinction and test would seem to be whether or not the objection is based on, or arises from, the jurisdictional clause or clauses under which the jurisdiction of the tribunal is said to exist'.[57]

The ICJ confirmed this distinction in the *Genocide Case*. Here, the Court found that an admissibility objection consists in the assertion that 'there exists a legal reason, even where there is jurisdiction, why the Court should decline to hear [a] case, or more usually, a specific claim therein'.[58] In a similar spirit, the ICJ found in the *Oil Platforms Case* that:

> [o]bjections to admissibility normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.[59]

A comparable understanding of the concept of admissibility was already prevailing in the jurisprudence of the PCIJ. While the legal framework for the PCIJ contained no explicit reference to the concept of admissibility, Article 62 of the PCIJ Rules allowed in more general terms for the invocation of preliminary objections. The PCIJ has interpreted Article 62 of the PCIJ Rules as a basis for decisions on admissibility. In the *Panevezys Railway* case, for example, the PCIJ made the following ruling:

> It is clear that Article 62 covers more than objections to the jurisdiction of the Court. Both the wording and the substance of the Article show that it covers any objection of which the effect will be, if the objection is upheld, to interrupt further proceedings in

53 Art. 79(9) of the ICJ provides that '[a]fter hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. (. . .)'.

54 *Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary objections, Judgment of 2 December 1963, [1963] ICJ Rep. 97 (Judge Sir Gerald Fitzmaurice, Separate Opinion). See also G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, (1986), 438 et seq.

55 *Northern Cameroons*, *supra* note 54, at 101.

56 Ibid.

57 Ibid., at 103.

58 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* note 49, at 456, para. 120.

59 *Case Concerning Oil Platforms (Islamic Republic of Iran v. USA)*, Preliminary objection, Judgment of 12 December 1996, [1996] ICJ Rep. 161, para. 29.

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> the case, and which it will therefore be appropriate for the Court to deal with before enquiring into the merits.[60]

As regards the procedure to be followed in the event of preliminary objections, the PCIJ noted in the *Mavrommatis* case that it was 'at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to the procedure before an international tribunal and most in conformity with the fundamental principles of international law'.[61]

Taken together, the above statements of the PCIJ and the ICJ allow for the conclusion that a plea of inadmissibility is a preliminary objection, which is independent from a jurisdictional objection. The assessment of whether or not it is successful depends on the discretion of the respective court and presupposes a valid reason. Such valid reason may exist in various situations. Examples include the failure to specify a claim with precision, situations of extreme delay, the mootness of a claim or the absence of legal interest in a decision of the court.[62] Considerations that have guided the ICJ and PCIJ in ruling upon these pleas of inadmissibility included their responsibility for due administration of justice,[63] the need for legal security[64] or the desire to ensure that delay causes no prejudice with regard to the establishment of the facts and the determination of the law.[65]

4.2. The concept of admissibility in proceedings before arbitral tribunals

The concept of admissibility may also be relied upon in proceedings before arbitral tribunals. The fact that the ICJ has treated a claim as inadmissible, e.g. for absence of legal interest, does not, however, allow for the conclusion that an arbitral tribunal should reach the same conclusion. This is due to normative (see Section 4.2.1) and institutional (see Section 4.2.2) differences between proceedings before arbitral tribunals and courts.

4.2.1. Normative differences

The normative differences between proceedings before the ICJ and the PCIJ on the one hand, and proceedings before arbitral tribunals on the other, result from the fact that there is no equivalent to Article 79 of the ICJ Rules or Article 62 of the PCIJ Rules for proceedings before arbitral tribunals.

While Article 41(1) of the ICSID Arbitration Rules allows for preliminary objections to be asserted, it only refers to objections that a claim is not 'within the

60 *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)*, PCIJ Rep Series A/B No 76 4. See also, *Electricity Company of Sofia and Bulgaria*, *supra* note 33, at 49, paras. 5 et seq. (Judge Erich, Separate Opinion).

61 *Mavrommatis Palestine Concessions*, *supra* note 33, at 16.

62 See e.g., *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Merits, Judgment of 13 July 2009, [2009] ICJ Rep. 213, at 264, paras. 137 et seq.; *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction, Judgment of 4 December 1998, [1998] ICJ Rep. 432, at 447, paras. 29 et seq. See also *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary objections, Judgment of 26 June 1992, [1992] ICJ Rep. 240, at 266, paras. 68 et seq.; *Avena and Other Mexican Nationals (Mexico v. USA)*, Merits, Judgment of 31 March 2004, [2004] ICJ Rep. 12, at 37, para. 44.

63 Dispute regarding Navigational and Related Rights, *supra* note 62, at 264, paras. 137 et seq.

64 *Fisheries Jurisdiction*, *supra* note 62, at 447, para. 29 et seq. See also *Certain Phosphate Lands in Nauru*, *supra* note 62, at 266, paras. 68 et seq.

65 Ibid.

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jurisdiction of the Centre' or, for other reasons 'not within the competence of the Tribunal'. It is very questionable whether the term 'competence' may be interpreted so as to cover pleas of admissibility. The plain wording of Article 41(1) of the ICSID Arbitration Rules contains no sufficient indication for this.[66] If one looks at the French version of Article 41 of the ICSID Arbitration Rules, this becomes even clearer. The French version uses the same term to designate the 'competence du Centre' and 'celle du Tribunal'.[67] Had the drafters of the ICSID Arbitration Rules intended to refer to two distinct concepts, i.e., jurisdiction and admissibility, one would have expected this to be reflected in all versions of the ICSID Arbitration Rules. The absence of such wording speaks for itself. The drafting history of the ICSID Convention does not reveal any intent to expressly include the concept of admissibility, either.[68] At this juncture, there is no further need to elaborate on the meaning of the terms 'competence of the Tribunal' as opposed to 'jurisdiction of the Centre'. Suffice it to say that one may interpret the 'jurisdiction of the Centre' so as to designate the general outer jurisdictional limits of ICSID arbitration and to interpret the 'competence of the Tribunal' so as to designate the concrete jurisdictional limits of an ICSID tribunal in a given case.[69]

Arbitral tribunals have noted that neither the ICSID Convention nor the ICSID Arbitration Rules refer to the concept of admissibility. The arbitral tribunal in *CMS* v. *Argentina* concluded on this basis that the distinction between jurisdiction and admissibility would simply be inappropriate in the context of ICSID arbitrations.[70] In a similar vein, the arbitral tribunal in *Methanex* v. *USA* concluded that it enjoyed no authority to rule on admissibility objections under the UNCITRAL Arbitration Rules. It did so on the ground that the concept of admissibility is not addressed in the UNCITRAL Arbitration Rules.[71] Notably, the UNCITRAL Arbitration Rules would contain no provision equivalent to Article 79 of the ICJ Rules.[72]

While these arbitral tribunals were correct in their observation that neither the ICSID regime nor the UNCITRAL Arbitration Rules expressly refer to the concept of admissibility, one may not conclude that the concept is non-existent in investment arbitration proceedings. Rather, the power to dismiss a case for lack of admissibility can be grounded upon the theory of inherent powers.[73]

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66 See also G. Zeiler, 'Jurisdiction, Competence, and Admissibility of Claims in ICSID Arbitration Proceedings', in C. Binder et al. (Eds.), *International Investment Law for the 21st Century – Essays in Honor of Christoph Schreuer* (2009), 76, at 79.

67 The French version of Art. 41(1) of the ICSID Arbitration Rules reads: 'Tout déclinatoire fondé sur le motif que le différend ou toute demande accessoire ne ressortit pas à la competence du Centre ou, pour toute autre raison, à celle du Tribunal, est soulevé aussitôt que possible. (. . .)'

68 Schreuer et al., *supra* note 23, at 85 et seq. See also Zeiler, *supra* note 66, at 91. ICSID Arbitration Rule 41(5) may, however, be interpreted so as to cover admissibility objections.

69 For a different view see *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, para. 112.

70 *CMS Gas Transmission Company and the Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, para. 41.

71 *Methanex v. USA*, *supra* note 1, para. 123. See also I.A. Laird, 'A Distinction without Difference? An Examination of the Concepts of Admissibility and Jurisdiction in Salini *v.* Jordan and Methanex *v.* USA', in T. Weiler, *International Investment Law and Arbitration, Leading Cases from the ICSID, IAFTA, Bilateral Treaties and Customary International Law*(2005), 201, at 222.

72 *Methanex v. USA*, *supra* note 1, para. 125.

73 See also Shany, *supra* note 19, at 797.

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Inherent powers have been described by the Iran-US Tribunal (IUSCT) as 'those powers that are not explicitly granted to the tribunal but must be seen as a necessary consequence of the parties' fundamental intent to create an institution with a judicial nature'.[74] Various investment tribunals have endorsed this concept. The arbitral tribunal in *Hrvatska Elektroprivreda* v. *Slovenia*, for example, confirmed that arbitral tribunals have 'an inherent power to take measures to preserve the integrity of the proceedings'.[75] In a similar vein, the arbitral tribunal in *RSM* v. *Grenada* acknowledged the existence of inherent powers of arbitral tribunals.[76] Provisions such as Article 44 of the ICSID Convention, Article 19 of the ICSID Arbitration Rules or Article 17 of the UNCITRAL Arbitration Rules are declaratory of such inherent powers.[77]

4.2.2. Institutional differences

The exercise of inherent powers requires taking into account the institutional differences between arbitral tribunals and courts. The need to do so has already been acknowledged in the jurisprudence of the IUSCT which held that inherent powers have to be exercised in view of the 'particular features of each specific court or tribunal, including the circumstances surrounding its establishment, the object and purpose of its constitutive instrument, and the consent of the parties in that and related instruments'.[78]

One such difference concerns the capacities of courts on the one hand, and arbitral tribunals on the other. Courts are standing organs, which have a limited number of resources. They may see the need to streamline their dockets by striking out certain matters.[79] While the capacity constraints of courts may also be countered by means of a limited jurisdiction, admissibility is a further instrument that is relied upon to streamline the dockets of courts.[80] The same does not hold true for arbitral tribunals. As arbitral tribunals are established for each and every case, and given that arbitrators have to confirm their availability prior to their appointment, there are fewer capacity problems to overcome than before standing courts. Accordingly, arbitral tribunals may have fewer incentives to dismiss cases.

Vice versa, there are also situations where an international court, such as the ICJ, may have a greater interest in rendering a decision than an arbitral tribunal. This is due to the particular dynamics and impact of decision-making by the ICJ. As principal

74 Decision No DEC 134-A3/A8/A9/A14/B61-FT), IUSCT, Decision Ruling on Request for Revision by Iran of July 1, 2011, para. 59.

75 *Hrvatska Elektroprivreda v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Ruling of May 6, 2008, para. 33.

76 *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14 (Annulment Proceeding), Decision on RSM Production Corporation's Application for a Prelminary Ruling of 29 October 2009, para. 20.

77 Schreuer et al., *supra* note 23, at 688. See also In the Matter of an Arbitration Before a Tribunal Constituted in Accordance with the Agreement between the Government of Hong Kong and the Government of Australia for the Promotion nad Protection of Investments, signed on 15 September 1993, and United Nations Commission on International Trade Law Rules of Arbitration as Revised 2010 between Philip Morris Asia Limited and Commonwealth of Australia, Procedural Order No. 8, 14 April 2014, para. 118.

78 Decision No DEC 134-A4/A8/A9/A14/B61-FT, *supra* note 74, para. 61.

79 Shany, *supra* note 21, at 67 et seq.

80 This was correctly observed by the majority in Daimler *v.* Argentina, *supra* note 1, para. 194. However, the majority incorrectly drew the conclusion that admissibility has no role to play in arbitration proceedings.

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organ of the UN, the ICJ may significantly contribute to the stabilization of normative expectations, the promotion of global interests as well as the legitimization of public authority.[81] In certain cases, the ICJ may therefore have a strong incentive to assume its role as agent of the international community even if an arbitral tribunal would have dismissed a similar case as inadmissible.

One could continue to list such differences and the fact remains that the application of the concept of admissibility may lead to different outcomes before courts and arbitral tribunals.[82]

4.3. The relevant test for distinguishing jurisdiction and admissibility

The above considerations lead to the conclusion that the relevant test for distinguishing jurisdiction and admissibility is as follows: the concept of jurisdiction is determined by the consent of the parties. All conditions to consent, such as cooling off periods or local litigation requirements, must be interpreted as jurisdictional limits. The concept of admissibility, in contrast, concerns the question whether a court or tribunal may decline to render a decision on the merits for reasons other than a lack of jurisdiction. It is determined by arbitral tribunals, which render their decisions on the basis of their discretion.

5. Assessment of the decision in *BG* v. *Argentina*

The application of the above-referenced test to the facts underlying the case in *BG* v. *Argentina* leads to the conclusion that the US Supreme Court erred in its analysis.

In line with international jurisprudence, the US Supreme Court should have interpreted the local litigation requirement in Article 8 of the United Kingdom–Argentina BIT as a condition to arbitrate that constitutes a jurisdictional limitation.[83] Contrary to what was suggested by Justice Sotomayor in her concurring opinion, this does not pressupose an express designation of the local litigation requirement as a condition on the parties' consent.[84] Instead, such conclusion may also be reached on the basis of a good faith interpretation in light of the object and purpose of such litigation requirement.[85]

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81 See J.E. Alvarez, 'What are International Judges for? The Main Functions of International Adjudication', in C.P.R. Romano, K.J. Alter and C. Avgerou, *The Oxford Handbook of International Adjudication* (2013), 159.

82 Admissibility issues that have been recognized by arbitral tribunals include the specification of claims, the principles of *res judicata*, the requirements for submitting a counterclaim or a breach of the principle of good faith. See e.g., In the Matter of an Arbitration before a Tribunal constituted in Accordance with the Treaty between the Federal Republic of Germany and the People's Republic of Bulgaria concerning the Reciprocal Encouragment and Protection of Investments, signed 12 April 1986, entered into Force 10 March 1988, and Arbitration Rules of the United Nations Commission on International Trade Law, 2010, between ST-AD (Germany) and Republic of Bulgaria, Award on Jurisdiction, 18 July 2013, para. 295; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. 05/19, Award, 3 July 2008, para.126; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, paras. 292, 298. In cases of manifest fraud, this may in exceptional cases also affect the jurisdiction of an arbitral tribunal. See *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)10/1, Award, 16 May 2014, para. 138; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 407.

83 See Section 3.2, *supra*.

84 572 US (2014), Justice Sotomayor, concurring in part, at 4.

85 Cf. Art. 31 of the VCLT.

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To the extent that Argentina prevented the satisfaction of this condition, it should be barred from invoking a lack of jurisdiction on this ground. Chief Justice Roberts, joined by Justice Kennedy, correctly acknowledged this in their dissent.[86] Having found that the majority had incorrectly treated the local litigation requirement as a matter of admissibility and not as a jurisdictional limitation, the dissent held that the failure to comply with a condition to arbitrate may not be invoked if such failure is due to the state's own fault.[87] However, even the dissent did not assess the full spectrum of doctrinal approaches that could have justified such conclusion. While making reference to an implicit futility exception,[88] it did not dwell on this point in greater detail. Neither did it address further doctrinal approaches such as an implied waiver, the principle of abuse of rights or the principle of estoppel.

In sum, the decision in *BG* v. *Argentina* must hence be criticized for not being in line with international law. Critics might still be tempted to defend the approach taken by the US Supreme Court on the grounds that it minimizes the risk of undue interference by state courts at the enforcement or set-aside stage. And indeed, one may find manifold policy arguments, e.g., efficiency considerations of saving time and costs, that could justify giving arbitral tribunals the full control of the proceedings, including the assessment of whether a condition to arbitrate has been complied with. The *amici curiae* in support of claimant's application comprehensively set this out in their submissions.[89] Yet, the US Supreme Court was not required to take a policy decision. Neither was it mandated to make its analysis on the basis of domestic law. Instead, it was obliged to interpret the local litigation requirement in accordance with international law. Such interpretation is the only way to respect the will of states and to acknowledge the far-reaching implications that the consent to arbitrate may have.

6. Final remarks

The distinction between jurisdiction and admissibility boils down to a matter of power and control. In the principal-agent-relationship between parties and arbitral tribunals,[90] the principals, i.e., the parties, exercise power and control over the grant of jurisdiction.[91] They define the contours of jurisdiction by deciding whether and,

86 572 US (2014), Justice Roberts, dissenting, at 2 et seq.
87 Ibid., at 17.
88 Ibid.
89 *BG Group PLC v. Republic of Argentina*, Motion for Leave to File Brief *Amicus Curiae* and Brief of AWG Group Limited as *Amicus Curiae* in Support of Petitioner, 30 August 2012; *BG Group PLC v. Republic of Argentina*, Motion for Leave to File and Brief of *Amicus Curiae* The United States Council for International Business in Support of Petitioner; *BG Group PLC v. Republic of Argentina*, Motion for Leave to File Brief *Amicus Curiae* of the American Arbitration Association as *Amicus Curiae* in Support of Petitioner, 27 August 2012; *BG Group PLC v. Republic of Argentina*, Motion for Leave to File Brief *Amicus Curiae* Brief and Brief of Professors and Practitioners of Arbitration Law as *Amici Curiae* in Support of Petition for a Writ of Certiorari, 29 August 2012.
90 Cf. Alvarez, *supra* note 81, at 161. Some scholars have rejected the application of principal agent analysis and characterized the relationship between parties and arbitral tribunal as a relation of trusteeship. See e.g., K.J. Alter, 'Delegation to international courts and the limits of re-contracting political power', in D.G. Hawkins et al., *Delegation and Agency in International Organizations* (2014), 312, at 334 et seq.
91 Cf. Shany, *supra* note 19, at 785.

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if so, to what extent they delegate power to the agent, i.e., the arbitral tribunal. The latter is strictly bound to obey these jurisdictional limits. In doing so, it is subject to control by the parties. This control is exercised indirectly with the help of a state court in set-aside proceedings or with the help of the Annulment Committee in the ICSID annulment proceedings. As regards jurisdiction, power and control hence rest with the parties.

Things look different as regards admissibility. In this regard, the agent, i.e., the arbitral tribunal, exercises power and control over the decision on admissibility. It enjoys a considerable degree of discretion in its assessment of whether or not a ground of inadmissibility is given. In doing so, it is hardly subject to control by external authorities, as the mere incorrect assessment of admissibility provides no reason to set aside or annul an award.

In *BG* v. *Argentina* the majority of the US Supreme Court has taken a distorted view on the distribution between power and control. In line with the jurisprudence of the ICJ and the PCIJ, the correct approach would have consisted in interpreting the conditions in the compromissory clause as jurisdictional limitations. To the extent that Argentina prevented the satisfaction of this condition, it should be barred from invoking a lack of jurisdiction on this ground.