

# BEFORE ENDING THE CASE:† DISASSEMBLING JURISDICTION AND ADMISSIBILITY IN *BG V. ARGENTINA*

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## ABSTRACT

*Pre-arbitration requirements contained in bilateral investment treaties (BITs) have been variously interpreted as pertaining to issues of arbitrability, procedure, jurisdiction, or admissibility. That categorization—getting the categorization right—can determine the outcome of when and whether a case reaches the merits. This Article explores the current ad hoc method of categorization and the international disharmony that exists.*

*BG v. Argentina, the arbitral award, and the enforcement action that went up on appeal before the United States Supreme Court, is foregrounded as a focal point for the struggle with pre-arbitration requirements, specifically, the local litigation requirement in the Argentina-United Kingdom BIT. Ultimately, this Article seeks to put in conjunction and evaluate the various approaches to pre-arbitration requirements; it aims to lay the groundwork for further development in the law around threshold issues stemming from treaties. It posits a unitary jurisdictional approach/regime to process requirements. One of the instigations for this paper is Chief Justice Roberts’ statement in his dissent in *BG v. Argentina*, the Supreme Court’s first decision interpreting a bilateral investment treaty. He stated: “The only question is whether BG group formed an arbitration agreement with Argentina.”*

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† “One can understand why a superficial reading of cases leads to the temptation to lump together all objections which, if upheld, would end the case.” Jan Paulsson, *Jurisdiction and Admissibility*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601, 608 (G. Aksen, K.H. Böckstiegel, P.M. Patocchi, & A.M. Whitesell eds., 2005). “In the end, an investment tribunal may dismiss a case because it finds that it lacks jurisdiction or because it considers that the claims are inadmissible. Thus, a valid question arises concerning whether this distinction is not merely an artificial or, at best, academic one that satisfies the observer’s predilection for categorizing phenomena that may indeed be distinguishable, but in the end are irrelevant.” August Reinisch, *Jurisdiction and Admissibility in International Investment Law*, 16 LAW & PRAC. INT’L CTS. & TRIBS. 21, 25 (2017).

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I. INTRODUCTION

Threshold issues are a hard-fought battle in investment arbitration because of the stakes involved and the costs of litigation.<sup>1</sup> Nevertheless, two categories of preliminary issues—jurisdiction and admissibility—are blended, blurred, and confused.<sup>2</sup> Frequently misunderstood is the relative value and ordering of jurisdiction and

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1. See Jan Paulsson, *Jurisdiction and Admissibility*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601, 602–03 (G. Aksen, K.H. Böckstiegel, P.M. Patocchi, & A.M. Whitesell eds., 2005); Friedrich Rosenfeld, *Arbitral Præliminaria – Reflections on the Distinction between Admissibility and Jurisdiction after BG v. Argentina*, 29 LEIDEN J. INT’L L. 137, 137 (2016).

2. “If a tribunal has elected to make a preliminary ruling on issues relating to its jurisdiction or the admissibility of claims, then such issues must be determined conclusively by the tribunal in its preliminary decision.” ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 134 (2009). Admissibility is not only a preliminary issue. It also concerns the “alleged failure of new claims to remain within the scope of the initial notice” and whether “additional claims may be raised once the initial pleadings have been submitted.” Paulsson, *supra* note 1, at 609.

admissibility and the fundamental difference between the terms.<sup>3</sup> The U.S. Supreme Court's decision in *BG v. Argentina* typifies the ground for controversy and debate—and what happens when the importance of the terms in international investment law goes unrecognized and the rules governing power and control are not observed.<sup>4</sup>

“[T]he first decision in its [the Supreme Court's] history on the interpretation of a bilateral investment treaty” demonstrates: (1) the importance and consequences of the distinction between jurisdiction and admissibility; (2) the need for a brighter-line rule or shorthand dividing line; and (3) why institutions such as the Supreme Court have avoided or sidestepped the distinction, contributing to inconsistency and incoherence in international law.<sup>5</sup>

It is necessary to foreground the importance of the question—the admissibility of jurisdiction and admissibility as choice or distinction—for the economic cooperation between host states and investors.<sup>6</sup> Preliminarily, it concerns the expectations and reliance interests of the parties.<sup>7</sup> This Article attempts to balance and mediate between the ad hoc method of dealing with these threshold issues, which has led to inconsistency—“subjective decision-making process[es] [of arbitral tribunals] that disappointed litigants may consider unprincipled”—and international law concepts such as fair and equitable treatment, access to and the administration of justice, procedural due process and good faith—and whether such principles should ever remain entirely separate and distinct from questions of jurisdiction and admissibility.<sup>8</sup>

3. Obtaining or surviving dismissal based on jurisdiction as compared with admissibility goes to the fundamental quantification of the case. The distinction is critical and this explains why jurisdiction and admissibility are often pitted against each other.

4. See Rosenfeld, *supra* note 1, at 152–53 (“the parties, exercise power and control over the grant of jurisdiction;” “the arbitral tribunal, exercises power and control over the decision on admissibility;” “[i]n *BG v. Argentina* the majority of the US Supreme Court has taken a distorted view on the distribution between power and control.”).

5. Rosenfeld, *supra* note 1, at 138.

6. See, e.g., JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATIES* 252–54 (2d ed. 2015) (discussing investment treaties in the context of “legitimate economic expectations” of the parties and “making economic life more calculable or predictable”).

7. See *id.* at 253–54 (“Investor expectations are fundamental to the investment process. It is the investor’s expectations with respect to the risks and rewards of the contemplated investment that have a crucial influence on the investor’s decision to invest. . . . Thus, when a state has created certain expectations through its laws and acts that have led the investor to invest, it is generally considered unfair for the state to take subsequent actions that fundamentally deny or frustrate those expectations.”).

8. *Id.* at 251, 253.

Section II of this Article considers the difference between a decision on jurisdiction and that of admissibility and the nature of the decision in the *B.G. v. Argentina* arbitral award, a decision that later bothered the U.S. Supreme Court because the tribunal obscured the distinction. Section III analyzes the Supreme Court's review of *BG v. Argentina*, and the significance of the sources used in its decision for the jurisdiction/admissibility distinction. It ends with providing an alternative and clearer path to deciding the issue raised by the situation of a party's non-compliance with the local litigation requirement. Section IV analyzes the tradeoffs of a system where there is greater uniformity in the interpretation of pre-condition requirements to arbitration contained in an investment treaty. Section V concludes with some final observations on the investment regime as a jurisdictional regime and re-affirms the importance of *BG v. Argentina* as focalizing the issue of jurisdiction and admissibility.

## II. THE IMPORTANCE AND CONSEQUENCES OF A DECISION ON JURISDICTION VERSUS A DECISION ON ADMISSIBILITY AND THE AWARD IN *BG v. ARGENTINA*<sup>9</sup>

The distinction between jurisdiction and admissibility matters because of the relative importance of these issues in a case and of the concepts to each other. Section A considers the differential consequences. Section B considers the decision on the jurisdiction/admissibility dichotomy in the *B.G. v. Argentina* award and its consequences.

### A. *Differential Consequences*

The relative importance of issues relating to jurisdiction and admissibility cannot be overstated. These issues "concern the existence, scope and exercise of adjudicative power by the arbitral tribunal."<sup>10</sup> As seen in *BG v. Argentina*, the jurisdiction/admissibility distinction determines the road to the merits, whether the merits are reached, and valuation of the case.<sup>11</sup> Before approaching the fundamental definitional

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9. See generally *BG Grp. PLC v. Republic of Argentina, Final Award* (UNCITRAL Arbitral Trib. 2007) [hereinafter *BG Award*], <https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf>.

10. DOUGLAS, *supra* note 2, at 77.

11. The *BG v. Argentina* saga exemplifies this point. See generally *BG Award*, *supra* note 9. *Contra* Veijo Heiskanen, *Ménage à trois? Admissibility and Competence in Investment Treaty Arbitration*, ICSID REV. – FOREIGN INV. L.J. 231, 234, 242 (2013) ("understanding of the relationships between these three concepts [jurisdiction, admissibility, and competence] may not be outcome-determinative in the context of arbitral decision-making, it may nonetheless inform the way in which we approach our respective tasks as counsel and arbitrator"). Valuation is particularly relevant to

difference, it is important to understand jurisdiction and admissibility relationally through the lens of: (1) reviewability, (2) relative ordering, and (3) arbitral discretion.

### 1. Reviewability

A characteristic feature of international arbitration is that arbitral tribunals finally decide objections as to admissibility, whereas a decision on jurisdiction is subject to review by a supervisory body.<sup>12</sup> In the context of investor arbitration, “the investor or the host state has the opportunity of contesting the arbitral tribunal’s decisions with respect to the existence of its [the tribunal’s] adjudicative power (jurisdiction), but not to the exercise of that adjudicative power (admissibility or the merits).”<sup>13</sup> Review of the arbitral tribunal’s decision is obtained “before *ad hoc* committees in the case of ICSID [International Center for the Settlement of Investment Disputes] proceedings or before national courts [at the seat of arbitration for set-aside or annulment] in the case of non-ICSID [*ad hoc*] arbitrations.”<sup>14</sup> It is therefore frequently argued “that reviewing bodies should have the power to reclassify a tribunal’s categorization in order to avoid its attempted ‘immunization from review.’”<sup>15</sup>

### 2. Relative Ordering

Both a decision on admissibility and jurisdiction can end a case, but issues of admissibility are addressed after jurisdiction is established.<sup>16</sup>

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the investment treaty regime, which places such value on money, investment expectation and transaction costs: promoting and encouraging future investment and return on investment. DOUGLAS, *supra* note 2, at 379. Investors are particularly attuned to the economics of the investment; third-party funders are attuned to the economics of investment in a case; and; “efficiency” “in the resolution of disputes relating to investments” in terms of time and money are a key component of the system. *Id.* at 239. It may be said that in the international investment context “rules . . . create an investor’s legitimate expectations and facilitate the Weberian concept of calculability.” SALACUSE, *supra* note 6, at 260. Therefore, defined sequencing—procedural requirements—to be performed should not easily be overlooked.

12. *See e.g.*, Paulsson, *supra* note 1, at 604–05, 608 (“a dominant feature of arbitration is that jurisdictional decisions are reviewable, but not others”).

13. DOUGLAS, *supra* note 2, at 141.

14. August Reinisch, *Jurisdiction and Admissibility in International Investment Law*, 16 LAW & PRAC. INT’L CTS. & TRIBS. 21, 25 (2017) (“A tribunal’s finding that a specific claim is admissible or inadmissible, however, will lead to a set-aside by domestic courts or to an annulment by an ICSID *ad hoc* committee only if it can be shown that the decision openly failed to state sufficient reasons or was arrived at after a serious departure from a fundamental rule of procedure.”).

15. *Id.*

16. *See also* Rosenfeld, *supra* note 1, at 149 (While “neither the ICSID regime nor the UNCITRAL Arbitration Rules expressly refer to the concept of admissibility, one may not

Jurisdiction must be established before a claim can be admitted.<sup>17</sup> Therefore, jurisdiction must be addressed, first, in sequence and ordering, as a pre-condition or condition precedent to deciding admissibility.<sup>18</sup> While an arbitral tribunal can be assembled, and it is within the competence of a tribunal to rule on its jurisdiction, jurisdiction in investment arbitration is multi-dimensional: a tribunal can have jurisdiction over a general class of cases, that is its jurisdictional field, but lack jurisdiction as regards to a particular case because of certain specific conditions to consent to arbitration that have not been met.<sup>19</sup> Accordingly, the process to arbitration takes on added importance.<sup>20</sup> Jurisdiction is the single largest power struggle in investment arbitration: if the arbitral tribunal sustains a preliminary objection, would the decision “lead to the conclusion that it is inappropriate for the tribunal to exercise its adjudicative power in any circumstances?”<sup>21</sup>

### 3. Discretion

The degree of difference, conceptually, also turns on malleability of the terms and discretion. Jurisdiction is an on/off switch, a stop/start valve;<sup>22</sup> “a question relating to jurisdiction can and must be raised by a tribunal *proprio motu*,”<sup>23</sup> and a tribunal that lacks jurisdiction must dismiss the case.<sup>24</sup> Furthermore, an “impediment to exercising jurisdiction . . .

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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.”).

17. Paulsson, *supra* note 1, at 604; Reinisch, *supra* note 14, at 24 (“jurisdiction is a primary issue which has to be affirmed first; and admissibility may be a secondary issue that only arises once a tribunal has affirmed its jurisdiction”); *see also* Micula v. Romania, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 63 (Sept. 24, 2008) (“an objection to admissibility aims at the claim itself and presupposes that the tribunal has jurisdiction”).

18. *See* SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, ¶ 184 (Aug. 6, 2003).

19. Heiskanen, *supra* note 11, at 235–236, 242 (“jurisdiction concerns the scope of the State’s consent to arbitrate”).

20. SALACUSE, *supra* note 6, at 411 (“The arbitration process is based on agreement by the parties and the authority of the arbitrator is founded on that agreement.”). Questions of adherence to process or procedural requirements go to the integrity of the system.

21. DOUGLAS, *supra* note 2, at 148.

22. *See, e.g.*, Heiskanen, *supra* note 11, at 245–46 (“jurisdiction is . . . conceptually mandatory, a matter of either/or;” “jurisdiction is indeed a ‘strict’ concept in the sense that a tribunal either has or does not have jurisdiction”).

23. DOUGLAS, *supra* note 2, at 141 (citing ICSID Arbitration Rules, Rule 41(2)); *see, e.g.*, SGS Société Générale, ICSID Case No. ARB/01/13, ¶ 154 (where the tribunal raised the issue of jurisdiction and admissibility).

24. Reinisch, *supra* note 14, at 21.

embodied in a provision in a multilateral treaty . . . cannot be waived by the respondent host state either expressly or by its conduct in the proceedings.”<sup>25</sup> This is because an incorrect decision on jurisdiction can lead to an invalid or unenforceable award.

Admissibility is more elastic; dismissal of a claim for inadmissibility is discretionary.<sup>26</sup> Additionally, there is a growing jurisprudence that assumes that the issue of admissibility can be bypassed: “the assessment of admissibility is a matter of discretion that is guided by considerations of judicial propriety and due administration of justice.”<sup>27</sup> Admissibility can be avoided and overridden based on policy considerations and by looking to the underlying purpose of the limitation.<sup>28</sup> Therefore, the divergent effects of these different decisions determine the hydraulic of pressure for each party’s claim and litigation strategy: for instance, the host state may want to start and stop a case on jurisdiction.<sup>29</sup>

The next question is whether there is malleability between the terms. In moving towards a distinguishing definition in the next section, it is important to observe that scholars, such as Jan Paulsson, while articulating the “fundamental distinction between the two concepts,”<sup>30</sup> still make room in their definition for the legitimate expectations of the parties: “whether in a given case the parties should reasonably be considered to have intended that contentions regarding any particular issue, including threshold problems which might preclude consideration of the merits, should be decided conclusively by the arbitrators.”<sup>31</sup> Re-characterizing the inquiry as whether an issue should be reached and decided by the arbitrators—results-oriented thinking—suggests malleability. In the discussion that follows, of particular note, will be

25. DOUGLAS, *supra* note 2, at 141.

26. *Id.*; see also David A.R. Williams, *Part III Procedural Issues, Ch. 22 Jurisdiction and Admissibility*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 868, 919-20 (Peter T. Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008) (“It has been said that issues such as the existence of a legal dispute, the existence of a legal interest by the claimant, or the nationality of the claim all provide grounds for a challenge to admissibility.”).

27. Rosenfeld, *supra* note 1, at 138.

28. See Reinisch *supra* note 14, at 35–36; Paulsson, *supra* note 1, at 616.

29. Arbitrator incentives also configure the hydraulic of pressure. Arguably, in the jurisdiction/admissibility game there is a hydraulic of pressure pushing an issue into the bucket of admissibility, simply because this provides arbitrators with more discretion and latitude and is a path of less resistance.

30. Paulsson, *supra* note 1, at 603.

31. *Id.* at 615. This partly explains why “[a] considerable number of tribunals have simply evaded the intricacies of making a distinction between admissibility and jurisdiction and left the question open.” Rosenfeld, *supra* note 1, at 143 n.34.

the degree of malleability of the terms.<sup>32</sup>

B. *The Award: The Right Decision for the Wrong Reasons?*

The arbitral tribunal in *BG v. Argentina* awarded BG Group \$185 million in damages under the Argentina-United Kingdom Bilateral Investment Treaty (“the Treaty”).<sup>33</sup> In reaching the merits, the investment tribunal interpreted the dispute resolution provision in the Treaty. Article 8 of the Treaty, “Settlement of Disputes Between an Investor and the Host State,” states:

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

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32. See generally Heiskanen, *supra* note 11, at 233, 245 (“Should one not simply settle on the pragmatic view that jurisdiction and competence are effectively synonymous, and that although admissibility may become an issue in certain circumstances, it is a form of preliminary objection that is often linked to the merits of the case and should therefore ordinarily be joined to the merits phase—a consequence that considerably reduces its practical relevance as a preliminary issue of legal principle?” “It turns out, upon closer analysis, that the conceptual triad of jurisdiction, admissibility and competence may be understood to consist of only two concepts—jurisdiction and competence/admissibility—or indeed of only one: jurisdiction in the broad sense (also comprehending competence/admissibility) or competence in the broad sense (also covering jurisdiction and admissibility).”).

33. BG Award, *supra* note 9, ¶¶ 457–58, 467 (BG claimed new legislation in Argentina on gas tariffs, a product of Argentina’s economic crisis, caused an expropriation of BG’s investment, license rights, and denied BG fair and equitable treatment under the BIT).



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(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.<sup>34</sup>

In its preliminary submissions, Argentina objected to the jurisdiction of the tribunal and the admissibility of BG's claims. In the main,<sup>35</sup> "Argentina argued that failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible."<sup>36</sup> Argentina further alleged that the tribunal *lacked jurisdiction* because "Argentine courts have exclusive jurisdiction over this dispute,"<sup>37</sup> "Argentina did not assume any commitment with respect to BG,"<sup>38</sup> and "Argentina has not consented to the arbitration of this dispute."<sup>39</sup>

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34. Agreement for the Promotion and Protection of Investments, U.K.-Arg., art. 8, Dec. 11, 1990, 1765 U.N.T.S. 38.

35. BG Award, *supra* note 9, ¶ 95 ("[T]he dispute between the two focuses on the scope of protection to which BG's investment is entitled.").

36. *Id.* ¶ 141 ("It is to be noted that Article 8(1) of the BIT entitles Argentina to trigger domestic litigation of treaty disputes, and there is no evidence on the record that Argentina even attempted to do so.") (footnote omitted); *see also* BG Grp. v. Argentina, 572 U.S. 25, 48 n.1 (2014) (Sotomayor J., concurring) ("Argentina points to no evidence that its objection was of the consent variety. This omission is notable because Argentina knew how to phrase its arguments before the arbitrators in terms of consent; it argued separately that it had not consented to arbitration with BG Group on the ground that BG was not a party to the license underlying the dispute. . . . The question here . . . is, whether the local litigation requirement was a condition on Argentina's consent to arbitrate . . . or a procedural condition in an already binding arbitration agreement. . . . That Argentina apparently took the latter position in arbitration is surely relevant evidence that the condition was, in fact, not one on its consent."). BG argued that the local litigation requirement "is senseless as there is no chance that in a case of this nature a decision could ever be rendered within the eighteen-month period. BG further contended that the MFN clause of the Argentina-U.K. BIT entitles BG to rely on the more favorable treatment extended by Argentina to US investors. The Argentina-U.S. Bilateral Investment Treaty does not require prior recourse to local courts for a period of 18 months. Finally, BG relied on the customary international law rule that the requirement of exhaustion of local remedies may be disregarded in cases where ' . . . the course of justice is unduly slow or unduly expensive in relation to the prospective compensation.'" BG Award, *supra* note 9, ¶ 142 (footnote omitted).

37. BG Award, *supra* note 9, ¶ 106.

38. *Id.* ¶ 158.

39. *Id.* ¶ 180. It is unclear from the Award whether Argentina was trying to plead in the alternative or merely blended and blurred the two terms. *See Philip Morris Brands Sàrl v. Oriental Republic of Uru.*, ICSID Case No. ARB/10/7 (formerly FTR Holding SA v. Oriental Republic of Uru.), Decision on Jurisdiction, ¶ 93 (July 2, 2013), <https://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf> ("Respondent further seeks the following order" "that it [the Tribunal] has no jurisdiction to determine this dispute and/or that PM Asia's claim is

The tribunal in its award showed interplay and fluidity between the concepts of admissibility and jurisdiction. The ordering of the award seemed to suggest that the tribunal ruled in favor of the admissibility of BG's claims, before resolving all of Argentina's objections as to jurisdiction.<sup>40</sup> This may be due in part to the way Argentina framed its objections. It may be said that the tribunal never properly addressed or raised the issue of its jurisdiction. The tribunal failed to distinguish between jurisdiction and admissibility; and the tribunal did not address the issue of its jurisdiction over this particular case. It sidestepped the issue, or accepted the frame provided by the parties, even while blurring the distinction.<sup>41</sup>

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inadmissible"). Justice Breyer's opinion for the majority of the U.S. Supreme Court characterized the objection this way: "According to Argentina, the arbitrators lacked jurisdiction because: (1) BG Group was not a Treaty-protected 'investor'; (2) BG Group's interest in MetroGAS was not a Treaty-protected 'investment'; and (3) BG Group initiated arbitration without first litigating its claims in Argentina's courts, despite Article 8's requirement. . . . 171a. In Argentina's view, 'failure by BG to bring its grievance to Argentine courts for 18 months renders its claims in this arbitration inadmissible.'" BG Grp., 572 U.S. at 30 (quoting BG Award, *supra* note 9, ¶ 141). Chief Justice Roberts in dissent stated that "Argentina *did* object to the tribunal's jurisdiction to hear the dispute" and a "negative inference [should not be taken] from the *arbitrator's* [sic] characterization of Argentina's argument[.]" *Id.* at 63 n.2.

40. BG Award, *supra* note 9, ¶ 157 ("The Tribunal consequently finds admissible the claims brought by BG in this arbitration, thus rendering unnecessary the examination of the relevance of Article 3 of the BIT (Most Favored Nation) to determine whether Claimant should have sought relief by the courts of Argentina during at least a period of 18 months before resorting to arbitration."); *see id.* ¶¶ 104-243; *see also* Hanno Wehland, *Jurisdiction and Admissibility in Proceedings under the ICSID Convention and the ICSID Additional Facility Rules*, in *ICSID CONVENTION AFTER 50 YEARS: UNSETTLED ISSUES* 227, 233 (Crina Baltag ed., 2017), [https://www.researchgate.net/publication/316515881\\_Jurisdiction\\_and\\_Admissibility\\_in\\_Proceedings\\_under\\_the\\_ICSID\\_Convention\\_and\\_the\\_ICSID\\_Additional\\_Facility\\_Rules](https://www.researchgate.net/publication/316515881_Jurisdiction_and_Admissibility_in_Proceedings_under_the_ICSID_Convention_and_the_ICSID_Additional_Facility_Rules) ("Objections to jurisdiction and admissibility are often addressed simultaneously as 'preliminary objections' in a first phase of the proceedings before dealing with the merits of a dispute. As a consequence, tribunals sometimes leave explicitly open the question of whether a particular issue relates to jurisdiction or admissibility.") (footnotes omitted).

41. BG phrased its claim as falling under an exception to the customary international law rule of exhaustion of local remedies. BG Award, *supra* note 9, ¶¶ 144, 146. Although the tribunal did not accept BG's argument, it ruled in favor of BG on this issue for other reasons and structured its reasoning around the question of admissibility as provided by the parties. While there are commentators who believe exhaustion of local remedies "reverses the traditional rule of international law to the effect that a claim is admissible before an international jurisdiction." Heiskanen, *supra* note 11, at 238 n.28. This should be considered an erroneous proposition that produces confusion as seen in the U.S. Supreme Court's interpretation of the Award. *See* Williams, *supra* note 26, at 928 ("Presumably, if the exhaustion of local remedies is framed as a condition of consent in the BIT, then the matter is properly dealt with as a jurisdictional issue of consent, the claim itself being admissible."); INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES, art. 26 (2006), <https://icsid.worldbank.org/en/documents/icsiddocs/icsid%20convention%20english.pdf>. This may explain in part why the U.S.

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Another reason that may be posited, however, for the blurred distinction in the Award is the conscious desire on the part of the tribunal to qualify the local litigation requirement as merely a matter of admissibility. Because Argentina “passed laws that made it impossible for BG to actually comply with the local litigation requirement and to take legal action in Argentina,”<sup>42</sup> the tribunal used policy considerations and reverse-engineering to work back from the desired result. That is, the tribunal looked ahead to the merits.

This was not the only option for the tribunal to reach its result—or even the best option. It is “not uncommon that states prevent the satisfaction of a condition” or “prevent resort to courts that would otherwise be necessary in order to comply with a local litigation requirement.”<sup>43</sup> Regardless of the pleadings, the tribunal could have directed further briefing on its jurisdiction, or raised and taken jurisdiction on the basis of a “spectrum of doctrinal approaches” 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.”<sup>44</sup> A claim to the tribunal’s jurisdiction in *BG v. Argentina*, for instance, may be analogized to principles of administrative and constitutional law. For example, such a claim to jurisdiction may be grounded on principles of customary international law, such as Article 32 of the Vienna Convention on the Law of Treaties (VCLT)

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Supreme Court believed the tribunal’s determination on the local litigation requirement concerned jurisdiction: “It [the tribunal] began by determining that it had “jurisdiction” to consider the merits of the dispute. In support of that determination, the tribunal concluded that BG Group was an “investor,” that its interest in MetroGAS amounted to a Treaty-protected “investment,” and that Argentina’s own conduct had waived, or excused, BG Group’s failure to comply with Article 8’s local litigation requirement. *Id.* at 99a, 145a, 161a, 171a. The panel pointed out that in 2002, the President of Argentina had issued a decree staying for 180 days the execution of its courts’ final judgments (and injunctions) in suits claiming harm as a result of the new economic measures. *Id.* at 166a–167a. In addition, Argentina had established a ‘renegotiation process’ for public service contracts, such as its contract with MetroGAS, to alleviate the negative impact of the new economic measures. *Id.* at 129a, 131a. But Argentina had simultaneously barred from participation in that ‘process’ firms that were litigating against Argentina in court or in arbitration. *Id.* at 168a–171a. These measures, while not making litigation in Argentina’s courts literally impossible, nonetheless ‘hindered’ recourse ‘to the domestic judiciary’ to the point where the Treaty implicitly excused compliance with the local litigation requirement. *Id.* at 165. Requiring a private party in such circumstances to seek relief in Argentina’s courts for 18 months, the panel concluded, would lead to ‘absurd and unreasonable result[s].’ *Id.* at 166a.” *BG Grp.*, 572 U.S. at 30-31. The Tribunal’s decision was explicitly made on the basis of policy: “the Tribunal” states “that a serious problem would loom if admissibility of Claimant’s claims were denied this allowing Respondent at the same to” for instance “restrict the effectiveness of domestic judicial remedies.” *BG Award*, *supra* note 9, ¶ 156.

42. Rosenfeld, *supra* note 1, at 139 (footnote omitted).

43. *Id.* at 145.

44. *Id.* at 152.

and its implicit futility exception;<sup>45</sup> the concept of force majeure; frustration of the satisfaction of a condition as an “implied waiver [of the condition]; the principle of abuse of rights or the principle of estoppel;” bad faith under VCLT Article 26; denial of justice;<sup>46</sup> denial of procedural rights/due process; a fair and equitable treatment jurisdictional claim; and denial of the object and purpose of the Treaty under VCLT Article 31.<sup>47</sup> This is not to suggest that to excuse a jurisdictional

45. See *Occidental Petroleum Corp. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, ¶ 94 (Sept. 9, 2008), <https://www.italaw.com/sites/default/files/case-documents/ita0577.pdf> (“[T]he Tribunal accepts, albeit without prejudging the merits, that attempts at reaching a negotiated solution were indeed futile in the circumstances.”). “A number of tribunals have confirmed that where negotiations are bound to be futile, there is no need for the waiting period to have fully lapsed: see, e.g., *Lauder v. The Czech Republic*, Award dated 3 September 2001 at paragraphs 187-191. See also *Consorzio Groupement L.E.S.I. DIPENTA v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/03708, Award dated 10 January 2005 at paragraph 32(iv); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/10/13, Decision on Jurisdiction dated 6 August 2003 at paragraph 184; and *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction dated 24 June 1998 at paragraph 84.” *Id.* at ¶ 94 n.10. “[C]laimants do not have to seek to avail themselves of remedies which offer no reasonable prospect of success.” JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 130 (2005).

46. See *Murphy Expl. & Prod. Co. – Int’l v. Republic of Ecuador*, Partial Award on Jurisdiction, ¶¶ 190, 192 (Perm. Ct. Arb. Nov. 13, 2013) (“The Tribunal notes that if it were to dismiss Claimant’s claim on the basis of Respondent’s jurisdictional objection, the dispute would not be settled and Claimant would not have access to a binding resolution of the merits of its case through international arbitration;” “[a]s Claimant has pointed out, access to dispute resolution is in fact structured so as to lead to a decision on the merits.”). “[A] claim of denial of justice is an international complaint which cannot be disposed of by the very state whose conduct is in question[.]” PAULSSON, *supra* note 45, at 58.

47. See *Bilateral Investment Treaty, Arg.-U.K.*, art. 2.2, Dec. 11, 1990; Rosenfeld, *supra* note 1, at 145, 152 (citing *Occidental Petroleum Corporation Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, ¶ 46 (Sept. 9, 2008), which held that the six-month waiting period requirement needs not be complied with when attempts at a negotiated solution proved futile); see SALACUSE, *supra* note 6, at 252–53 (discussing fair and equitable treatment claims). But see DONALD R. SHEA, THE CALVO CLAUSE 278 (1955) (stating the proposition that local litigation requirements are Calvo clauses); Andrés Jana, *International Commercial Arbitration in Latin America: Myths and Realities*, J. INT’L ARB. 413, 415 (2015) (the Calvo doctrine “stated that if there is a conflict between a state and a foreign person, this conflict should be subject to the local courts. . . It was based on the notion that there should be no preferential treatment of a foreign national as compared to the local national”); Guido Santiago Tawil, *On the Internationalization of Administrative Contracts, Arbitration and the Calvo Doctrine*, in 15 ARBITRATION IN CHANGING TIMES, ICCA CONGRESS SERIES 325, 328–29 (Albert Jan van den Berg ed., 2011) (“[T]he Calvo Doctrine emerged in the second half of the nineteenth century within Latin American countries as a reaction against both the international minimum standard of treatment and the remedy of diplomatic protection;” The Calvo Doctrine’s central tenet is that international law requires that foreigners who establish themselves in another country should have the same right of protection as nationals of that host country. Foreigners

prerequisite is a low burden,<sup>48</sup> or that this avenue provides the tribunal with greater discretion as to jurisdiction.<sup>49</sup> Rather, it is to explain why the tribunal may have decided “in favor of admissibility,” when the path to jurisdiction seemed perilous; it seemed more uncertain in terms of jurisprudential foundation, validity, and enforcement.<sup>50</sup> Whether this was the correct decision or proper administration of the local litigation requirement is another matter to be discussed further below.

It is important to recognize that the tribunal also insulated its decision from review by determining the admissibility of BG’s claims. It is telling that the tribunal thought of its decision as both: (1) ruling on conditions to arbitrate and (2) closely connected to the merits—since the tribunal felt compelled to reach the merits.<sup>51</sup> This decision shows a tribunal pulled between the competing claims of jurisdiction and admissibility.

Therefore, several touchstones at the outset of analysis of the decision are as follows. First, conditions to arbitrate contained in a treaty are jurisdictional: the tribunal seemingly acknowledged this when it stated, “[a]s a matter of treaty interpretation . . . Article 8(2) (a) (i) cannot be construed as an absolute impediment to arbitration.”<sup>52</sup> Second, issues of admissibility are closely connected to the merits: “the Tribunal

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should receive the same treatment as nationals. While this aspect of the principle may be viewed positively, the negative aspect which complements this principle is that foreigners should receive only treatment equal to national treatment and no more.”)

48. See generally Occidental Award, ICSID Case No. ARB/06/11.

49. Rosenfeld, *supra* note 1, at 145 (“[I]t 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.”).

50. As will be explored later in this paper, a jurisdictional decision is the safer, more certain decision in terms of enforcement. If a tribunal “chooses” admissibility and gets the jurisdictional decision wrong, a court will potentially still review the decision and eviscerate the award. The law should be more developed in this area.

51. The tribunal did not see this as a choice between two presumptions.

52. BG Award, *supra* note 9, ¶147. Conditions, impediments and controls to arbitration that should be excused are jurisdictional claims. The Tribunal continues, “[w]here recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication.” *Id.*; see GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 924-925 n.1536 (2d ed. 2014) (interpreting the Award as holding “requirement to litigate in host State courts for 18 months cannot be construed as an absolute impediment to arbitration where recourse to domestic judiciary is unilaterally prevented or hindered by host State”).

is also persuaded that under the dire circumstances surrounding the emergency measures, the Executive Branch sought to prevent the collapse of the financial system by (i) directly interfering with the normal operation of its courts, and (ii) by excluding litigious licensees from the renegotiation process.”<sup>53</sup> The tribunal, therefore, blurred the distinction and avoided a direct discussion of the jurisdiction/admissibility divide, as it relates to the local litigation requirement in the BIT; the very issue the U.S. Supreme Court faced on writ of certiorari as to the reviewability of the award.

As will be explored more in the following section, the tribunal had a duty to ascertain whether it had jurisdiction, before proceeding to and deciding the merits. Additionally, pre-arbitration requirements should be respected insofar as that process is the agreed process of the parties and that process is workable.

### III. THE DEFINITION OF JURISDICTION AND ADMISSIBILITY AND THE SUPREME COURT’S DECISION IN *BG V. ARGENTINA*: TOWARD A BRIGHTER-LINE TEST OR HEURISTIC?

This section begins by further differentiating between jurisdiction and admissibility, specifically, as the terms relate to conditions to arbitrate in a treaty. The Supreme Court’s review of the award provides the foundation for a discussion of opposing presumptions of “procedural requirements,” articulated in the international law sources on which the Court relies.

#### A. *Division and Definition: Stating A Difference*

When approaching the question of jurisdiction and admissibility, it is important to hold the two concepts apart—to the extent of stating that there is no correlation, with no interaction between the two. In this context, linguistic formulations, short-hands, or labels break down;<sup>54</sup> the tendency to plaster the ground for debate with slogans creates a twilight zone effect or vanishing point, where the issues become “hostage to

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53. BG Award, *supra* note 9, ¶155. Issues of admissibility are often thought of as closely tied to the merits. This is because “[a] decision concerning whether a claim qualifies for present determination (admissibility) . . . is a decision on the merits unsusceptible of review beyond that which is available to decisions on the merits generally.” DOUGLAS, *supra* note 2, at 134.

54. Paulsson, *supra* note 1, at 615; DOUGLAS, *supra* note 2, at 141; *see, e.g.*, Reinisch, *supra* note 14 (“admissibility objections are often of a temporal nature”). Even formulas treating a limitation on a claim as admissibility and a limitation on access to a forum/tribunal as jurisdiction can seem imprecise when jurisdiction concerns the “scope of an investment treaty tribunal’s adjudicatory power . . . over claims relating to an investment.” DOUGLAS, *supra* note 2, at 134.

whatever presumptions individual decision-makers may wish to make about unexpressed intentions.”<sup>55</sup> This Article poses the question: can these issues be dramatically de-politicized and sharply categorized? Specifically, did the decision on the local litigation requirement involve a policy decision?<sup>56</sup>

The terms jurisdiction and admissibility refer to unique and differentiated concepts. The arbitral tribunal gets its power, jurisdiction, from the parties; that power comes from the consent or agreement to arbitrate. In the investment treaty context, for “a third party beneficiary [to] emerg[e] in a new legal relationship with one of the contracting states,” an “individual or legal entity with the nationality of one contracting state [must] . . . undertake certain positive steps to achieve the status of a third party beneficiary: it must acquire an investment in one of the other contracting states and thereby attain the status of an investor.”<sup>57</sup> The dispute resolution provision in an investment treaty represents an offer; for an investor to constitute consent and jurisdiction, the investor must accept or submit to certain general and specific conditions.<sup>58</sup> Those general conditions form constructs that must attain and come together to provide a tribunal with general jurisdiction. In a treaty, aspects of general jurisdiction may be elaborated such as: *ratione materiae* (subject matter), *ratione personae* (persons), and *ratione temporis*

55. Paulsson, *supra* note 1, at 614.

56. If the decision to allow the claim to go forward involved a policy decision, should it not be made by a politically accountable party, not an arbitrator?

57. DOUGLAS, *supra* note 2, at 135; *see also* Reinisch, *supra* note 14, at 28 (stating that jurisdiction is formed “without any direct contractual agreement between the parties, so called ‘arbitration without privity’.”). “Investment treaties themselves do not expressly name the actual beneficiary of the rights enshrined in them.” Jacomijn van Haersolte-van Hof & Anne K. Hoffmann, *The Relationship between International Tribunals and Domestic Courts*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 993 (Peter T. Muchlinski, Federico Ortino, Christoph Schreuer eds., 2008).

58. *See, e.g.*, Rosenfeld, *supra* note 1, at 141; Wehland, *supra* note 40, at 245 (“Where the investor wishes to accept the host State’s offer to arbitrate under the treaty mechanism, the requirement in . . . the BIT is jurisdictional, since the failure to observe the six months cooling-off period affects the very possibility to accept the host State’s offer to conclude an arbitration agreement.”); *BG Grp. v. Argentina*, 572 U.S. 25, 55 (2014) (Roberts, J., dissenting) (“BG Group concedes that other terms of Article 8(1) constitute conditions on Argentina’s consent to arbitrate, even though they are not expressly labeled as such. *See* Transcript of Oral Argument at 57, *BG Grp. v. Argentina* 572 U.S. 25 (2014) (“You have to be a U.K. investor, you have to have a treaty claim, you have to be suing another party to the treaty. And if those aren’t true, then there is no arbitration agreement”). The Court does not explain why the only other term—the litigation requirement—should be viewed differently.”).

(temporal).<sup>59</sup> The treaty defines its general scope (often in a definitions section): who is an investor, what is an investment in the territory of the Contracting State, and the treaty's application to investments within a certain temporal period.<sup>60</sup> In addition, a dispute resolution provision narrows the focus of jurisdiction to the case, often providing specific conditions to consent—for instance—to arbitrate.<sup>61</sup> Dispute resolution clauses “draw up boundaries to the tribunal's jurisdiction, delimiting which kind of claims they could or could not entertain.”<sup>62</sup>

Jurisdiction, therefore, concerns the fundamental power of the arbitral tribunal. The confines of jurisdiction should not be susceptible to value and policy choices, as is posited for admissibility—concerning whether a claim should be heard.<sup>63</sup> Therefore, methods that work back

59. See, e.g., Heiskanen, *supra* note 11, at 237. Article 25 of the ICSID Convention's jurisdictional elements are for cases brought under the ICSID Rules. Under an ICSID Arbitration these elements have to be fulfilled in addition to the requirements in the applicable Treaty—the double-barreled test. Reinisch, *supra* note 14, at 30. In a non-ICSID case, such as *BG v. Argentina*, jurisdictional requirements in the Treaty are the sole focus. “[O]ne 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.” Rosenfeld, *supra* note 1, at 149.

60. DOUGLAS, *supra* note 2, at 144 (“[t]he material, personal and temporal scope of an investment treaty tribunal's adjudicatory power (jurisdiction) over claims relating to an investment”); Rosenfeld, *supra* note 1, at 141.

61. DOUGLAS, *supra* note 2, at 144 (“The scope of the tribunal's adjudicative power is circumscribed by the same acts that confirm the existence of that power.”). Therefore, a claim or case becomes jurisdictionally permissible, power is attained, at the point at which these conditions are satisfied. “The explicit requirements to give notice of the dispute as arising under the BIT and to seek consultations and negotiations until one year has elapsed from the date of notification of the dispute is not to be watered down to a mere statement of aspiration. The Tribunal finds compliance is an essential element of Turkey's prospective consent to qualify its sovereignty to permit unknown future investors of the other contracting State to claim relief under the terms of the BIT against it in an international forum. The Tribunal finds that the fulfillment of the requirements in Article 8(2) is a pre-condition to the jurisdiction of this Tribunal.” *Tulip Real Estate Inv. and Dev. Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, ¶ 72 (Mar. 5, 2013). “Article 26 of the ICSID Convention explicitly recognises that a Contracting State may impose conditions on its consent to arbitration under the ICSID Convention, in a manner that determines the conditions in which jurisdiction may be said to exist and be capable of being exercised (without prejudice to any issue as to admissibility).” *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, ¶ 6.3.4 (July 2, 2013).

62. Guido Santiago Tawil, *The Distinction Between Contract Claims and Treaty Claims: An Overview*, in *INTERNATIONAL ARBITRATION 2006: BACK TO BASICS?*, 13 ICCA CONGRESS SERIES 511 (Albert Jan van den Berg ed., 2007).

63. See *Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, ¶ 149 (Dec. 15, 2010) (“[T]he requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does



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from results or start with policy considerations, obliterate this distinction and erode the stability of the concept of jurisdiction.<sup>64</sup>

Jurisdiction is such an important issue that an arbitral tribunal has a near obligation to not pass over the issue and raise and resolve the issue on its own initiative, regardless of the pleadings.<sup>65</sup> The same is not true of admissibility. There is a clear normative difference recognized in the investment regime: questions of admissibility are *not* to be resolved by arbitral tribunal *sua sponte* or *motu proprio*.<sup>66</sup>

The term “admissibility” is generally not found in International Investment Agreements (IIAs), nor is it found in the ICSID Convention,

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not constitute, as Claimant and some arbitral tribunals have stated, ‘a procedural rule’ or a ‘directory and procedural’ rule which can or cannot be satisfied by the concerned party. To the contrary, it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.’). *Contra* Ronald S. Lauder v. Czech Republic, Final Award, ¶ 190 (Sept. 3, 2001) (stating an “overly formalistic approach . . . would not serve to protect any legitimate interests of the Parties”).

64. Arbitral jurisdiction is never arbitrary. A jurisdictional regime should not produce widely vacillating decisions interpreting the same or similar treaty mechanisms. With the investment regime, arguably, there is a strong value to be reasonably consistent. *See, e.g.*, Paulsson, *supra* note 1, at 617 (“If the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse;” “[i]f the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal’s decision is final.”).

65. The systemic architecture and lines of demarcation are more firmly drawn as to obligations. *See* Inna Uchkunova, *Arbitral, Not Arbitrary – Part II: Special Case of Application of Arbitral Discretion. Functions Exercisable Proprio Motu in ICSID Arbitration* (Feb. 4, 2013), <http://arbitrationblog.kluwerarbitration.com/2013/02/04/arbitral-not-arbitrary-part-ii-special-case-of-application-of-arbitral-discretion-functions-exercisable-proprio-motu-in-icsid-arbitration/?print=print>. Under ICSID Rule 41(2), “The Tribunal *may on its own initiative* consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.” (emphasis added). However, this discretionary or permissive responsibility has been interpreted by tribunals as a near obligation or duty: “[T]he question of jurisdiction of an international instance involving consent of a sovereign State deserves a special attention at the outset of any proceeding against a State Party to an international convention creating the jurisdiction. As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined proprio motu, i.e., without objection being raised by the Party.” *Mihaly Int’l v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, ¶ 56 (Mar. 15, 2002), <https://www.italaw.com/sites/default/files/case-documents/ita0532.pdf>.

66. *See, e.g.*, *Hochtief AG v. Argentina Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶ 95 (Oct. 24, 2011) (“In the ICJ, for example, rules on admissibility include such matters as the rules on the nationality of claims and the exhaustion of local remedies. The ICJ may have jurisdiction to decide whether State A had injured corporation B in violation of international law; but it may be that the claim actually filed is inadmissible because it has been brought by the wrong State, or because local remedies have not yet been exhausted. But if no objection is raised on such grounds, the Court will not raise the matter proprio motu.”).

ICSID Arbitration Rules, and UNCITRAL Arbitration Rules.<sup>67</sup> Nevertheless, there is an expansive literature of admissibility that belies its application; this literature may be considered misleading or mistaken and obscures the desirability of uniform interpretation.<sup>68</sup> Specific conditional requirements in treaties, such as waiting periods, local exhaustion requirements, and fork-in-the-road provisions are subject to ongoing debate and disagreement about the parties' intentions and policy choices, apparently to be made by tribunals. Introducing choice and optionality into this discussion buffets about the proper parameters of jurisdiction and admissibility.<sup>69</sup> *Daimler v. Argentina*, therefore, starkly counsels, “[a]ll BIT-based dispute resolution provisions . . . are by their very nature jurisdictional.”<sup>70</sup>

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67. Rosenfeld, *supra* note 1, at 149; Reinisch, *supra* note 14, at 30. Therefore, some tribunals eschew the distinction altogether. See, e.g., CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, ¶ 41 (July 17, 2003), <https://www.italaw.com/sites/default/files/case-documents/ita0183.pdf> (“The distinction between admissibility and jurisdiction does not appear quite appropriate in the context of ICSID as the Convention deals only with jurisdiction and competence.”). “Still both ICSID and non-ICSID tribunals have generally adhered to the distinction and relied on it, contributing to the investment law jurisprudence in this field.” Reinisch, *supra* note 14, at 31. Rosenfeld locates the power to dismiss a case for lack of admissibility under the inherent powers of arbitration tribunals and Article 44 of the ICSID Convention, Article 19 of the ICSID Arbitration Rules, or Article 17 of the UNCITRAL Arbitration Rules. Rosenfeld, *supra* note 1, at 149–50.

68. Are criteria governing the application of admissibility discernible and sufficiently clear to provide reasonable predictability? Sometimes admissibility is used loosely to refer to the admittance of claims; at others, it is undergirded by technical, legal principles. See Wehland, *supra* note 40, at 239 (“[f]or instance, issues of standing, limitation periods regarding the assertion of claims, and principles aiming to avoid multiple proceedings such as *lis pendens*, *forum non conveniens*, or *res judicata*, all clearly relate to the admissibility of a claim”); Andrea Carlevaris, *Preliminary Matters: Objections, Bi-furcation, Request for Provisional Measures*, in *LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER’S GUIDE* 173, 181–82 (Chiara Giorgetti ed., 2014) (advocating an overly broad and expansive reading of admissibility) (“[d]espite being the most common type of preliminary issues, jurisdictional objections are not the only preliminary matters investment tribunals may have to decide. Other preliminary matters include . . . the admissibility of the claims (e.g., in case of objections to their ripeness, based on the alleged failure to comply with any pre-arbitral procedural requirements.”). Wehland states that “it is possible for requirements under an IIA to relate to admissibility rather than jurisdiction.” Wehland, *supra* note 40, at 246. Wehland argues that Article 26(2) of the Energy Charter Treaty represents such an example, where consent is provided in the instrument. The question is whether the three-month waiting period requirement provides a specific condition to consent to that particular claim? That is, if it is a condition for bringing a claim provided in an IIA, it is jurisdictional. The consent to which Wehland refers is the general consent; specific consent as to the particular claim must also be considered—if so stipulated or spelled out in the IIA.

69. See generally Wehland, *supra* note 40 (specifically discussing cooling-off periods, prior recourse to courts requirements, and fork-in-the-road provisions).

70. *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Jurisdiction, ¶ 193 (Aug. 22, 2012) (“The BIT [German-Argentina] contains ‘mandatory and

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There is no need to drag in policy arguments; all conditions to arbitration in an international investment instrument are jurisdictional. The province of admissibility, as involving discretionary decisions, is limited. The presumption should be that admissibility's role is narrow(er) and allowing policy determinations at the threshold distorts the credibility and effectiveness of investor-state dispute settlement.

### B. *The Supreme Court's Decision: More Confusion*

This section discusses the Supreme Court's decision, reasoning, effort at operationalizing a test, and the domestic precedent and presumptions the Court considers. The section then examines the international law sources the Court relies on and the opposing presumptions present in these sources. The section concludes by delineating a path to a brighter-line test out of *BG v. Argentina*.

#### 1. The Majority's Reasoning

The Supreme Court's decision in *BG v. Argentina* seems to have been forecast by Jan Paulsson in his article, "Jurisdiction and Admissibility." Paulsson writes: "[t]he persistent abuse of the word *arbitrability* has led to international disharmony, because elsewhere that word has an established meaning that is narrow and therefore useful. The American use of the word conflates admissibility and jurisdiction. This has created a vast muddle."<sup>71</sup>

The Supreme Court granted certiorari in the case because of "the importance of the matter for international commercial arbitration" and reversed the United States Court of Appeals for the District of Columbia Circuit after it had reversed the decision of the District Court for the District of Columbia confirming the award.<sup>72</sup>

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necessarily sequential language' under which an investor-State tribunal may exercise jurisdiction with the contracting state parties' consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts").

71. Paulsson, *supra* note 1, at 609.

72. *BG Grp. v. Argentina*, 572 U.S. 25, 32 (2014). The award was rendered in Washington, DC. The District Court for the District of Columbia denied Argentina's claims that the arbitrators exceeded their powers under the Federal Arbitration Act and confirmed the award. The Court of Appeals for the District Court of Columbia reversed, holding that "the interpretation and Article 8's local litigation requirement was a matter for courts to decide de novo, i.e., without deference to the views of the arbitrators. The Court of Appeals then went on to hold that the circumstances did not excuse BG Group's failure to comply with the requirement. Rather, BG Group must 'commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration.' Because BG Group had not done so, the arbitrators lacked authority to decide the dispute. And the appeals court ordered the award vacated." *Id.* (citation omitted).

The Court framed the question before it as whether a U.S. court should review *de novo* or with deference an arbitration award made under a treaty, interpreting a local litigation requirement.<sup>73</sup> The Court viewed its decision as dealing with jurisdiction: “the arbitration panel . . . began by determining that it has ‘jurisdiction’ to consider the merits of the dispute. In support of that determination, the tribunal concluded . . . that Argentina’s own conduct had waived, or excused, BG Group’s failure to comply with Article 8’s local litigation requirement.”<sup>74</sup>

In beginning its analysis, the Court viewed the Treaty as an ordinary contract: “[i]f the contract is silent on the matter of who primarily is to decide ‘threshold’ questions about arbitration, courts determine the parties’ intent with the help of presumptions.”<sup>75</sup> “On the one hand, courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about ‘arbitrability.’”<sup>76</sup> “On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration.”<sup>77</sup> The Court continues, stating that the “provision before us is . . . procedural” because the “text and structure of the provision make clear that it [the local litigation requirement] operates as a procedural condition precedent to arbitration. . . . It determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all.”<sup>78</sup> The Court

73. *Id.* at 33–34.

74. *Id.* at 30. That the Court initially signaled its review as concerning jurisdiction is surprising in light of the decision it later reaches.

75. *Id.* at 34.

76. *Id.*

77. *Id.*

78. *Id.* at 35. The field of procedural pre-conditions has been muddled by claims such as this: “Preliminarily, claims that a party has failed to comply with contractual procedural requirements present a question of characterization. Claims of this nature can be characterized as ‘jurisdictional’ defenses (on the theory that the arbitration agreement is not triggered or does not provide an arbitral tribunal with authority until pre-arbitration procedural requirements have been complied with), ‘admissibility’ defenses (on the theory that the arbitration agreement provides jurisdiction, but does not permit assertion of substantive claims until after specified requirements have been satisfied), or ‘procedural’ requirements (on the theory that pre-arbitration requirements merely concern the procedural conduct of the dispute resolution mechanism, but do not affect the parties’ substantive rights to be heard).” BORN, *supra* note 52, at 935. It is difficult to understand what Born means by “the procedural conduct of the dispute resolution mechanism.” Is he referring to the procedure of the arbitration? The notion of a third category “procedural requirement” is a much disputable proposition. “It is important to distinguish between issues relating to jurisdiction and admissibility from those relating to the procedure of the arbitration.” DOUGLAS, *supra* note 2, at 77. Douglas is careful to make this

further distinguishes between a “condition precedent to arbitration in an already-binding arbitration contract” and “a substantive condition on Argentina’s consent to arbitration,” and further holds that because “[t]he Treaty nowhere says that the provision is to operate as a substantive condition on the formation of the arbitration contract,” the operation of the provision can be “outweighed” by policy considerations.<sup>79</sup> In other words, in reviewing an arbitral tribunal’s decision on “jurisdiction,”<sup>80</sup> the Supreme Court holds that the tribunal decided a “claims-processing rule,” “a claims processing requirement” that “is not a requirement that affects the arbitration contract’s validity or scope, [and] we [the Court] presume that the parties (even if they are sovereigns) intended to give that authority to the arbitrators.”<sup>81</sup> The Court, therefore, holds that the tribunal apparently decided an issue of admissibility—to which the Court must afford considerable deference—even though the Court does not use this word.<sup>82</sup> In this way, the Court perpetuates more confusion.

The Court’s dance between presumptions and its discussion of a procedural rule of arbitrability accords with Paulsson’s reading of *First Options of Chicago v. Kaplan* (1995):<sup>83</sup>

Instead of seeing that this [case] was an issue of *jurisdiction*, and that the issue of whether a party has subjected itself to the authority of an arbitral tribunal can never be finally decided by the relevant arbitrator(s), the Supreme Court explained that this was an issue of *arbitrability*, and that the answer depended on the ‘fairly simple’ question: ‘Did the parties agree to submit the arbitrability question itself to arbitration?’<sup>84</sup>

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distinction because “[t]he procedural rules governing the arbitration do not regulate the existence, scope and exercise of adjudicative power by the arbitral tribunal but rather issues such as the modalities for constituting the tribunal, the taking of evidence, the conduct of hearings, and so on.” *Id.* Born characterizes the decision in the United States Court of Appeals for the District of Columbia Circuit this way: “The court held that the BIT’s pre-arbitration litigation requirement was a jurisdictional requirement (distinguishable from other procedural requirements regarding the conduct of the arbitral process itself).” BORN, *supra* note 52, at 939.

79. BG Grp., 572 U.S. at 40–43.

80. As related above, the Court characterized the tribunal’s decision to bypass the local litigation requirement as a jurisdictional decision. *Id.* at 29–32. The Court does not categorize its decision as pertaining to jurisdiction or admissibility. It uses the language of arbitrability and procedural requirements, perpetuating further confusion.

81. *Id.* at 41–44.

82. Nevertheless, the Court went on to review the arbitrators’ decision.

83. *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995).

84. Paulsson, *supra* note 1, at 611–12.

Paulsson states, “[i]t may be ‘fairly simple’ to imagine that parties might address *arbitrability* explicitly . . . [y]et it is something so rare or accidental in international practice that one cannot accept that the possibility of such a stipulation should serve as a reasonable basis on which to expect parties to regulate their conduct.”

Flash ahead to 2014 and the decision in *BG v. Argentina*, and the Supreme Court is still using the same logic it applied in *First Options*—citing *First Options*—but now applying that logic to the international investment space.<sup>85</sup> As in *First Options*, the Court sidestepped or departed from its original question: the question was whether the arbitral tribunal’s decision on the local litigation requirement was reviewable and *the correct one*—and, in effect, if this decision invalidated the award. In its discussion, the Court reframed the issue, as whether the parties agreed to submit the arbitrability question to arbitration when a “pre-arbitration procedural requirement” is at issue;<sup>86</sup> a question as reviewed, that never addressed the specific issue of whether the local litigation requirement concerned the jurisdictional authority of the tribunal or the admissibility of BG’s claims.<sup>87</sup>

## 2. Analysis of Sources: International Arbitration Treatises

Although the decision in *BG v. Argentina* may be criticized “for not being in line with international law,”<sup>88</sup> it is important to consider the “international arbitration treatises” the Court relies on for its

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85. The Supreme Court’s rule is unworkable: IIAs addressed in arbitration, whether signed pre- or post-1995 and *First Options* have not and will not be amended to make the intentions of the parties explicit as to “conditions to consent to arbitrate.” Does the Supreme Court’s rule make sense?

86. Paulsson also observes that in *Howsam v. Dean Witter Reynolds, Inc.*, 587 U.S. 79 (2002) and *Green Tree Financial Corp. v. Bazzle*, 529 U.S. 444 (2003) two cases after *First Options* on arbitrability, the Court avoided invoking admissibility. Paulsson, *supra* note 1, at 612 (“[i]nstead of purporting to read the minds of parties who assuredly had not been thinking about this matter at all, it would have been better to say that this was about admissibility”).

87. That confusion is further perpetuated in scholarly articles on *BG v. Argentina*. “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.” Rosenfeld, *supra* note 1, at 139. “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.” *Id.*

88. *Id.* at 152. *But see* Brief of Amici Curiae Professors and Practitioners of Arbitration Law in Support of Reversal at 12–16, *BG Grp. v. Republic of Argentina*, 572 U.S. 25 (2014) (No. 12-138) (explaining that to assume the parties intended *de novo* review of the provision by a court “is likely to set United States courts on a collision course with the international regime embodied in thousands of [bilateral investment treaties]”).

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propositions.<sup>89</sup> In the majority's view, "[t]he treaties ... primarily describe how an offer to arbitrate in an investment treaty can be accepted, such as through an investor's filing of a notice of arbitration."<sup>90</sup>

Indeed, while "[m]ost investor-State dispute settlement clauses in BITs offer unequivocal consent to arbitration," "[n]ot all references to investor-State arbitration in BITs constitute binding offers of consent by the host State."<sup>91</sup> Moreover, "[n]early all consent clauses in BITs provide for certain procedures that must be adhered to," and "[s]ome consent clauses in BITs provide for a mandatory attempt at settling the dispute in the host State's domestic courts for a certain period of time," as in the case of the Argentina-United Kingdom BIT.<sup>92</sup> A treatise by Christoph Schreuer, which is cited by the Court, uses the example of the Argentina-Germany BIT, a BIT similar to the Argentina-United Kingdom BIT:

[T]he Argentina-Germany BIT provides in Article 10(2) that any investment dispute shall first be submitted to the host State's competent tribunals. The provision continues:

(3) The dispute may be submitted to an international arbitration tribunal in any of the following circumstances:

(a) at the request of one of the parties to the dispute if no decision on the merits of the claim has been rendered after the expiration of a period of eighteen months from the date in which the court proceedings referred to in para. 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties persist.

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89. *BG Grp.*, 572 U.S. at 38–43, 54–55.

90. *Id.* at 42. See also CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH RUBINS, & BORZU SABAH, *INVESTOR-STATE ARBITRATION* 221 (2008) ("The investor's reciprocal consent is normally given through the filing of a request for arbitration or other document initiating the dispute settlement process."). However, this does not address the host state's consent. The Court cites to the following sources: SALACUSE, *THE LAW OF INVESTMENT TREATIES* 381 (2010); Christoph Schreuer, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INT'L INV. L.* 830, 836–37 (P. Muchlinski, F. Ortino, & C. Schreuer eds., 2008); Dugan, *Investor-State Arbitration*, at 221–22.

91. Christoph Schreuer, *Part III Procedural Issues, Ch. 21 Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INT'L INV. L.* 836 (Peter T. Muchlinski, Federico Ortino, Christoph Schreuer eds., 2008).

92. *Id.* at 843, 847.

A requirement of this kind as a condition for consent to arbitration creates a considerable burden to the party seeking arbitration with little chance of advancing the settlement of the dispute. A substantive decision by the domestic courts in a complex investment dispute is unlikely within 18 months, certainly if one includes the possibility of appeals. Even if such a decision should have been rendered, the dispute is likely to persist if the investor is dissatisfied with the decision's outcome. Therefore, arbitration remains an option after the expiry of the period of 18 months.<sup>93</sup>

Therefore, the treatise makes clear that even though the local litigation requirement creates a considerable burden to arbitration, that burden is a condition to consent and jurisdictional.<sup>94</sup> To use the language of the majority opinion of the U.S. Supreme Court on "procedural requirements": "[p]rocedural requirements [emphasis added] are potential obstacles to the effectiveness of consent to jurisdiction."<sup>95</sup> The presumption of this treatise by Christoph Schreuer, cited by the majority, is that pre-arbitration requirements, contained in a BIT, as in the Argentina-UK BIT, are jurisdictional pre-conditions or limitations.

An opposing presumption is projected by Gary Born; and the majority rests heavily on Born, in injecting into the conversation, a third category: "a purely procedural precondition to arbitrate"<sup>96</sup>—procedural preconditions that can be bypassed. The majority quotes Gary Born for the proposition that "[a] substantial body of arbitral authority from investor-state disputes concludes that compliance with procedural mechanisms in an arbitration agreement (or bilateral investment treaty) is not ordinarily a jurisdictional prerequisite."<sup>97</sup> To Chief Justice Roberts in

93. *Id.* at 847–48; *see also* Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶ 160 (Dec. 8, 2008) ("That an investor could choose at will to omit the second step [the 18-month domestic courts requirement] is simply not provided for nor even envisaged by the Argentina-Germany BIT – because (Argentina's) the Host State's 'consent' (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in the local courts.").

94. Schreuer, *supra* note 91, at 831 ("Participation in treaties plays an important role in the jurisdiction of tribunals but cannot, by itself, establish jurisdiction. Both parties must have expressed their consent.").

95. *Id.* at 866 ("These may impose periods for negotiations or mandate an attempt to settle the dispute in domestic courts for a certain period of time. Contrariwise, fork-in-the-road clauses may nullify consent to international arbitration where domestic remedies have been utilized.").

96. BG Grp., 527 U.S. at 43.

97. *Id.*



dissent, that begs the question or “simply restates the question. The whole issue is whether the local litigation requirement is a mere ‘procedural mechanism’ or instead a condition on Argentina’s consent to arbitrate.”<sup>98</sup> Born expounds further on the issue:

[A] substantial body of arbitral authority from investor-state disputes concludes that compliance with negotiation, mediation, conciliation, or similar procedural requirements in an arbitration agreement (or bilateral investment treaty) is not ordinarily a prerequisite to commencing arbitral proceedings. These decisions arise in both the context of provisions containing so-called “cooling off periods” (requiring notice and negotiations for a specified time period) and provisions requiring litigation of claims in domestic courts for a specified time period.<sup>99</sup>

There is a real worry, however, that the paradigm of international commercial arbitration will be grafted onto investment arbitration, when there are systemic and normative differences—very different stakes and conditions, including no privity—to take into account.<sup>100</sup>

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98. *Id.* at 55 (Roberts, J., dissenting). How far does the demoting label “mere procedural requirements” go? Ordinarily process cannot be had without knowing what that process is. The jettisoning of a procedural requirement is still a *process* chosen. Processes are meant not to change. If they do change, it should be through tightly controlled procedures.

99. BORN, *supra* note 52, at 923–24 n.1535–36.

100. Born’s paradigm is international commercial arbitration. “[A] substantial body of decisions by international commercial arbitral tribunals holds that violations of pre-arbitration procedural requirements (such as violations of waiting (or “cooling off”) periods or requirements to negotiate the resolution of disputes) are not violations of mandatory obligations.” *Id.* at 923. He then says, “[s]imilarly, a substantial body of arbitral authority from investor-state disputes concludes that compliance with negotiation, mediation, conciliation, or similar procedural requirements in an arbitration agreement (or bilateral investment treaty) is not ordinarily a prerequisite to commencing arbitral proceedings.” *Id.* However, first, the stakes in investment arbitration are vastly different than in international commercial arbitration; and, so too, the dispute resolution provisions and conditions to arbitration. The investment regime is a public international law regime rather than a private law system. “[T]he treat[y] in question potentially will give rise to multiple disputes over a potentially extended period of time. This is to be distinguished from legal instruments establishing one-off contractual arrangements.” U.N. Secretariat, U.N. Comm’n Int’l Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *The identification and consideration of concerns as regards investor to state dispute settlement* (Nov. 20, 2017), [https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc\\_156402.pdf](https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156402.pdf). Second, a treaty is not an ordinary contract. “The majority opinion nowhere explains when and how Argentina agreed *with BG Group* to submit to arbitration. Instead, the majority seems to assume that, in agreeing with the United Kingdom to adopt Article 8 along with the rest of the

Born also states, “[t]he question of whether the parties intended a pre-arbitration procedure to be mandatory, or, alternatively, non-mandatory, has often turned on a case-by-case assessment of the parties’ contractual language and intentions . . . ‘when a word expressing obligation [such as ‘shall’] is used in connection with amicable dispute resolution techniques, arbitrators have found that this makes the provision binding upon the parties’ and ‘compulsory, before taking jurisdiction.’”<sup>101</sup> The Born presumption is that no clause is a “condition precedent” unless explicitly distinguished as such:

To determine whether a particular provision is a ‘condition precedent’ or similar precondition to arbitration, whose breach bars access to arbitration, the language of the provision is important. Provisions that specifically provide that a particular pre-arbitration step is a ‘condition precedent’ or ‘condition’ will generally be more likely to be characterized as foreclosing access to arbitration if they are breached. Similarly, provisions with specific time periods and concrete pre-arbitration steps are more likely to be categorized as conditions precedent than mere contractual obligations [“whose breach entitle[s] a counterparty to damages, but were not conditions whose breach would preclude a party from initiating arbitration”].<sup>102</sup>

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Treaty, Argentina thereby formed an agreement with all potential U.K. investors (including BG Group) to submit all investment-related disputes to arbitration. That misunderstands Article 8 and trivializes the significance to a sovereign nation of subjecting itself to arbitration anywhere in the world, solely at the option of private parties.” *BG Grp.*, 572 U.S. at 51 (Roberts, J., dissenting). “The Court begins by deciding a different case, ‘initially treat[ing] the document before us as if it were an ordinary contract between private parties.’ *Ante*, at 1206. The ‘document before us,’ of course, is nothing of the sort. It is instead a treaty between two sovereign nations: the United Kingdom and Argentina. No investor is a party to the agreement. Having elided this rather important fact for much of its analysis[.]” *Id.* at 49. “When there is no express agreement between the host country and an investor, they must form an agreement in another way, before an obligation to arbitrate arises.” *Id.* at 50. Among other considerations, the class of follow-on potential disputants in investment arbitration makes investment arbitration materially different from international commercial arbitration. The stakes are also different because of the involvement of a sovereign as a party: “the power [granted to private adjudicators] to sit in judgment on its sovereign acts. Given these stakes, one would expect the United Kingdom and Argentina to have taken particular care in specifying the limited circumstances in which foreign investors can trigger the Treaty’s arbitration process.” *Id.* at 58. In Born’s defense, investment arbitration is an odd species: it takes a form of private dispute resolution and imports it into public international law to decide disputes between sovereigns and non-state actors.

101. BORN, *supra* note 52, at 924–26.

102. *Id.* at 929–30.

Effectively, Born perceives clauses of dispute resolution provisions in treaties as malleable conditions. He also distinguishes between “obligations to negotiate” and concrete pre-arbitration procedures. The categories appear murky: concrete pre-arbitration procedures provide specific time periods; obligations to negotiate are “by nature imperfect and uncertain obligations, whose breach has only minimal consequences on the parties’ rights” and are “not intended to result in a bar to access to arbitration.”<sup>103</sup> He concludes, therefore, “absent very explicit language” negotiation requirements should not be treated as a condition precedent to arbitration, “impos[ing] disproportionate costs and delay on the entire dispute resolution process.”<sup>104</sup>

In the 2014 edition of *International Commercial Arbitration*, Born explicitly refers to the appellate court decision vacating the award in *Republic of Argentina v. BG Group PLC*, as a controversial decision that treated a pre-arbitral procedural requirement as a jurisdictional requirement.<sup>105</sup> Born provides at least three reasons for determining this case another way: (1) it is “important that pre-arbitration negotiation and litigation requirements not limit the parties’ access to justice.”<sup>106</sup> (2) Requiring satisfaction of a mandatory condition precedent would be ‘unduly formalistic,’<sup>107</sup> it would require the arbitrators to dismiss the case and for the party to complete the necessary procedural steps before commencing the same arbitral process again.<sup>108</sup> And ultimately, (3) “[f]ragmenting resolution of procedural issues between (potentially two or more) national courts and the arbitral tribunal produces the risk of multiple proceedings, inconsistent decisions, judicial interference in the arbitral process and the like.”<sup>109</sup> These justifications and the need for a consistent rule and international harmony on the issue of “procedural local litigation requirements” will be addressed in the final section of this Article. For now, it is important to acknowledge

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103. *Id.* at 931.

104. *Id.*

105. *Id.* at 940. “[A]lthough pre-arbitration procedural requirements can conceivably be drafted to resemble jurisdictional requirements, the better view is that these requirements inherently involve aspects of the arbitral procedure and, equally important, the remedies for breach of these requirements necessarily involve procedural issues – in both cases, which are best suited for resolution by arbitral tribunals, subject to minimal judicial review, like other procedural decisions.” *Id.* at 939.

106. *Id.* at 932.

107. *Id.*

108. See Murphy, Partial Award on Jurisdiction, *supra* note 46 (for an example where a procedural jurisdictional defect was cured and the case was resubmitted to arbitration).

109. BORN, *supra* note 52, at 937.

the opposing presumptions at odds and in tension in the Supreme Court's international law sources.

### 3. Toward a Brighter-Line Test

The sources cited by the majority are split between recognizing pre-arbitration requirements as hard rules, creating a stable legal framework upon which parties can rely, and *requirements* necessitating a policy decision. This latter alternative or category of *policy decisions* is apparently to be made by arbitrators in light of system design.

Policy decisions are more difficult decisions, however, to structure. Policy decisions are unpredictable, and they produce a patchwork of different decisions—where one factor is weighted more and others are left behind. For instance, the attempt to place the parties on equal-footing. Each policy decision has its own collateral effects and consequences for the case. *Arbitral policymakers*—those who make policy decisions—tend to view threshold issues as always involving difficult policy decisions.

Perhaps the greater debate is about whether those difficult decisions should be and have already been made in advance—*ex ante*—by public international law actors, namely sovereigns, in compromissory agreements in international investment instruments; or whether these decisions should be made by party-appointed arbitrators *impromptu*, *ad hoc*, and *ex post* after a dispute has arisen and is before them. Obtaining a view, a correct view, of the system design choice, has serious practical implications for the expectations of all participants.

As stated above, Born, specifically, identifies three possible categorizations of procedural requirements.<sup>110</sup> Although jurisdiction and admissibility can be categorized as defenses, the category “procedural requirements” circumvents issues of jurisdiction:

[These] [c]laims . . . can be characterized as “jurisdictional” defenses (on the theory that the arbitration agreement is not triggered or does not provide an arbitral tribunal with authority until pre-arbitration procedural requirements have been complied with), “admissibility” defenses (on the theory that the arbitration agreement provides jurisdiction, but does not permit assertion of substantive claims until after specified

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110. Reflect for a minute on why so much process is frontloaded into investment arbitration, even more so than international commercial arbitration. As this paper maintains, this is because of the relative stakes and costs of achieving arbitral jurisdiction.

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requirements have been satisfied), or “procedural” requirements (on the theory that pre-arbitration requirements merely concern the procedural conduct of the dispute resolution mechanism, but do not affect the parties’ substantive rights to be heard).<sup>111</sup>

The argument of this Article is that the term procedural requirements is merely a slogan;<sup>112</sup> it is non-descriptive or all-descriptive; it implies that a policy judgment has already been made by the tribunal—the tribunal will assume jurisdiction. Effectively, the tribunal forgoes interpretation and admits the claim. Instead of even asking the question, whether a “requirement” impacts jurisdiction or admissibility, introducing the phrase “a mere procedural mechanism,” oblates the distinction—it presumes what it sets out to find—“whether the local litigation requirement is a mere ‘procedural mechanism.’” It presumes a “procedural requirement” can be bypassed, unless the dispute resolution mechanism explicitly provides otherwise. Does this scrutiny or test make sense?

In searching for a unitary standard, the Born presumption finds “it appropriate to presume that pre-arbitration procedural requirements are not ‘jurisdictional’” unless “the parties’ contractual language clearly and unequivocally indicates” otherwise.<sup>113</sup> The problem with the category procedural requirements is that the category subsumes jurisdiction and admissibility; the category gives the arbitrator the freedom to reach the result she wants to reach. In the Supreme Court’s verbal formulation: the categorization never considers or decides the question whether there is a duty to arbitrate. Rather, it assumes a false dichotomy between whether there is a duty to arbitrate and when the duty to arbitrate arises—where both verbal formulations can encompass the jurisdictional mandate and consent of the parties.

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111. BORN, *supra* note 52, at 936.

112. Are party agreed procedures for an arbitration normally avoidable? Generally, arbitrators should follow the agreed procedures of the parties, unless they are absolutely unworkable.

113. BORN, *supra* note 52, at 937; BG Grp., 572 U.S. 25, 47 (2014) (Sotomayor, J., concurring) (“where the waiver requirement is expressly denominated a ‘condition on consent’ in an international investment treaty, the label could well be critical in determining whether the states party to the treaty intended the condition to be reviewed by a court”); *see also* Murphy, *supra* note 46, ¶ 125 n.257 (citing KENNETH J. VANDELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 600 (2009) (citing U.S. Submission in *Pope & Talbot v. Canada*) RLA-196) ([Respondent] “note[s] that the United States considers conditions attached to arbitration to be mandatory and jurisdictional.”).

The difficulty tribunals and courts therefore encounter in assessing BITs is in treating the dispute resolution mechanism as meaning what it says.<sup>114</sup> A section in a BIT “Settlement of Investment Disputes” “implies that investors’ conditional entitlement to arbitrate lies solely” in that section and that section provides “the exclusive consent to arbitrate investment disputes.”<sup>115</sup> The Born view is less formalized; it is less practicable because “[t]he conditional language . . . would serve no purpose if there existed, somewhere in the shadows of the BIT, a parallel yet unwritten and unconditional entitlement to arbitrate.”<sup>116</sup>

Properly framed, *BG v. Argentina* enumerates principles for approaching threshold issues: (1) jurisdiction is not a waivable defense. Even if the host state does not object on the proper grounds, the tribunal has a responsibility to raise this issue on its own. (2) Threshold determinations that make implicit judgments about the merits of the underlying legal dispute, move on from the essential inquiry about the tribunal’s reach over certain cases or claims. (3) Sharply differentiated categories are needed to avoid deciding preliminary issues only on a policy determination.

*BG v. Argentina* is finally a case about jurisdiction. “[T]he only question is whether BG group formed an *arbitration* agreement with Argentina.”<sup>117</sup> A bright line test assesses whether an agreement to arbitrate was formed or consent provided between a Contracting State and a claimant that was not a party to the original investment agreement.<sup>118</sup> “Under Article 8(2) (a), the requisite consent is demonstrated by compliance with the requirement to resort to a country’s local courts.”<sup>119</sup> This is not a vague requirement or “mere formality.”<sup>120</sup> Rather, arbitral jurisdiction over the case and claims is not triggered or perfected until an investor “first litigate[s] its dispute in Argentina’s courts either to a ‘final decision’ or for 18 months, whichever comes first.”<sup>121</sup>

114. *BG Grp.*, 572 U.S. at 56–57 (Roberts, J., dissenting); Rosenfeld, *supra* note 1, at 142–43 (“Many arbitral tribunals appear to have encountered difficulties in assessing conditions to consent to arbitrate.”); *Dede v. Romania*, ICSID Case No. ARB/10/22, Award, ¶¶ 219, 225 (Sept. 5, 2013 (dismissing a claim as a result of investors’ non-compliance with domestic litigation requirement) (“The BIT clearly says that the investor is entitled to submit the investment dispute to arbitration only after compliance with these preconditions.”)).

115. *Id.* ¶¶ 217, 221.

116. *Id.* ¶ 220.

117. *BG Grp.*, 572 U.S. at 54 n.1 (Roberts, J., dissenting).

118. *Id.* at 61–62. “The majority opinion nowhere explains when and how Argentina agreed with *BG Group* to submit to arbitration.” *Id.* at 51.

119. *Id.* at 53.

120. *Id.* at 62.

121. *Id.* at 54. Unlike the majority, Chief Justice Robert’s takes the further step of citing to international arbitration awards interpreting local litigation requirements: “another arbitral

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Within this framework, the question then becomes whether the arbitral tribunal should have dismissed this case for lack of jurisdiction because BG did not litigate its case in Argentinian courts for eighteen months prior to commencing arbitration. For the tribunal to take jurisdiction, BG could have argued futility, that “there is no reasonable possibility of an effective remedy before courts of the respondent State.”<sup>122</sup> Then, in determining its jurisdiction, the arbitral tribunal could have determined whether an available or effective legal remedy exist[ed] at the local level.<sup>123</sup> (An international arbitral tribunal would seem better

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tribunal concluded that the local litigation requirement was a condition on Argentina’s consent to arbitrate despite the absence of the sort of clear statement apparently contemplated by the majority. *See* ICS Inspection & Control Servs. Ltd. v. Argentine Republic, PCA Case No. 2010–9, Award on Jurisdiction, ¶ 262 (Feb. 10, 2012). Still other tribunals have reached the same conclusion with regard to similar litigation requirements in other Argentine bilateral investment treaties. *See* Daimler Fin. Servs. AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, ¶¶ 193, 194 (Aug. 22, 2012); Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶ 116 (Dec. 8, 2008).” *Id.* at 54-55; *see also* Daimler Award, *supra* note 70, at ¶ 192 (interpreting conditions to consent such as local litigation requirements as jurisdictional) (“One may ask whether the Tribunal may nonetheless waive the 18-month domestic courts requirement on the grounds that it is merely procedural, not jurisdictional, and therefore within the discretionary power of the Tribunal to observe or discard. Such is the case, for example, with admissibility objections before domestic courts and tribunals. However, admissibility analyses patterned on domestic court practices have no relevance for BIT-based jurisdictional decisions in the context of investor-State disputes. In the domestic context, admissibility requirements are judicially constructed rules designed to preserve the efficiency and integrity of court proceedings. They do not expand the jurisdiction of domestic courts. Rather, they serve to streamline courts’ dockets by striking out matters which, though within the jurisdiction of the courts, are for one reason or another not appropriate for adjudication at the particular time or in the particular manner in question.”).

122. *See* DUGAN, *supra* note 90, at 350–51; Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, 2, ¶ 3.4.1, (July 2, 2013) (citing ICS, Inspection and Control Services Limited v. The Argentine Republic, UNCITRAL, PCA Case No. 2010-9, ¶ 269, (Feb. 10, 2012)) (“This is said to be a very stringent test that has been defined as requiring that the local remedy in question be ‘patently unavailable’ or ‘completely ineffective’); Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, 2, ¶ 8.1.10, (July 2, 2013) (“Claimant’s futility analysis is based principally on broad statements and third party studies/reports, to the effect that the Turkmen judiciary lacks independence, and that the Turkmen authorities would have had a particular aversion to Turkish investors. The Tribunal considers, however, that if a party to proceedings such as these is to make a futility argument, it has the onus of showing that recourse to the Contracting State’s courts would be futile or ineffective, and that requires the tendering of probative evidence that goes to the specificity of the issue in dispute. It is not enough to make generalised allegations about the insufficiency of a state’s legal system. Against the backdrop of relevant Turkmen laws introduced into the record by Respondent, such material as has been relied upon by Claimant cannot constitute sufficient evidence of unavailability or ineffectiveness.”).

123. *See* Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, 2, ¶ 7.9.1, (July 2, 2013) (“unless Claimant is excused from

situated than a local court to make this decision.) This decision on jurisdiction would be properly subject to review before a court at the place of arbitration in ad hoc arbitration or in an annulment proceeding in an ICSID arbitration. Roberts's dissent therefore suggests that the tribunal made the right decision for the wrong reasons: that a condition to consent provision in a dispute resolution mechanism of an IIA could be excused if performance became impossible because of the offeror's fault; he draws analogy under customary international law to other areas of law.<sup>124</sup>

#### IV. WITHOUT DISTINCTION: FLOUTING AND SIDESTEPPING JURISDICTION, ANALYZING TRADEOFFS

If the tribunal in *BG v. Argentina* blurred the distinction between jurisdiction and admissibility, the Supreme Court sidestepped the issue and saved the result. It crafted a rule that “minimize[d] the risk of undue interference by state courts at the enforcement or set-aside stage.”<sup>125</sup> The decision, however, did not respect the investment treaty or the “will of states,” upholding the carefully calibrated bargain or compromise inherent in the system, including the importance of jurisdiction and the respect for strict limitations on jurisdiction in investor-state dispute settlement (ISDS).<sup>126</sup>

Arguments against a rigid distinction and jurisdictional threshold usually take several forms, based on: economy, efficiency, and fairness, including access to justice, which would be better served through

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mandatory prior recourse to Respondent's courts by reason of its futility argument” the tribunal has no jurisdiction over this arbitration); Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), Exh. CL-25, art. 44, ¶ 5 (“Only those local remedies which are ‘available and effective’ have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case.”) Chief Justice Roberts cites to Dugan for the proposition that a “background principle of customary international law [is] that a foreign individual injured by a host country must ordinarily exhaust local remedies—unless doing so would be “futile.” *BG Grp.*, 572 U.S. at 64. Dugan generally speaks about exhaustion of local remedies when an exhaustion requirement is not contained in a treaty: an issue of admissibility. The doctrinal approach can equally be extended and analogized to conditions to arbitral jurisdiction. See Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, 2, ¶ 4.3.1-4.3.4, (July 2, 2013); DUGAN, *supra* note 90, 347–57.

124. See *BG Grp.*, 572 U.S. at 56–57, 64 (“It would be open to BG Group to argue” that “an implicit aspect of Argentina's unilateral offer to arbitrate” is that a “failure to comply with an essential condition of the unilateral offer ‘will not bar an action, if failure to comply with the condition is due to the offeror's own fault.’”).

125. Rosenfeld, *supra* note 1, at 152.

126. *Id.*



providing arbitrators with more discretion. And, in truth, it is argued, that “jurisdiction,” “admissibility,” or “procedure” are simply alternative paths to reaching the same result—namely, the merits.

Then, why the fuss? Most commentators who consider the issue of procedural requirements believe a functional and malleable, rather than formal approach, is normatively preferable:

It would seem that the question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution. A better way to deal with non-compliance with a waiting period may be a suspension of proceedings to allow additional time for negotiations if these appear promising.<sup>127</sup>

These commentators bypass the point of a strong emphasis on jurisdictional prerequisites. Because of the costs and stakes of investment arbitration, jurisdiction must be perfected at the preliminary stage, and the importance of the jurisdictional threshold must be re-affirmed and re-stated. The fulfillment of a condition to arbitration is important for the administration and integrity of the foreign direct investment system; gaining access to arbitral jurisdiction in the international investment regime is a consequential gateway in the whole dispute resolution process.<sup>128</sup> The conditions in dispute resolution provisions in treaties are separable from the rest of the treaty and stand-alone as conditional requirements; they form dispute resolution failures, milestones, or stages. To bypass them is to elide, rewrite, or re-trade the complicated political bargain between public international law actors.

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127. Schreuer, *supra* note 91, at 846.

128. See SALACUSE *supra* note 6, at 394 (“[i]f an arbitral tribunal ultimately judges contested measures to be illegal under the applicable treaty, the resulting award may not only require the offending government to pay the investor damages and to incur heavy arbitration costs but also to repeal or modify such measures in order to avoid similar claims from other foreign investors;” “in most investor-state, treaty-based disputes, host countries face the risk of having to pay substantial negotiated settlements or arbitration awards that might prove burdensome in relation to the country’s budget and financial resources”).

Equally, it should be recognized that the pre-arbitration process is not impractical. “Investor-state arbitration has risks and costs for both sides.”<sup>129</sup> While economy, convenience, utility, burdensomeness, delay, and access to justice are legitimate concerns in considering local litigation requirements,<sup>130</sup> these concerns could be considerably alleviated through a clear and consistent rule and coherent case law: to enforce the treaty as written and treat conditions in a dispute resolution provision as properly jurisdictional, implicating the power of a tribunal to decide a dispute that has failed other dispute resolution processes. Moreover, the biggest cost and delay that can be envisioned is the rendering of an invalid and unenforceable award based on lack of jurisdiction. The uniform application of a rule of pre-conditions to arbitration is necessary to ensure credibility and consistency in ISDS in interpreting the same or similar dispute resolution mechanisms and avoiding problems later at the enforcement stage.

Two additional points follow from this: (1) there should be greater development and definition of the jurisprudence around when jurisdictional requirements can be validly excused, or when the process to arbitration can be adjudged as frustrated or rendered futile.<sup>131</sup> (2) Insofar

129. *Id.* at 407 (stating that both parties should recognize “the hard realities of the costs, slow pace, and unpredictability of arbitration”).

130. *See* Reinisch, *supra* note 14, at 42–43 (“Of course, asking such a question touches on the preliminary issue of whether . . . international investment tribunals, have to provide access to justice in the first place. But even if it were only a policy maxim that investment tribunals should dispense justice by adjudicating investment claims that fall under their jurisdiction, difficult problems start if one accepts that there may be justifiable grounds in order to protect the integrity of the investment arbitration system. . . .”); BORN, *supra* note 52, at 931 (“[I]t is also important that pre-arbitration negotiation and litigation requirements not limit the parties’ access to justice. These provisions create the risk that parties will be prevented from pursuing presumptively meritorious claims, and obtaining presumptively justified relief, in the parties’ agreed forum for dispute resolution. Conditions restricting a party’s access to adjudicative mechanisms, in an agreed forum, are not to be favored or interpreted expansively.”). “[P]arties can be assumed to desire a single, centralized forum . . . . The more objective efficient and fair result, which the parties should be regarded as having presumptively intended, is for a single, neutral arbitral tribunal to resolve all questions regarding the procedural requirements and conduct of the parties’ dispute resolution mechanism.” *Id.* at 936; SALACUSE, *supra* note 6, at 394 (“Given the international legal nature of these disputes, unilateral attempts by a host state to deal with them through domestic laws and regulations may well be unsuccessful.”). “[L]ocal courts may lack judicial independence and might be subject to the control of the host government, depriving the investor of an impartial forum. . . . [E]ven if the judiciary is independent, it may nonetheless harbor prejudice towards foreign investors.” *Id.* at 397.

131. *See* Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan, ICSID Case No. ARB/10/1, Award, ¶ 3.4.2 (July 2, 2013) (“Respondent asserts that few investor-state

## BEFORE ENDING THE CASE

as tribunals should be interested in justice,<sup>132</sup> it should be recognized that there are practical advantages for a host state to condition a staged proceeding in an investment instrument, especially where arbitral tribunals have “fewer incentives to dismiss cases,”<sup>133</sup> and respondent states face tight turnaround times in preparing their submissions.<sup>134</sup> That is, jurisdictional requirements must not easily be overlooked or put aside. They serve practical advantages for both parties beyond honoring the public international law bargain.

The lesson of *BG v. Argentina* should be that process and its observance is important to the integrity of the international investment system. “Process requirements” should therefore not be treated simply as rules designed to make life more difficult.

### V. CONCLUSION: THE PRESUMPTION OF A JURISDICTIONAL REGIME

The local litigation requirement contained in Article 8 of the Argentina-United Kingdom BIT provided specific jurisdictional conditions on Argentina’s agreement to investment arbitration. The arbitral tribunal had a responsibility to address its jurisdiction with respect to the specific conditions in Article 8, either at the parties’ motion or on its own initiative. This decision would be open to review by a court in this ad hoc arbitration under the UNCITRAL Arbitration Rules.

Within the international investment system, getting this “most important matter of all” right, takes on added importance with the stakes and costs of investment arbitration.<sup>135</sup> This is because of the political nature and public international law context of investment disputes and the nature of the international investment system as a regime, in which actors, constituents, stakeholders, lawyers, and

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decisions provide guidance for the application of the futility test to the mandatory requirement to submit a dispute to the local courts of the host state.”).

132. Reinisch, *supra* note 14, at 43; U.N. Secretariat, U.N. Comm’n Int’l Trade Law, *supra* note 100.

133. Rosenfeld, *supra* note 1, at 150; *see also* SALACUSE, *supra* note 6, at 394 (“The political nature of these disputes influences the strategies of both the governments and investors involved in seeking to resolve them.”).

134. Note by the Secretariat, UN Comm’n Int’l Trade Law, Working Group III (Investor-State Dispute Settlement Reform), *Possible reform of Investor-State Dispute Settlement (ISDS), Comments by the Gov’t of Thailand* (Apr. 11, 2018), <https://undocs.org/en/A/CN.9/WG.III/WP.147>.

135. *BG Grp.*, 572 U.S. at 62 (Roberts, J., dissenting) (“[O]ur precedents presume that parties do not submit to arbitration the most important matter of all: whether they are subject to an agreement to arbitrate in the first place.”) “Because an arbitrator’s authority depends on the consent of the parties, the arbitrator should not as a rule be able to decide for himself whether the parties have in fact consented.” *Id.* at 60.

arbitrators “regularly refer to prior decisions applying one treaty in order to interpret a wholly separate treaty,” unlike international commercial arbitration.<sup>136</sup>

The tribunal’s decision and the Supreme Court’s review of the decision on the local litigation requirement at best shows an uncertainty with an effective method for getting to the merits and securing an enforceable award when dealing with situations where the respondent state denies or impedes fulfillment of a jurisdictional condition to investment arbitration. Although this issue may be common, it is not well-understood in international law, especially when denial of access to one forum is so apparently bound up with a violation of fair and equitable treatment or a customary international law claim under the merits.<sup>137</sup> Where the Supreme Court’s majority decision further complicated the ground of jurisdiction and admissibility and contributed to international disharmony, Chief Justice Roberts put a firm gloss on establishing a clear jurisprudence for those exceptional circumstances where jurisdiction can still be maintained, in spite of the lack of attainment of a condition precedent to arbitration as a result of the offeror’s fault. The decision is not a policy one or an issue of admissibility discretionarily made by an arbitrator in an ad hoc fashion; rather, a clear(er) path to a decision and the merits should exist, based on a distinct rule of jurisdiction that puts the host state on notice that gamesmanship will not be tolerated. This distinct rule of jurisdiction bolsters uniformity, consistency, and coherence and ensures the integrity and administrability of the international investment system. This Article has attempted to wrestle with the tensions at work in distinguishing between jurisdiction and admissibility. It has provided an orthodox and catholic view of jurisdiction; it has also counseled for restraint in the approach to jurisdiction.

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136. SALACUSE, *supra* note 6, at 9. “Why have states chosen this essentially private method for implementing collective choice? No doubt capital-exporting countries believed that ranting investors a private right of action for violation of regime rules would be an effective way of assuring that regime rules were respected.” *Id.* at 15.

137. Tawil, *supra* note 62, at 501 (stating that at the jurisdictional phase tribunals are “called to address objections to jurisdiction which are closely related to the merits of the case, without engaging in prejudgment”). “The jurisdictional phase should not be turned into a merits stage, thus preventing claimant from fully presenting and arguing its case.” *Id.* at 505.