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The Question of Admissibility of Claims in Investment Treaty Arbitration

Andrew Newcombe (University of Victoria Faculty of Law) · Wednesday, February 3rd, 2010

In my [last post](#) I questioned whether investor misconduct (such as fraud, illegality and corruption) is invariably a jurisdictional issue. This post focuses on the use of admissibility as a filtering mechanism to screen investor claims. Although it has been suggested by at least one investment treaty tribunal that the concept of admissibility does not apply in investment treaty arbitration, I argue that investment treaty tribunals can use admissibility to rule on whether claims may be heard. Further, admissibility can be a useful tool for approaching questions of investor misconduct.

The terms jurisdiction and admissibility are not used consistently in investment treaty arbitration (or for that matter by international courts and tribunals). Pleadings and awards often refer to objections to jurisdiction and admissibility without distinguishing between the two. In his recent treatise, *The International Law of Investment Claims*, Zachary Douglas presents a taxonomy of preliminary issues distinguishing between the existence of adjudicative power (jurisdiction) and the exercise of adjudicative power (admissibility or the merits). Admissibility goes to the question of whether a tribunal can “exercise its adjudicative power in relation to the specific claims submitted to it” (para. 297). See also paras. 306-312 for further discussion. In other words, the distinction lies in whether the objection takes aim at the tribunal or the claim (para. 311). For a succinct and edifying analysis of the issue, see [Jan Paulsson’s article “Jurisdiction and Admissibility”](#).

Perhaps the clearest articulation of the distinction in an investment treaty decision is that by the late [Keith Highet](#) in his dissenting opinion in *Waste Management, Inc. v. United Mexican States*, where, in discussing the issue of waivers under Article 1121, NAFTA, he stated:

International decisions are replete with fine distinctions between jurisdiction and admissibility. For the purpose of the present proceedings it will suffice to observe that lack of jurisdiction refers to the jurisdiction of the Tribunal and inadmissibility refers to the admissibility of the case. [para. 57]

... Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act. [para. 58]

In a footnote, he provides the example of where the “claim is time-barred or where there is a similar substantive defect on the face of the complaint which does not, however, invalidate or depreciate the Tribunal’s jurisdiction as such.”

Of relevance to the issue of investor misconduct, he noted that the matter of admissibility is also related to the question of severability (para. 61). Mr. Highet asked why the entire claim should be dismissed on jurisdictional grounds where only one part of the claim might be inadmissible. In his words, the Waste Management tribunal “has heaved the baby, enthusiastically, out with the bath-water: the entire NAFTA claim has been undone.” (para. 63)

The status of the concept of admissibility remains unclear in investment treaty arbitration. Indeed, at least one award suggests that there is no power to dismiss claims on the basis of inadmissibility. In *Methanex v. United States*, in response to a challenge by the United States to the admissibility of Methanex’s claims, the tribunal stated:

... There is here no express power to dismiss a claim on the grounds of “inadmissibility”, as invoked by the USA; and where the UNCITRAL Arbitration Rules are silent, it would be still more inappropriate to imply any such power from Chapter 11. [para. 124]

It is unnecessary to develop these materials further. This Tribunal has no express or implied power to reject claims based on inadmissibility... [para. 126]

The tribunal’s statement should, however, be viewed in its context. As noted by Jan Paulsson in his article, “Jurisdiction and Admissibility”, the US argument was that Methanex’s claims were legally hopeless, not that the case was unhearable.

The terms admissibility and inadmissibility do not appear in the UNCITRAL Rules, the ICSID Convention or the ICSID Arbitration Rules. Further, the indices of leading treatises on international commercial arbitration (such as the new edition of Gary Born’s *International Commercial Arbitration* and *Fouchard Gaillard Goldman on International Commercial Arbitration*) do not refer to admissibility or *irrecevabilité* as distinct concepts or principles in international commercial arbitration. And although the distinction between jurisdiction and admissibility is recognized in Art. 79 of the ICJ’s Rules of Court, care must be exercised in drawing conclusions from the ICJ’s jurisprudence. Since its decisions are not reviewed by other judicial authorities, any distinction it draws between jurisdiction and admissibility does not have the same

consequences as for arbitral awards subject to review by national courts or annulment within the ICSID system (see Jan Paulsson's article on this point).

Although the distinction between jurisdiction and admissibility is often hard to draw, the concept of admissibility has a long-standing place in the international law relating to claims of diplomatic protection. Issues such as nationality, exhaustion of local remedies and delay have been viewed as issues of admissibility (see Article 44, Admissibility of Claims, ILC Articles on State Responsibility). Although care needs to be exercised in applying the law relating to diplomatic claims to investor-state arbitration, I would argue that the principle that there can be impediments to the bringing of claims can be drawn from general principles of international law. For example, laches—or unwarranted delay in making a claim—might appropriately be viewed as a bar to the admissibility of a claim.

Similarly, I argue that abuse of process and egregious forms of investor misconduct can be the basis for denying the admissibility of a claim. Although the tribunal has jurisdiction, the claim may not be heard because of a procedural or substantive impediment. This is exactly what happened in *Plama v. Bulgaria*, where the tribunal found that the effect of the claimant's fraud and illegal conduct was to "preclude the application of the protections of the ECT" (para. 135) and that the "[c]laimant is not entitled to any of the substantive protections afforded by the ECT" (para 325). In its reasons, the tribunal states that granting the protection of the ECT would be contrary to the principle of *nemo auditur propriam turpitudinem allegans*—no one is heard when alleging one's own wrong (para. 143). The operative idea is that the claim cannot be heard because of the fraud and illegality, not because the tribunal lacks jurisdiction.

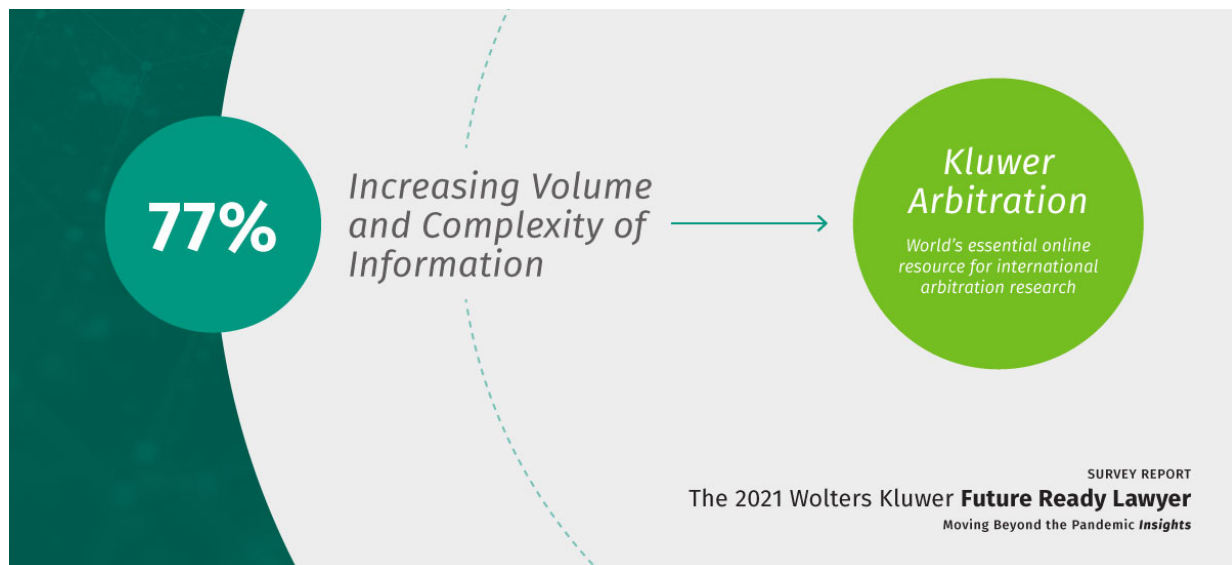
As a final point, it is interesting to note that the recently released interim awards in the Yukos-related claims under the Energy Charter Treaty (*Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*) are each titled "Interim Award on Jurisdiction and Admissibility". The three interim awards confirm that the disputes are admissible and within the tribunal's jurisdiction, subject to two issues; first, they defer the "decision on the objection to jurisdiction and/or admissibility based on Article 21 [Taxation] of the ECT to the merits phase of the arbitration"; second, they confirm that the "decision on the objections to jurisdiction and/or admissibility involving the Parties' contentions concerning "unclean hands" and Respondent's contention that "Claimant's personality must be disregarded because it is an instrumentality of a criminal enterprise" is deferred to the merits phase of the arbitration" (see the final decision in each of the interim awards). It should also be noted that in the Yukos claims, the parties treated the denial of benefits provision in Art. 17 of the Energy Charter Treaty as a question of admissibility. It remains to be seen whether the tribunal in the three Yukos cases views allegations of unclean hands as an issue going to jurisdiction or admissibility.

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