Jurisdictional Review of ICSID Awards

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Reviewing jurisdictional issues is, in essence, about ensuring that consent to arbitration is both protected and respected. Consent to arbitration is essential, especially in the system of the International Centre for Settlement of Investment Disputes (ICSID), where States are involved.

This article examines how the Washington Convention, which does not have a specific ground for annulment based on jurisdictional error, deals with this issue. Is the ground of the tribunal having “manifestly exceeded its powers” appropriate for jurisdictional review? Is the Washington Convention flexible enough to allow strict jurisdictional review as it is submitted, is appropriate? This article concludes that it is, for reasons that can be found in the Convention itself and in the practice (scarce but enlightening) of ad hoc committees.

I. THE CURRENT STATUS OF JURISDICTIONAL REVIEW

A. Peculiarities of the ICSID System

There are not many decisions from ad hoc committees dealing specifically with the issue of jurisdiction. This may be due to the fact that there are not many decisions of ad hoc committees altogether, but given the importance of jurisdictional issues one would anticipate that all decisions would include a jurisdictional element. This is not so.

If we consider the five published decisions of ad hoc committees,1 only two of them actually deal with jurisdictional issues: Klöckner and Vivendi. In Amco I, the jurisdictional objection raised by Indonesia was subsequently withdrawn.2

Prior to briefly analysing these decisions, two peculiarities of the ICSID system should be noted. The first is that jurisdictional review in the ICSID system encompasses, in reality, the review of two distinct questions. According to the Washington

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2 Amco Asia, ibid., at §56.
Convention, these questions concern the following:

- the "jurisdiction" of the Centre; and
- the "competence" of the arbitral tribunal.

The former relates to the conditions set forth in Article 25 of the Washington Convention. These conditions are, on the one hand, the existence of an investment and of a legal dispute arising out of that investment and, on the other hand, nationality. As such, these conditions extend beyond the usual scope of jurisdictional issues to cover issues such as locus standi and the notion of investment under the Convention. These conditions have been analysed and commented upon in great detail.3

The latter relates to the jurisdiction of the arbitral tribunal itself, that is to the fact that the arbitral tribunal fully complied with the arbitration agreement which served as a basis of its jurisdiction, whether this arbitration agreement be found in a given contract or in an international instrument such as an investment treaty. The Convention refers to this jurisdiction as "competence", and this term shall be used henceforth to distinguish it from the jurisdiction of the Centre.

The second peculiarity of the ICSID system is that the decisions in which an arbitral tribunal recognizes that it is competent (positive decisions on jurisdiction) cannot be challenged until a decision on the merits of the case has been rendered. This is because the ICSID Secretariat takes the view that these decisions are not "final" and therefore cannot be challenged separately from the final decision on the merits. Positive decisions on jurisdiction are therefore called "decisions", not awards.

By contrast, decisions declining jurisdiction are viewed by the Secretariat as being final and can be challenged immediately.4 Accordingly, they are called "awards" by the Secretariat. Again, the position taken by the Secretariat has been widely commented upon, with authors expressing differing views.5

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4 From a purely informative point of view, it is interesting to note that in a matter unrelated to investments the German Supreme Court recently took the exact opposite view by declaring that an award declining jurisdiction cannot be challenged at all for want of a corresponding ground of annulment in the German law on arbitration, which is derived from the UNCITRAL Model Law (BGH, Case III ZB 44/01 of 6 June 2002, published in (2003) Schieds VZ (German Arbitration Journal) 39). Serious doubts have been raised, with reason, as to the correctness of this decision (see S. Kröll, Reasone against Negative Decisions on Jurisdiction, 20 Arbitration International 55 (2004), at 61–72).