Jurisdictional Review of ICSID Awards

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INTRODUCTION

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Reviewing jurisdictional issues is, in essence, about making sure that consent to arbitration is both protected and respected.

Consent to arbitration is essential, especially in the ICSID system where States are involved.

How does the ICSID Convention, which does not have a specific ground for annulment based on jurisdictional error, deal with this issue ?

Is the ground that the tribunal has *"manifestly exceeded its powers"* appropriate for jurisdictional review? Is the Washington Convention flexible enough to allow strict jurisdictional review, as is, I believe, appropriate? The short answer is yes. Reasons for 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. General considerations

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 have anticipated 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 I* and *Vivendi.* In

[1] Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and other, ICSID Case No. ARB/81/2, Decision of the first *Ad Hoc* Committee of 3 May 1985, 2 *ICSID Rep.* 95 (1994), Amco Asia Corp. and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision of the first *Ad Hoc* Committee of 16 May 1986, 1 *ICSID Rep.* 509 (1993), Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision of the *Ad Hoc* Committee of 22 December 1989, 4 *ICSID Rep.* 79 (1997), Wena Hotels Ltd v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision of the *Ad Hoc* Committee of 5

Amco I, the jurisdictional objection raised by Indonesia was subsequently withdrawn[2].

A peculiarity is that jurisdictional review in the ICSID system encompasses in reality the review of two distinct questions. According to the Washington Convention these questions are 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, conditions of nationality. These conditions extend beyond the usual scope of jurisdictional issues and cover issues such as *locus standi* and the notion of investment under the Convention. As such, these conditions have been analysed and commented upon in great detail[3].

The "competence" of the arbitral tribunal relates to the jurisdiction of the arbitral tribunal itself, i.e. 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 we shall use this term henceforth to distinguish it from the jurisdiction of the Centre.

February 2002, 41 *ILM* 933 (2002), Vivendi v. Argentine Republic, ICSID Case No. ARB/97/3, Decision of the *Ad Hoc* Committee of 3 July 2002, 41 *ILM* 1135 (2002).

[2] Amco Asia Corp. et al. v. Republic of Indonesia, Decision of the first *Ad Hoc* Committee of 16 May 1986 at §56.

[3] See, in particular, C. Schreuer, *The ICSID Convention, A Commentary*, Cambridge University Press, 2001, 82-344; A. Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States", 136 *Recueil des Cours de l'Académie de Droit International de La Haye* 331, C. B. Lamm, "Jurisdiction of the International Centre for Settlement of Investment Disputes", 6 *ICSID Rev*. 462 (1991).

B. The current thinking in relation to jurisdictional review

The position of *ad hoc* committees has changed dramatically between the first and the second round of annulment proceedings, namely between *Klöckner I* and *Vivendi*[4], and the change is welcomed.

The approach taken by the *ad hoc* Committee in *Klöckner I* was, in our view, rather inadequate. The Committee found that the arbitral Tribunal had exceeded its powers by assuming jurisdiction over a contract that contained an ICC arbitration agreement. The *ad hoc* Committee, however, refused to set aside the award because the findings of the arbitral Tribunal on jurisdiction were "tenable". It did not therefore pass, according to the *ad hoc* Committee, the test of the "manifest excess of powers"[5].

This approach is the exact opposite of the approach that should be taken in order to verify the existence of jurisdiction. One cannot be half-right or half-wrong when it comes to jurisdictional issues. Either there is jurisdiction of the Centre and competence of the arbitral tribunal, or there is not. If there is not, the award must be annulled because, for reasons explained below, the arbitral tribunal necessarily committed a manifest excess of powers in these circumstances.

By contrast, the approach taken by the *ad hoc* Committee in *Vivendi* is much more sensible. The Committee simply stated that:

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[4] These decisions have been widely commented upon. See, for commentaries on the Decision of the *Ad Hoc* Committee of 3 May 1985 in the Klöckner case, in particular: A. Broches, "Observations on the Finality of ICSID Awards", 6 *ICSID Rev.* 321 (1991), M. Reisman, "Repairing ICSID's Control System : Some Comments on Aron Broches, Observations on the Finality of ICSID Awards" 7 *ICSID Rev*. 196 (1992), A. Broches, "On the Finality of Awards : A Reply to Michael Reisman", 8 *ICSID Rev*. 92 (1993), G. Delaume, "The Finality of Arbitration Involving States: Recent Developments", 5 *Arbitration International* 21, 1989; D. Caron, "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal", 7 *ICSID Rev.* 21 (1992); A. Redfern, "ICSID – Loosing its Appeal?" 3 *Arbitration International* 98 (1987); E. Gaillard, "Chronique des Sentences CIRDI", 114 *Journal du Droit International* 184 (1987). See, for a commentary on the Decision of the *Ad Hoc* Committee of 3 July 2002, E. Gaillard, "Chronique des Sentences CIRDI", 130 *Journal du Droit International* 230 (2002).

> *"It is settled and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement of treaty and the ICSID Convention, read together, but also fails to exercise a jurisdiction which it possesses under those instruments"*.[6]

The *Vivendi* approach is therefore neutral: jurisdiction and competence are to be reviewed by *ad hoc* committees and the scope of review is not be limited. In addition, there is no suggestion under the *Vivendi* approach that an arbitral tribunal that erred on jurisdiction or competence may subsequently escape annulment because its reasoning, although wrong, is "tenable".

We believe that the *Vivendi* approach is far more consistent with what is required by article 52 of the Convention.

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[5] Klöckner v. Cameroon, ICSID Case No. ARB/81/2, Decision of the first *Ad Hoc* Committee of 3 May 1985, 2 *ICSID Rep.* 95 (1994), at §52.

[6] *Vivendi v. Argentine Republic*, Decision of the *Ad Hoc* Committee of 3 July 2002, §86.

II. JURISDICTIONAL REVIEW AND THE MANIFEST EXCESS OF POWERS TEST

A. The overriding importance of consent to arbitration

Protecting consent to arbitration is more than a legitimate concern. International law places great emphasis on the consent given by the State for jurisdictional purposes[7]. Accordingly, verifying the existence and the scope of the consent given by the State is absolutely essential, especially at a time when the legitimacy of the whole process of international arbitration is being called into question by various organisations and NGOs, and even in some cases States themselves.

The need to protect the consent given by the investor is equally important. The existence of a neutral forum to settle disputes with the host State is quite often a pre-requisite of the investment. The investor's decision to invest cannot therefore be isolated from its consent to arbitration. If the arbitration agreement is not enforced, when it should, it is legitimate for the investor to seek redress before an *ad hoc* committee.

Parties cannot be dragged into arbitrations to which they did not consent, even through a "tenable" reasoning. Consent to arbitration must therefore be protected and respected. This is exactly what is suggested by the *Vivendi* decision:

- jurisdiction must be exercised when consent to arbitration of the dispute in question is found to exist; and

[7] "To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent" (I.C.J. Case of *the Monetary Gold Removed from Rome in 1943, Rec.* 1954, p.32); "La juridiction de la Cour dépend de la volonté des Parties" (C.P.J.I., *Affaire des Droits des minorités en Haute Silésie polonaise,* Series A, No. 15, p. 22 ;

- jurisdiction must be denied in the absence of such consent.

How can the overriding importance of consent to arbitration be reconciled with the notion of "manifest excess of powers" ?

B. Consent to arbitration and "manifest excess of powers"

It has been noted repeatedly that, in the ICSID system, jurisdiction is reviewed through the ground of "manifest excess of powers". In other words, there is no autonomous ground for the review of jurisdictional issues[8].

The relationship between the jurisdictional review of ICSID awards and the ground of manifest excess of powers has already been explored. A substantial body of literature is devoted to this issue.

Certain scholars take the view that the ground is after all an adequate ground for jurisdictional review[9]. Others consider that this ground is inadequate because jurisdiction must be strictly reviewed[10]. Still others, for their part, believe that the use of a single ground to review jurisdictional issues and issues relating to the merits is unfortunate: the degree of control would be too strict for issues relating to the merits and too lax for jurisdictional issues[11].

The History of the Convention appears inconclusive on the issue of the extent of control of jurisdictional issues[12]. In any event, we do not believe that,

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8 See *e.g.* art. 190 al. 2 of the Swiss LDIP : "La sentence est définitive dès sa communication. Elle ne peut être attaquée que : (…) b. Lorsque le tribunal s'est déclaré à tort compétent ou incompétent;

9 See, A. Broches, "Observations on the Finality of ICSID Awards", 6 *ICSID Rev.* 321 (1991), 358-360; C. Schreuer, *The ICSID Convention, A Commentary*, 935, 936-943; P. Kahn, "Le contrôle des sentences arbitrales rendues par un Tribunal CIRDI", *La juridiction internationale permanente*, Société française de droit international, Colloque de Lyon, p. 363 (1986).

10 See D. Thompson, "The Klöckner v. Cameroon Appeal, A Note on Jurisdiction", 3 *Journal of International Arbitration* 93 (1986); B. Pirrwitz, "Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States", 23 *Texas International Law Journal* 73 (1988)).

11 See E. Gaillard "C.I.R.D.I. Chronique des sentences arbitrales", 114 *Journal du Droit International* 135, 187.

12 See, *History of the ICSID Convention*, vol. II, pp. 271, 423, 850-851.

today, much can be derived from the History of the Convention in general. Some forty years after its signature, it is far preferable to focus on the Convention itself, and to determine whether this instrument is flexible enough to withstand current needs or perceptions, rather than focusing on the hypothetical (and often unclear) intentions of the drafters. This is also consistent with the Vienna Convention on the Law of Treaties that fixes only a subsidiary role to the *travaux préparatoires*[13] .

The question is therefore to what extent is the review of jurisdictional issues warranted by the ground of manifest excess of powers. The answer to this question is that this ground allows the *ad hoc* committee full control over the findings of the arbitral tribunal. The reasons for this conclusion can be summarized as follows.

The notion of "manifest excess of powers", albeit vague, carries a certain meaning. The tribunal must have exceeded its powers, and this excess must be manifest. It therefore implies that the degree with which the tribunal exceeded its powers must be appreciated by the committee reviewing its decision.

The term "manifest" means: "Clear to sight or mind" (Oxford Dictionary), "Evident, obvious, apparent, plain. Readily perceived by the eye or the understanding" (Random House Dictionary), "Obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident and self-evident. In evidence, that which is clear and requires no proof; that which is notorious" (Black's Law Dictionary).

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[13] See Article 32 of the Vienna Convention on the Law of Treaties entitled "Supplementary means of interpretation", "Recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

In French, “manifeste” means : “dont l’existence ou la nature est évidente” (Robert), “Evident, mais sous diverses nuances : (…) 2. En soi très apparent, patent, qui se révèle de lui-même et de façon très visible” (Vocabulaire Capitant).

In Spanish, “manifiesto” means “manifest, express, patent, apparent, blatant”.

Manifest means obvious, but this adjective relates only to the excess of powers itself. Establishing the existence of an excess of powers, as distinct from assessing its degree, may not be obvious. If the word “manifest” relates to degree in which the tribunal exceeded its powers, it does not necessarily imply that the error (in our case, the excess of powers) must be detected easily.

In other words, “manifest excess of powers” is not synonymous with “*prima facie* excess of powers”.

Prima facie review would mean that the excess of powers should be apparent on the face of the award, thereby limiting considerably the extent of review. If the review was a *prima facie* test only, competent drafting of the award would in all likelyhood render it immune from subsequent challenge. This cannot be so, especially when jurisdictional issues are concerned. This never was, in any event, the practice of *ad hoc* committees.

Establishing the existence of an excess of powers may well require a careful examination by the *ad hoc* committee of complex legal and factual issues, and yet the excess of powers may still be manifest. The obviousness required by the Convention must go to the extent of the error committed, not to its existence. In short, what should be reviewed under the ground of “manifest excess of powers” is the degree of correctness of the decision rendered by the arbitral tribunal as far as jurisdiction and competence are concerned.

The difficulty is that jurisdiction, unlike the merits of a dispute, is not susceptible of giving rise to half-way decisions. There is only one answer to a given jurisdictional objection, and that answer is yes or no. It cannot be "perhaps" or "I am half-competent to deal with this issue". Conversely, a jurisdictional decision on a given objection can only be right or wrong. It cannot be half-right, or half-wrong.

The question is then to reconcile this finding with the requirement of "manifest" excess of powers.

One way of looking at it is to consider that the "manifest" requirement plays no role when it comes to reviewing jurisdictional decisions, precisely because it entails a review of the degree of correctness of the decision reached and that there is no such degree with jurisdictional decisions. They are either right or wrong.

Another way of looking at the same issue is to consider that the "manifest" requirement is always satisfied when a decision is wrong on jurisdiction.

Going back to the principle set forth in *Vivendi*, we shall first consider the situation in which an arbitral tribunal wrongly assumes jurisdiction. It is quite clear that this situation always constitutes a manifest excess of powers. In this case, not only does the arbitral tribunal exceed its powers, but it does not have any powers at all[14]. In other words, the arbitral tribunal is deprived of what certain French scholars refer to as "the power of judging" ("*pouvoir de juger*")[15].

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[14] See C. Schreuer, *The ICSID Convention, A Commentary*, 937: "Where there is no jurisdiction, the term 'absence of powers' would be more appropriate".

[15] See, T. Clay, *L'arbitre*, Dalloz, 2001.

It is not difficult, in this case, to discern that the error committed by an arbitral tribunal that wrongly assumes jurisdiction is necessarily manifest. What could be more manifestly wrong than assuming jurisdiction with a complete absence of power allowing the arbitral tribunal to do so?

The same applies where an arbitral Tribunal refuses to exercise jurisdiction that it possesses. In this case, both parties have consented to arbitration for the dispute in question and are nevertheless deprived of the neutral forum to which they agreed. The expectation of the parties must be respected. In other words, when consent to arbitration is found to exist there is no way out for the arbitral tribunal. Refusing to give effect to this consent amounts to modifying the agreement between the parties. It amounts to denying them what they wanted. Wrongly refusing to exercise jurisdiction when it exists would necessarily entail committing a manifest excess of powers.

Whatever the solution adopted ("manifest" plays no role, or the excess of powers is always "manifest"), the result is the same: jurisdiction is strictly and fully reviewed. This is highly desirable because ultimately it is the consent to arbitration which is at issue.

I have a preference for the positive approach, i.e. the excess of powers is always "manifest" with jurisdictional issues, because it gives effect to the wording of the Convention. It illustrates, in reality, the inherent flexibility of the Washington Convention that allows -- and warrants -- strict review for issues that should be strictly reviewed, such as jurisdiction, and less strict review for issues relating to the merits.