



ISSN : 1875-4120
Issue : (Provisional)
Published : November 2016

This article will be published in a future issue of TDM (2016). Check website for final publication date for correct reference.

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The Artifact of International Jurisdiction: Concept, History and Reality by V. Heiskanen

(minor revisions 04/11/2016)

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The Artifact of International Jurisdiction: Concept, History and Reality

Veijo Heiskanen*

Since our topic tonight is rather abstract, let me start with a concrete example.¹

Mr X, a national of country A, moves to country B and sets up a business venture together with a local business partner, a national of country B. Things don't work out, problems emerge between Mr X and his business partner, and he takes the case to the courts of country B. His claims are dismissed, in his view wrongly, and in a process that he feels unfairly favored his business partner. He appeals, but the appeal is dismissed. He appeals again, going up to the local Supreme Court. His appeal is again dismissed, and he is not happy. He feels he has not been given a fair hearing. He feels he has been denied justice. He wants to bring an international claim against country B for denial of justice.

Let us assume there is no international human rights court that would be able to deal with Mr X's claim, and no bilateral or multilateral investment treaty between countries A and B. His own country, country A, has not accepted the compulsory jurisdiction of the International Court of Justice, nor has country B, and there is no other treaty that could provide a legal basis for an international claim. He turns to his own government, requesting that they exercise diplomatic protection on his behalf and espouse his claim against country B.

Now let us assume the government accepts the request, and agrees to espouse the claim, where do we find ourselves? Or rather, where do the diplomats who agreed to exercise diplomatic protection on Mr X's behalf find themselves?

Our example has taken us onto the international plane. Or, in other words, we have landed on the international plane.

"International plane" is a term that is used less frequently today, but not long time ago it was used almost as a term of art. Take, for example, the Vienna Convention on the Law of Treaties, which provides, in Article 2(1)(b), that "[f]or the purposes of the present Convention ... 'ratification,' 'acceptance,' 'approval' and 'accession' mean in each case the international act so named whereby a State establishes *on the international plane* its consent to be bound by a treaty."²

The commentary of the Vienna Convention is peppered with references to the "international plane," which is described as an "entirely different plane[s]" from the plane on which a constitutional ratification of a treaty takes place.³

What is the "international plane"? And where is it? It is not suggested that it is a real place, like the place on which a State is located. You cannot stand or walk or sail on the international plane, as you can on the territory of a State, although you can fly on it.

¹ Lecture given at the University College London on 26 October 2016.

² Vienna Convention on the Law of Treaties of 23 May 1969, 115 U.N.T.S. 331. (Emphasis added.)

³ Draft Articles on the Law of Treaties with Commentaries, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION Yearbook, at 197 (1966).

The international plane is literally in the air. It is a plane of air – *en plain air*. It is a fiction. It is the imaginary plane onto which diplomatic protection takes us, the plane on which States and international organizations operate – although they can both also operate on the internal or the domestic plane, in real time and place.⁴

But even if the term “international plane” is used in legal documents such as the Vienna Convention, it is not really a legal term of art. It is rather a description – a quasi-factual rather than a quasi-legal term. The international plane is the higher dimension on which international organizations and international courts and tribunals are established and on which they operate, and on which States also operate when acting in their capacity as a sovereign.

The conceptual counterpart of the international plane on the domestic level is not the State, but another term that is a bit less technical, such as “country.” For example, England is a country, but not a State. Scotland is a country, and not a State – at least for the time being. The United Kingdom is a State.

But just as England can be described as a country, it can also be called (together with Wales) a *jurisdiction*. England & Wales constitutes its own internal legal place, its own jurisdiction within which English courts operate. In other words, jurisdiction and the State may, but do not necessarily, coincide.

Similarly, just as a country can be called a “jurisdiction,” the international plane can be called “international jurisdiction.”

The term “international jurisdiction” is lawyers’ parlance. International jurisdiction is another name – the international lawyer’s name – for the international plane. While a layman – our countryman – speaks of a “country,” the lawyer speaks of a “jurisdiction;” and while a diplomat – our countryman on the international plane who negotiated the Vienna Convention – speaks in terms of the “international plane,” the international lawyer speaks in terms of “international jurisdiction.”

But just as the international plane is not a real place, international jurisdiction is not a real jurisdiction. It is an ideal jurisdiction: it is, but it does not exist. As an ideal, international jurisdiction should not be confused with the jurisdiction of an actual international court or tribunal: whereas international jurisdiction ideally coincides with the international plane in its entirety, the actual jurisdiction of an actual international court or tribunal is defined in their constituent instrument, which in reality always falls short of the ideal.⁵ International jurisdiction is therefore not an actual jurisdiction. It is rather a *potential* jurisdiction. It is a

⁴ One could also say, less dramatically, that “international plane” is an imaginary place because it is not a place, or a position in the first place (pun intended, but not as a pun); it tracks the conceptual *movement* around a place (just as an imaginary number tracks rotation around an axis). There is nothing metaphysical about this, just as there is nothing metaphysical about imaginary numbers: the fact that the international plane cannot be imagined as a place is merely the conceptual expression of Heisenberg’s uncertainty principle (or more accurately, inaccuracy principle): it is conceptually not possible to focus on position and momentum at the same time. Consequently, there is literally a conceptual blind spot in our thinking whenever we focus on movement (momentum) rather than a place (position) – concepts capturing movement cannot precisely be placed on a map; we can only know that they are somewhere around here (or there). Like the international lawyer, they move around.

⁵ This is the case also with the International Court of Justice – not all States are members of the Court, and many of those that are, have not accepted its compulsory jurisdiction.

potentia, or *dunamis*, in the Aristotelian sense of this term: a potentiality that may or may not become an actuality, in a more or less ideal form.⁶

Like Aristotle's *potentia*, or the configuration space in quantum physics, international jurisdiction is a potential jurisdiction that can become actual in the more or less probable case that the actors on international plane – the States or the international organizations – agree in fact to create one. This is the dilemma faced by Mr X in our example above – if the diplomats of country A who agreed to espouse his claim, fail to settle the claim amicably, they may not be able to agree on a *compromis* with the diplomats of country B that would create an international tribunal to arbitrate the claim – an outcome that is certainly less than ideal, at least from Mr X's perspective (if not necessarily from country B's perspective), as it would effectively leave his claim unsettled.⁷

As a *potentia*, international jurisdiction is a fiction, but it is not pure fiction. It is a potentiality, something that may or may not become actual, depending on the political will and power of the actors on the international plane.

However, an international court or tribunal that has in fact been established is not a mere potential jurisdiction; it is a jurisdiction that has become actual. It is not real as it does not exist in any particular place; rather it is actual (*wirklich*) in the Hegelian (and Aristotelian) sense that it may have an effect (*wirkt*) in reality.⁸ In other words, one may say that it exists only in time – actually – but not in place – although it may have an effect on it.⁹

As an actual jurisdiction an international court or tribunal is therefore also a matter of fact; but because it exists on the international plane and not in a real place, its jurisdiction is somewhat artificial. Its jurisdiction is a legal fiction – a fiction that has become a fact, but only as a matter of law but not as a matter of fact. In other words, it is an *artifact*.¹⁰

⁶ 2 THE COMPLETE WORKS OF ARISTOTLE, COLLECTED WORKS (Ed. by Jonathan Barnes) 1009(a) 31-35, and *passim* (1984). In this sense, international jurisdiction is not unlike the configuration space in quantum mechanics – the fictional space of probability that can be described and calculated by Schrödinger's wave function, but which only becomes actual when observed in the real space in the form of a physical particle. See, e.g., WERNER HEISENBERG, PHYSICS AND PHILOSOPHY 11 (1962) ("The probability wave ... meant a tendency for something. It was a quantitative version of the old concept of '*potentia*' in Aristotelian philosophy. It introduced something standing in the middle between the idea of an event and the actual event, a strange kind of physical reality just in the middle between possibility and reality.")

⁷ In this sense, just as measurement breaks the symmetry (or coherence) of the quantum state, the qualification of the positions of two parties as parties to a dispute breaks the legal symmetry (or the "qualia" state) that prevails between them before the dispute arose – one of the parties necessarily becomes a claimant, the other a respondent. See Veijo Heiskanen, Key to Efficiency in International Arbitration, 30 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 481, 484 (2015).

⁸ See G.W.F. HEGEL, ENZYKLOPÄDIE DER PHILOSOPHISCHEN WISSENSCHAFTEN IM GRUNDRISSE: ERSTER TEIL – DIE WISSENSCHAFT DER LOGIK 281 (1970) ("Die Polemik des Aristoteles gegen Platon besteht dann näher darin, dass die Platonische Idee als bloße *Dunamis* bezeichnet und dagegen geltend gemacht wird, dass die Idee, welche von beiden gleicherweise als das allein Wahre anerkannt wird, wesentlich als *Energeia*, d.h., als das Innere, welches schlechthin heraus ist, somit als die Einheit des Inneren und Äußeren oder als die Wirklichkeit in den hier besprochenen emphatischen Sinne des Wortes zu betrachten ist.")

⁹ In plain terms, the jurisdiction of an international court or tribunal becomes effective – has an effect in the real world – when its judgment (or its award) is complied with, or enforced.

¹⁰ A dictionary definition of "artifact" is "any object made by man, esp. with a view to subsequent use L phrase arte factum something made with skill." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989).

In this sense, as a matter of fact, the history of international law starts not from Grotius or Vattel, who were theorists of international law and international jurisdiction, but from the Jay Treaty arbitrations. The commissions created by the Jay Treaties were the first international tribunals operating on the international plane, the first instances of the idea (if not the ideal) of international jurisdiction becoming actual as an artifact.

Many other international arbitrations were conducted in the course of the 19th and the early 20th century, as *ad hoc* arbitral tribunals were created increasingly frequently to deal with international claims, both claims espoused by way of diplomatic protection and State-to-State claims. The tribunals that were created to deal with these claims were usually based on a *compromis*, a submission agreement that referred to international arbitration a dispute that had already arisen. These were not regulatory treaties that referred to arbitration *future* disputes arising between the State parties or their nationals; they were concerned with the past rather than with the future.

The fact that these tribunals' jurisdiction was based on a *compromis* meant that it was difficult to challenge their jurisdiction by way of a preliminary objection. There was an agreement to arbitrate the one dispute that was submitted to them so it was difficult to argue that there was no jurisdiction. The sole objection the respondent State could raise to the jurisdiction of the tribunal was to challenge its jurisdiction to decide on its own jurisdiction – its “competence-competence.” Such objections were indeed raised, including in the Jay Treaty arbitrations, and although the question was answered affirmatively, it remained an issue throughout the 19th century, until the Alabama arbitrations.¹¹ In substance, the issue of competence-competence was effectively about whether any independent international jurisdiction could exist in the first place, including the very limited actual *ad hoc* jurisdiction created by the *compromis* in question. Namely, if an international tribunal cannot decide on its own jurisdiction, it would remain in the realm of fiction as its functioning could always be pre-empted *limine litis*, by an objection to its jurisdiction to decide on its own jurisdiction. Competence-competence is, therefore, about the independence of judicial and arbitral power – the power to convert a fiction – in this case the fiction of judicial or arbitral power – into an artifact – into actual exercise of international jurisdiction; the power to say what the law in fact is.¹²

However, while it was difficult to challenge the jurisdiction of an *ad hoc* tribunal operating under a *compromis*, what could be challenged was the *admissibility* of the claims – whether the claim was really, or in substance, an international claim. Only international claims are admissible before an international tribunal, not domestic or national claims. A sophisticated set of rules of admissibility were developed by these early courts and tribunals to deal with such objections, and these were subsequently endorsed by the Permanent Court of International Justice and the International Court of Justice and became part of the *corpus* of international law.¹³

¹¹ See the *Betsey Case*, Jay Treaty of 1794, in MOORE, 3 HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS 2278 (1898). The Alabama Claims Tribunal was still hesitant on the issue; see THE ALABAMA ARBITRATION GENEVA 1972.

¹² The term “*Kompetenz-Kompetenz*” has its roots in the 19th century German constitutional law, where it was used to refer to the federal State's sovereign power to change the constitution and reduce the competencies of member states. Although the source seems distant, the core of the concept is the same: the power to convert a fiction, or a potential law, into an (arti)fact, or “positive” law. *Kompetenz-Kompetenz* thus is a concept that lies at the core of any exercise of power, whether legal or political.

¹³ See VEIJO HEISKANEN, INTERNATIONAL LEGAL TOPICS 144-200 (1992).

Under these rules, in order to be admissible before an international court or tribunal, a claim had to be admissible *ratione temporis*, *ratione personae* and *ratione materiae* – it had to be an international claim in all of these three aspects. It had to be admissible *ratione temporis*, that is, it had to be ripe for international jurisdiction in the sense that local remedies had been exhausted. It had to be admissible *ratione personae* in the sense that the claim espoused by the claimant State had to be owned by a national of that State and not by a national of the respondent State (otherwise there was no diversity of nationality and no international claim), and it had to be admissible *ratione materiae* in the sense that it had to be based on a *prima facie* breach of an international legal obligation and not on an alleged breach of municipal law. Only if these criteria – these tests of admissibility – were met, one could say that one was dealing with an international claim.

The rules of admissibility are therefore, historically, about the criteria that a *claim* must meet, in order to be admissible as an international claim.

The distinction between jurisdiction and admissibility began to emerge when *ad hoc* arbitration was replaced by the Permanent Court of International Justice, and when the exercise of international jurisdiction was first institutionalized. The PCIJ, and the many other international courts created in the course of the 20th century, were not *ad hoc* tribunals; they were based on treaties, and they were, or at least were meant to be, more or less permanent. They were meant to make the *potentia* of international jurisdiction a permanent actuality, an artifact that would not come and go like international arbitral tribunals, but would firmly stand on the international plane, as a permanent presence – as a permanent court of international justice.¹⁴

The legal instruments that created the international courts of the 20th century also created a new category of jurisdiction – the jurisdiction of a particular court. These instruments were regulatory instruments in that they dealt with and referred to litigation *future* disputes, and therefore were forward looking rather than backward looking like the *compromis* of the 19th century, which referred to arbitration before an *ad hoc* international tribunal disputes that had already arisen.

The new regulatory approach to the settlement of international disputes that resulted in the creation of the Permanent Court also introduced a new, positivist concept of jurisdiction. International jurisdiction was no longer a potentiality that would occasionally become an actuality in the form of an *ad hoc* arbitral tribunal; it became a permanent actuality within the jurisdictional limits circumscribed in the relevant treaty. These jurisdictional limits could be conceptualized, and were in fact conceptualized, in the very same terms as the admissibility of claims before *ad hoc* arbitral tribunals, that is, in the three familiar dimensions – in terms of time (*ratione temporis*), person (*ratione personae*) and subject matter (*ratione materiae*).

However, even if the terms were the same, the limits were not the same. Jurisdiction *ratione temporis* is not about whether the claim is international in terms of time; it is about whether the claim arose during the time period when the treaty was in force. Jurisdiction *ratione personae* is not about whether the claim is international in terms of person (i.e., who owns it); it is about whether the claimant has standing to appear before the court under the treaty. Jurisdiction *ratione materiae* is not about whether the claim is international in terms of the

¹⁴ Or *Bestand*, in Heideggerian terms; see MARTIN HEIDEGGER, THE QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAY 17-18 (1977). It is perhaps not a coincidence that Heidegger uses an airplane as an example of a *Bestand*; see *ibid.*

applicable law; it is about whether the claim relates to a subject matter that the treaty in question regulates.¹⁵

The jurisdiction of an international court or tribunal came to be defined as a field within international jurisdiction, as opposed to the boundary between the international and the domestic.

The earlier debate about the competence-competence of international arbitral tribunals had also introduced a potential further concept to the debate about the limits of power of international courts and tribunals – that of *competence*. While the distinction between jurisdiction and competence was initially seen essentially as a matter of legal terminology,¹⁶ the two concepts gradually came to be seen as different, or at least potentially different concepts. Judge Fitzmaurice in his commentaries on the jurisprudence of the International Court of Justice famously defined the distinction between jurisdiction and competence as a “distinction between jurisdiction or competence in the general sense, and as existing or not in a particular case.”¹⁷ He noted that although it was in practice sometimes difficult to say which term was the appropriate one in the circumstances, “[t]hese two terms represent concepts which are theoretically quite distinct.”¹⁸ He also specifically referred to jurisdiction as a *field*, noting that

“[t]here is the question of the general class of case in respect of which a given tribunal has jurisdiction – the tribunal’s jurisdictional field, whether *ratione materiae*, *personae*, or *temporis*, and there is the question of its competence to hear and determine a particular individual case – e.g., the case may not fall *ratione materiae*, within the tribunal’s general field; or, even if it does, may be excluded on grounds arising *ratione personae* or *ratione temporis*. A tribunal may have jurisdiction in the ‘field’ sense, yet lack competence in the particular case. Want of jurisdiction in the ‘field’ sense, on the other hand, necessarily involves incompetence to determine the particular case.”¹⁹

¹⁵ These two may coincide, at least almost, in instances where the jurisdiction of the international court in question approaches the ideal of international jurisdiction. Thus, e.g., the Statute of the International Court of Justice provides that the Court has jurisdiction to resolve any dispute arising under the sources of international law – a provision which explains why the distinction between the concepts of jurisdiction *ratione materiae* and (substantive) admissibility *ratione materiae* may be easily overlooked.

¹⁶ See, e.g., *Mavrommatis Palestine Concessions*, PCIJ Series A (No. 2), p. 10 (1924).

¹⁷ Gerald Fitzmaurice, *The Law and Practice of the International Court of Justice: International Organizations and Tribunals*, 29 BRIT. Y.B. INT’L L. 1, 41, note 2 (1952). He went on to state: “Alternatively, one of these terms may be held to be a special case of another; but whichever view be taken there are two aspects of jurisdiction or competence. There is first the general field in which a court exercises and is entitled to exercise its functions, as for instance when it is said that courts are competent (or have jurisdiction) to hear and determine legal questions, but not political questions; or if it is said that a tribunal is set up under a treaty to decide disputes regarding its interpretation and application has competence (or jurisdiction) to hear cases arising on that treaty, but not cases arising on some other treaty. Next there is the question of the competence of a court to hear and determine a particular case belonging to the category to which its jurisdiction relates. Thus a court may be competent to deal with a certain class of case, but only if certain conditions are fulfilled in the individual case, e.g., the parties must consent, or some preliminary procedure such as an attempt to settle the dispute by recourse to diplomatic methods must have gone through.” *Ibid.* 40-41.

¹⁸ *Id.*

¹⁹ Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: Questions of Jurisdiction, Competence and Procedure*, 34 BRIT. Y.B. INT’L L. 1, 8-9 (1954). The relevant passage reads in full: “On the basis of certain remarks made by Dr Daxner, acting as Albanian judge *ad hoc* in that case [i.e., the Corfu Channel Case], it was suggested that there is a distinction between jurisdiction and competence, and that

In other words, according to Fitzmaurice, jurisdiction is a more general concept than competence; it refers to the court's jurisdictional "field" *ratione temporis, personae* or *materiae*, whereas competence is a particular or specific concept; it refers to the court's competence in a particular case. The relationship between the two concepts is also asymmetric in the sense that while competence implies jurisdiction, the reverse is not necessarily true – a court that has jurisdiction may also be competent, but this is not necessarily the case.

Not much has been written by legal scholars on the issue since Fitzmaurice made his contribution so this is where legal scholarship has effectively left us. The question of what "competence" really means, in concrete legal terms, and whether it really is a distinct or independent concept, has not been effectively addressed.

However, taking the term "competence" in its ordinary meaning, one can ask whether there is really any difference between the concept of substantive admissibility developed by the 19th century arbitral tribunals and the Permanent Court in the context of diplomatic protection and the concept of competence as outlined by Judge Fitzmaurice based on the practice of international courts: just as one can say that a claim is not admissible before an international court or tribunal if it is, in substance, a domestic rather than an international claim, can one also not say that an international court or tribunal is not *competent* to deal with domestic claims, in the ordinary meaning of this term? Can one not, more or less justifiably, raise the question whether dealing with claims that are in substance based on domestic law is really within the *competence* of international courts or tribunals? Is competence not the other side of the coin of substantive admissibility, and *vice versa*? Are substantive admissibility and substantive competence in fact not one and the same thing?²⁰

Keeping in mind these issues, and this historical background, let us now fast-forward and look at the concepts of jurisdiction, admissibility and competence in another, more timely context, the context of investment treaty arbitration. It is in this context that the relationship between the three concepts has re-emerged at least as a potential if not as an actual issue.

although these terms are often used interchangeably, they ought probably each to be confined to a particular aspect of the matter. No doubt this distinction is one which, as a matter of terminology, appears mainly in the English rather than in, for example, the French language. But that merely means that in French the term *compétence* is often used in two senses so that the distinction of substance remains. There is the question of the general class of case in respect of which a given tribunal has jurisdiction – the tribunal's jurisdictional field, whether *ratione materiae, personae*, or *temporis*, and there is the question of its competence to hear and determine a particular individual case – e.g., the case may not call *ratione materiae*, within the tribunal's general field; or, even if it does, may be excluded on grounds arising *ratione personae* or *ratione temporis*. A tribunal may have jurisdiction in the 'field' sense, yet lack competence in the particular case. Want of jurisdiction in the 'field' sense, on the other hand, necessarily involves incompetence to determine the particular case."

²⁰ In this sense, the question of competence raises the question of the *propriety* of the exercise of (rather than power to exercise) international jurisdiction. See SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 301-302 (2nd rev. ed., 1985). ("While the question of terminology may not be of major importance, and indeed the maintenance of some flexibility even desirable, it is suggested that, in so far as concerns the Court, 'jurisdiction' is a stricter concept than 'competence.' Jurisdiction relates to the capacity of the Court to decide a concrete case with a binding force. 'Competence,' on the other hand, is more subjective, including both jurisdiction and the element of the propriety of the Court's exercising its jurisdiction."); CHRISTOPH H. SCHREUER WITH LORETTA MALINTOPPI, AUGUST REINISCH AND ANTHONY SINCLAIR, *THE ICSID CONVENTION* 531 (2nd ed., 2009) (noting that "competence" concerns "the narrower issues confronting a specific tribunal, such as its proper composition or *lis pendens*.")

This is hardly a surprise since investment treaty tribunals are on the one hand *ad hoc* tribunals like the 19th and early 20th century arbitral tribunals – they are created for one case only – but on the other hand, like permanent international courts, they operate under regulatory treaties that deal with future disputes, not existing or outstanding disputes like the 19th century arbitral tribunals that were created under a *compromis*.²¹ They also deal with wrongs allegedly committed by States against private parties rather than inter-State disputes so they are also effectively successors of the diplomatic protection regime. Accordingly, both the rules of substantive admissibility developed by the 19th century arbitral tribunals and subsequently ratified by the Permanent Court, and the jurisdictional approach developed by the 20th century international courts, are at least potentially relevant in their activity.

At the same time, legal instruments such as Article 41(2) of the ICSID Convention, which refers to both “jurisdiction of the Centre” and the “competence of the Tribunal,” maintained at least the potential, if not the actuality, of a continuing debate about the relationship between these two terms, jurisdiction and competence.²² Similarly, the dispute resolution clauses of investment treaties introduced new requirements as to when and how claims could be presented, such as forks in the road, cooling-off periods, deadlines for presentation of the claim, and prior domestic litigation requirements.

Consequently, investment treaty arbitration has inherited a conceptual legacy that involves three key concepts that appear to be closely related – jurisdiction, admissibility and competence – but the relationship of which has remained largely undefined in legal scholarship and in the jurisprudence of international courts and tribunals. The issue has been complicated by the dispute resolution mechanisms in investment treaties, which have introduced new, additional procedural requirements for the presentation of international claims.

This is not the time or the place to attempt to engage in an exhaustive analysis of these issues – or indeed to suggest that the topic is exhaustible in the first place. But let us venture a few preliminary remarks – and I apologize in advance for the telegraphic style.

Objections to admissibility, jurisdiction and competence are each a category of preliminary objections, or pleas in bar, that may be raised by a respondent state in response to an international claim. If upheld by an international court or tribunal, all three objections generally preclude an examination of the claim on the merits. This much one can say without much controversy – although objections to competence seem extraordinarily rare in practice, so even to suggest that there could be an objection to competence, separate from and independent of objections to jurisdiction or admissibility, may be at least potentially controversial.

²¹ In this sense the Iran-United States Claims Tribunal is a throwback to the 19th century international arbitration: an international arbitral tribunal created on the basis of a *compromis* that covered only claims that existed, or were “outstanding,” on 19 January 1981, the date of the Claims Settlement Declaration. 19 January 1981, the date of the Claims Settlement Declaration. For further discussion of the distinction between regulatory and compromissory treaties see Veijo Heiskanen, *Entretemps: Is there a distinction between jurisdiction *ratione temporis* and substantive protection *ratione temporis*?*, in EMMANUEL GAILLARD AND YAS BANIFATEMI (EDS.), JURISDICTION IN INVESTMENT TREATY ARBITRATION (forthcoming, 2016).

²² Thus, *e.g.*, Article 41 of the ICSID Convention distinguishes between the “jurisdiction of the Centre” and the “competence of the Tribunal,” but does not mention the term “admissibility.” Nonetheless, objections to the admissibility of the claim are frequently raised in ICSID arbitration.

The distinction between jurisdiction and the classical doctrine of substantive admissibility, as developed in the context of diplomatic protection, seems reasonably clear: As discussed above, an objection to jurisdiction relates to the scope of the treaty, in terms of time, person and subject matter, under which the dispute has arisen, whereas an objection to substantive admissibility relates to the claim and more specifically, to the question of whether the claim is really international, in terms of time, person and subject matter. Objections to substantive admissibility are therefore often more closely linked to the merits of the case than objections to jurisdiction, and may not be capable of being resolved as a preliminary issue. Consequently, they are often examined after the examination of objections to jurisdiction and may also be joined to the merits.

However, since the late 19th and early 20th century, this classical doctrine of substantive admissibility has developed further in the practice of international courts and tribunals, and a distinction has emerged between what could be termed “substantive” and “procedural” admissibility. The former reflects the classical substantive boundary between the international and the domestic; the latter is linked to the procedural steps that a claimant must take, in order to be in a position to bring a claim before an international court or tribunal. These steps include, in the context of investment treaty arbitration, procedural steps such as compliance with the cooling-off periods, deadlines for presenting the claim, and domestic litigation requirements. They arguably relate to (procedural) admissibility rather than jurisdiction because they are not about the scope of the treaty, in terms of time, person and subject matter; they regulate the dispute resolution process and are thus “internal” to the dispute resolution clause of the treaty. One could therefore say that, as a result of its regulation in investment treaties, “admissibility” has become a more technical term than the substantive concept of admissibility developed in the context of diplomatic protection. It is an entirely different question whether substantive admissibility has ceased to be valid law, or whether it has in fact been replaced, by its procedural counterpart.

What are, then, objections to “competence”? Judge Fitzmaurice’s remarks on the jurisprudence of the International Court, and the language of Article 41(2) of the ICSID Convention, which refers to both the “jurisdiction of the Centre” and the “competence of the Tribunal,” provides some indication on how one might approach the issue.

Objections to competence, in a technical (rather than substantive)²³ sense of this term, may be said to relate to the question of whether a particular dispute falls within the scope of the arbitration agreement, in terms of time, person and subject matter. Thus, for instance, the question of whether the dispute resolution clause in an investment treaty covers pre-existing disputes, i.e., disputes that had arisen before the treaty entered into force, could be characterized as an issue of competence *ratione temporis* rather than jurisdiction *ratione temporis*; this latter issue is rather about whether the treaty covers pre-existing investments, or investments made prior to the entry into force of the treaty. Similarly, the question of whether the alleged breach is attributable to the respondent State may be said to be an issue of competence *ratione personae* rather than jurisdiction; this latter is about whether the claimant falls under the category of defined investors that have standing to appear before the tribunal under the treaty. In other words, competence *ratione personae* is about whether the respondent State is a proper party to the dispute, and as an issue of competence rather than jurisdiction (in the strict sense) this issue may arise even if there is no dispute that the respondent State has given its consent to arbitrate in the treaty. Finally, the question of

²³ As noted above, competence in the substantive sense is hardly distinguishable from substantive admissibility.

whether the claim is based on the treaty or another legal basis such as a contract should arguably be characterized as an issue of competence *ratione materiae* rather than as an issue of jurisdiction *ratione materiae*; this latter issue is about whether the claim relates to, or arises out of, an investment – the subject matter regulated by the treaty.

Like objections to admissibility, objections to competence tend to be more closely related to the merits than objections to jurisdiction and therefore often cannot be decided separately from the merits. However, unlike objections to admissibility, which relate to the claim, objections to competence rather relate to the *dispute*. In other words, they are about whether the dispute is really covered by the treaty in terms of time, whether the State is really a party to the dispute, or whether the dispute is really, in substance, a dispute arising under the treaty.

The question that arises is of course whether all these conceptual gymnastics really matter. Does it make any difference in practice whether an objection is classified as an objection to jurisdiction, admissibility or competence?

Not always. For instance, the question of whether a particular preliminary objection is classified as an objection to jurisdiction or as an objection to competence, in the technical sense just discussed, is not necessarily consequential in practical terms. If the dispute does not fall under the arbitration agreement, whether in terms of time, person or subject matter, the tribunal really has no choice but to dismiss the claim. Thus, for instance, if the tribunal determines that the alleged breach of the treaty is not attributable to the respondent State, the claim must be dismissed as the dispute is not governed by the arbitration agreement. Whether it prefers to classify such a decision as a decision on jurisdiction or competence does not really matter, in practical terms. While conceptual precision may be a virtue, it is less so when it has no practical consequences.²⁴

However, in certain situations conceptual precision does make a difference in practice, apart from clarifying our thinking in theory. The classification of a preliminary objection as an objection to jurisdiction (or competence) or as an objection to procedural admissibility, in particular, may have legal consequences. If an objection to jurisdiction in the strict sense of the term is upheld, the arbitral tribunal has no discretion and the claim must be dismissed for lack of jurisdiction. However, because objections to procedural admissibility relate to compliance with the procedural requirements set out in the dispute resolution clause rather than the scope of the treaty or of the arbitration agreement, arbitral tribunals arguably have a measure of discretion to determine whether to admit or dismiss the claim in the circumstances of the case (or, *e.g.*, whether to suspend it when its presentation is premature).

The question of whether a particular preliminary objection should be addressed as an objection to substantive admissibility or as an objection to jurisdiction is more delicate. It could be said that, unlike a decision on jurisdiction, which is a matter of a strict binary decision of yes or no, there is an element of discretion, or consideration of propriety, involved in the decision as to whether or not to admit a claim that is in substance a domestic claim, whether in terms of time, person or subject matter, before an international tribunal. One can, can one not, justifiably raise the question of whether dealing with what is in substance a domestic claim constitutes a proper exercise of the powers of an international tribunal? Is an international tribunal competent, in the substantive sense of this term, to deal with such

²⁴ See CHRISTOPH H. SCHREUER WITH LORETTA MALINTOPPI, AUGUST REINISCH AND ANTHONY SINCLAIR, *THE ICSID CONVENTION* 532 (2nd ed., 2009) (suggesting that “the distinction [between jurisdiction and competence] is of little consequence The terms are frequently used interchangeably.”)

claims? Is there not a risk that an assertion of jurisdiction over such claims undermines, in the longer term at least if not in an instance, the very legitimacy of international jurisdiction as a jurisdiction operating on the international plane, a plane “entirely different” from the domestic plane? Is there not a risk that domestic courts and tribunals eventually return the favor and assert jurisdiction over what are arguably, in substance, international claims? Do we really want to erase these jurisdictional limits, or these boundaries between the international and the domestic?