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Manifest Excess of Powers as A Ground for Annulment Under the ICSID Convention

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List of Abbreviation

**Annulment Decision:** A decision of an Ad hoc Committee rendered in accordance with the Article 52 of the ICSID Convention to affirm or annul the arbitral award rendered by a Tribunal

**Art.:** Article

**BIT:** Bilateral Investment Treaty

**Center:** The International Center for Settlement of Investment Disputes

**Committee(s)/ Ad hoc Committee(s):** (An) Ad hoc Committee(s) composed of three persons, constituted in accordance with Article 52/3 of the ICSID Convention

**ICSID:** The International Center for Settlement of Investment Disputes

**ICSID award/ Award:** The arbitral tribunals decision rendered in accordance with the Article 48 of the ICSID Convention

**ICSID Convention/ Convention:** The Convention on Settlement of Investment Disputes Between States and National of Other States, finalized on March 18, 1965, entered into force on October 14, 1966.

**ILC:** International Law Commission

**ILC Articles:** Draft articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001

**ILC Draft:** The 1953 United Nations International Law Commission Draft Convention on Arbitral Procedure

**p.:** page

**para: paragraph**

**Parties:** The parties of a legal dispute arising directly out of an investment, a Contracting State and a national of another Contracting State to the ICSID Convention who have already given to the dispute consent in writing to submit to the Center

**Tribunal(s):** (An) arbitral tribunal(s) constituted in accordance with the Article 37 of the ICSID Convention, adjudicating the investment dispute within the terms of the ICSID Convention

Introduction

This thesis is about, one of most invoked grounds for the annulment of ICSID awards, “the manifest excess of powers”. The first part of this thesis analyzes annulment process under the ICSID Convention. Within the first part, the self-contained nature of the ICSID Convention, the drafting history of the annulment provisions of the ICSID Convention, the differences between appeal and annulment and the scope of ad hoc committees’ review will be elaborated. The second part of this thesis is about “the manifest excess of powers” as an annulment ground. Within this second part, the meaning of manifest, the methodologies used by the Committees to decide on manifest excess of powers, and how the Committees interpret the excess of powers in terms of jurisdiction and the application of the proper law will be elaborated.

A. The Purpose, the Research Questions and the Delimitation

This dissertation aims to answer two main questions in terms of the interpretation of the Art. 52/1/b of the ICSID Convention. The first one is “Is non application of a specific provision a failure to apply the proper law?”, put another words “Should the Committees interpret failure to apply some specific provisions within the proper law as failure to apply proper law in total?” or “If the Tribunal fails to apply some specific provisions within the proper law, could it be deemed as an excess of power in terms of the ICSID Convention?”. The second question is “How should the Committees apply the manifest requirement while deciding on jurisdictional issues on excess of mandate claims?”. Put differently, “How excess of mandate can be manifest on jurisdictional matters?”. While answering these two main questions, crucial debates on “a de novo trial under ICSID Convention for judicial matters” and “applicable law in terms of the Art. 42/1 of the ICSID Convention” will be discussed.

Art. 25, Art. 41 and Art. 42/1 of the ICSID Convention will be analyzed in relation with the excess of mandate in a limited scope. More detailed and broad analysis on the issue of applicable law and Art. 25 are out of the scope of the legal purpose of this dissertation.

This thesis does not aim to criticize de lege lata or to propose a de lege frenda. The proposes to amend the ICSID system are will not be discussed within this dissertation. The legal object of this thesis is to interpret the related provisions of the ICSID Convention in terms of the pertinent rules of interpretation and analyze
and criticize the Annulment Decisions and to answer the abovementioned two hotly debated questions of the topic.

B. Methodology and Sources

The thesis is mainly divided into three parts; the identification of the most controversial issues of the manifest excess of power on the Annulment Decisions and scholarly opinions, the presentation of the related provisions of the ICSID Convention and the history of the Convention to decide on the aim and purpose of these provisions, and the analysis of the Annulment Decisions on this issues based on the related provisions of the ICSID Convention in terms of the pertinent rules of interpretation. The Vienna Convention and the ICSID Convention are the main sources of this thesis as well as a certain number of Annulment Decisions and scholarly opinions.

This thesis will analyze whether the Committees have interpreted Art. 52/1/b in accordance with the pertinent rules of interpretation and the object and purpose of the ICSID Convention looking into the reasoning and the findings of the Committees in cases where the manifest excess of powers invoked by the Parties. The analysis will be formed through interpreting the provisions of the ICSID Convention in accordance with the rules laid down in Art. 31 of the Vienna Convention which sets out four interpretative criteria: good faith, the ordinary meaning of the treaty’s terms and the context of such terms, the object and purpose of the treaty. Scholarly opinions will also be referred to in order to formulate the criteria. The similarities and differences between the Annulment Decisions will be elaborated and the approaches of the Committees will be criticized based on the interpretation of the related provisions of the ICSID Convention.

The main methodology, which is used in this thesis, is the teleological method to discuss the ordinary meaning, purpose, and intention of the related ICSID provisions. The legal-deductive method is also used to supplement. Firstly, the annulment procedure within ICSID Convention and its drafting history is discussed in a more general way. The principal of finality, the differences between annulment and appeal and the scope of the Committees’ mandate to review will be analyzed. Later, the Art. 52/1/b will be analyzed deeply in more specific terms.

I. Annulment Under the ICSID Convention

The annulment mechanism is a unique element of the ICSID system which provides a competitive advantage to the arbitration procedures under ICSID system
over other investor state arbitral forums by removing the possibility of judicial review by domestic courts. In non ICSID arbitrations, each rendered award is subject to the control of, or revision by, the domestic courts at the seat of the arbitration. The ICSID awards are subject to review only by an ad hoc Committee established under the ICSID Convention with a limited scope which is prescribed within the Convention itself.

The annulment mechanism under the ICSID Convention is a limited review mechanism based on specified grounds and was not designed to function as an appeal system, as discussed below, there is no review on merits of the Awards. Art. 52 of the ICSID Convention stipulates the annulment process and lists exhaustively the grounds for annulment. An arbitral award can be annulled only based on these listed grounds. Ad hoc committees will only address the allegations raised by the Parties corresponding to these grounds which are listed exhaustively, any other ground will not be considered. The allegations which do not refer to the any of the listed grounds for annulment, will be rejected without any analysis.

A. The Self-Contained Nature of the Annulment Mechanism

The ICSID arbitration system is defined as an autonomous, delocalized, and self-contained system. Art. 53 of the ICSID Convention stipulates that “The Award shall be binding on the Parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”. Unlike any other international arbitral awards, ICSID awards cannot be challenged before national courts. Local courts in any particular state have no role in the ICSID proceeding and post award remedies, no local court is empowered to review or invalidate an ICSID award in any respect. So, ICSID awards are not anchored by domestic arbitration acts. The ICSID Convention states its own self contained system for the review process. This is the hallmark and one of the most characteristic features of the ICSID system.

The one and only review procedure for an ICSID award is stipulated in Art. 52 of the ICSID Convention. In accordance with this article, either Party may request

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1 Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Annulment Decision, 1 February 2016, para 163.
2 Art. 50 of the ICSID Convention stipulates the interpretation of the Award in terms of meaning or scope; Art. 51 of the ICSID Convention stipulates the revision of the Award in case of discovery of some fact which may affect the Award. Both post award remedies cannot be deemed as a real review process for the Award.
annulment of the Award by application in writing addressed to the Secretary-General within 120 days after the date on which the Award was rendered. The grounds for annulment are stipulated, in numerous clauses, as follows:

a. the Tribunal was not properly constituted,
b. the Tribunal has manifestly exceeded its powers,
c. there was a corruption on the part of a member of the Tribunal,
d. there has been a serious departure from a fundamental rule of procedure, and/or
e. the Award has failed to state the reasons on which it is based.

The annulment request has to be based on one or more of the abovementioned grounds, there is no other reason for annulment. The most frequently invoked grounds for annulment are the Tribunal had manifestly exceeded its powers, there had been a serious departure from a fundamental rule of procedure, and the Award had failed to state the reasons on which it was based. These grounds for annulment are usually invoked cumulatively by the Parties to support their annulment claim.  

B. The Drafting History of the Annulment Provisions

After five years of negotiation and consultation among government officials and international legal experts, the ICSID Convention is approved by the Executive Directors of the World Bank in 1965. The final text was approved by the Executive Directors on March 18, 1965 and came into force on October 14, 1966.

The earliest draft of the ICSID Convention was an internal World Bank document entitled “Working Paper in the Form of a Draft Convention” of June 5, 1962 which had not foreseen any provision for annulment. At later stage, a text on annulment identical to the 1953 ILC Draft was included in the Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Section 13/1 of this preliminary draft stated that “The validity of an award may be challenged by either party on one or more of the following grounds:

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3 Except when annulment is requested on the ground of corruption. In that case, such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.
5 Ibid., p. 2.
(a) that the Tribunal has exceeded its powers;
(b) that there was corruption on the part of a member of the Tribunal; or
(c) that there has been a serious departure from a fundamental rule of

procedure, including failure to state the reasons for the award” and the purpose
of this section explained as “As a general rule the award of the Tribunal is final,
and there is no provision for appeal... where there has been some violation of the
fundamental principles of law governing the Tribunal’s proceedings such as are
listed in Section 13, the aggrieved party may apply to the Chairman [of the
Administrative Council of ICSID] for a declaration that the award is invalid. Under
that section the Chairman is required to refer the matter to a Committee of three
persons which shall be competent to declare the nullity of the award. It may be
noted that this is not a procedure by way of appeal requiring consideration of the
merits of the case, but one that merely calls for an affirmative or negative ruling
based upon one or other of the three grounds listed in Section6.

Following that, the specific grounds for annulment had been discussed at the
series of Regional Consultative Meetings. During the first set of Regional
Consultative Meetings, legal experts from various countries made suggestions for
changes to this preliminary draft.7 A concern was raised by a legal expert from
Germany which remarked that annulment posed a risk of frustrating awards and
therefore the annulment provision should be made more restrictive. To that effect,
this expert proposed a requirement that an excess of powers be manifest to warrant
annulment.8 Other suggestions were to add the words a serious misapplication of
the law or including the failure to apply the proper law to the ground concerning
the excess of powers, but these were defeated by a vote of 17 to 8.9

Following the meetings of the Legal Committee, a Revised Draft Convention
on the Settlement of Investment Disputes was prepared in December, 1964. Art.
52/1 of the Revised Draft stated that “Either Party may request annulment of the
Award by an application in writing addressed to the Secretary-General on one or

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6 ICSID, History of the ICSID Convention: Documents Concerning the Origin and the
Formulation of the Convention on the Settlement of Investment Disputes between States
7 Ibid., p. 236-584.
8 Ibid. p. 303.
9 Ibid. p. 851, 853, 854.
more of the following grounds:

(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the Award has failed to state the reasons on which it is based”.

The Art. 52 of the Revised Draft remained the same and became the text of the ICSID Convention. As discussed in the preliminary work of the ICSID Convention, excess of mandate can be an annulment ground only if it is a manifest one. The other important point is, a misapplication of the law cannot be a ground for annulment itself even if it is a serious one.

C. Finality versus Correctness

Finality and correctness are competing principles in all legal review processes. Finality serves the purpose of efficiency in terms of a rapid and economical settlement of disputes. On the other hand, correctness may take additional time and effort and include several layers of control. It is generally accepted that in international arbitration the principal of finality is, typically, given more weight than the principle of correctness. The desire to see that the dispute is settled is often regarded as more important than the substantive correctness of the decision.

The grounds for annulment in the ICSID Convention derive from the 1953 United Nations International Law Commission Draft Convention on Arbitral Procedure which was an effort to codify existing international law on arbitral procedure in State-to-State arbitration. The ILC recognized that the finality of an award is an essential feature of arbitral practice, but also recognized that there was a need for exceptional remedies calculated to uphold the judicial character of the award as well as the will of the Parties as a source of the jurisdiction of the tribunal and sought to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice. During its deliberations, the ILC decided that no appeal against an arbitral award should be allowed, but that the validity of an

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award might be challenged within rigidly fixed limits.\textsuperscript{13}

The annulment remedy, which may be requested by either of the Parties or both Parties, under Art. 52 of the ICSID Convention is limited by the grounds expressly enumerated in paragraph 1. This limitation of the grounds for annulment aims to reinforce the finality and the stability of ICSID awards.\textsuperscript{14} The ICSID Convention does not foresee any substantive review of Awards.

In terms of the interpretation\textsuperscript{15} of the ICSID Convention, finality is the prevailing principle for the ICSID awards and annulment is an exceptional remedy. Annulment was designed purposefully to confer a limited scope of review which would safeguard against violation of the fundamental principles of law governing the proceedings.

1. Not Appeal, But Annulment

Annulment is different from appeal and the ICSID Convention does not offer any appeal mechanisms. The ICSID system is structured to assure the finality of the ICSID awards. The annulment procedure concerns only serious procedural irregularities in the decisional process rather than an appeal on merits. The limited and exceptional nature of the annulment precludes inquiry on the substance of the case. In annulment procedure, the Committees should not review the Awards in terms of the misapplication of the proper law or Tribunal’s mistakes while analyzing the facts or evidences.

The ad hoc Committees have been highlighting the distinction between annulment and appeal in their decisions and they have been stating that their functions are limited and they do not function like a court of appeal.\textsuperscript{16} As stated by

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    \item \textsuperscript{13}Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, p. 3.
    \item \textsuperscript{14}RSM Production Corporation v. Central African Republic, ICSID Case No. ARB/07/2, Annulment Decision, 20 February 2013, paras 73, 75.
    \item \textsuperscript{15}Art. 31 of the Vienna Convention, general rule of interpretation based on good faith, its history, wording, context, object and purposes.
the ad hoc Committee in *CDC Group plc v. Republic of Seychelles* case, this mechanism is a protection against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions), this principal arises from the ICSID Convention’s drafters’ desire that Awards shall be final and binding.\(^\text{17}\)

As stated on the Annulment Decision of *Compañía de Aguas Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* case, “It is agreed by all that Article 52 does not introduce an appeal facility but only a facility meant to uphold and strengthen the integrity of the ICSID process. In the Treaty, the possibility of annulment is in this connection based on specific and limited grounds\(^\text{18}\)”. The Annulment Decision of *Patrick Mitchell v. Democratic Republic of the Congo* case stated the same as follows, “No one has the slightest doubt – all the ad hoc Committees have so stated, and all authors specializing in the ICSID arbitration system agree – that an annulment proceeding is different from an appeal procedure and that it does not entail the carrying out of a substantive review of an award\(^\text{19}\)”.

2. Distinction Between Appeal and Annulment

Basically there are two main differences between appeal and annulment mechanisms. Firstly, annulment is only about the legitimacy of the process of rendering the Award and there is no review in terms of the substance. On the other hand, an appeal process concerns about both of the procedure and the substance of the Award. In other words, an annulment review only deals with the legitimacy of the process, while an appeal authority reviews the Award not only on procedural deficits, but also on its merits.

Secondly, an appeal procedure may result with the replacement of the Award with a new one while annulment just removes the original decision without replacing it. Ad hoc Committees do not have the power to render their own decisions on the merits. The Committee has only two choices which are to leave

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the decision as how it was or declare it as a void one.\textsuperscript{20} After the Award is annulled, the dispute can be resubmitted to a new Tribunal upon request of an either Party. On the other hand, an appeal authority may submit its own decision on the merits of the case.

The Ad hoc Committee on \textit{Iberdrola Energía, S.A. v. Republic of Guatemala} case referred to these two differences between appeal and annulment mechanisms by stating that “Most Committees have understood that this recourse of annulment must be clearly distinguished from an appeal. The difference between appeal and annulment is relevant in two ways. First, as to the result of the review procedure: an appeal can modify the Award under review, whereas annulment can only invalidate it (fully or partially) or assert its validity, without being able to modify its content. Second, as has been recognized (among others) by the Committees in \textit{Soufraki} and \textit{Pey Casado} in the Annulment Decisions, it is not pertinent to rule on the substantive correctness of the Award, because the annulment regime was designed to protect the integrity and not the result of ICSID arbitration proceedings; therefore, annulment refers only to the legitimacy of the decision process and not to its merit\textsuperscript{21}.”

\textbf{D. Ad Hoc Committees’ Scope of Review}

Annulment is an exceptional and narrowly circumscribed remedy. Ad hoc Committees are authorized to assess the legitimacy of the process, not the correctness of the Award. Annulment is prescribed as an extraordinary remedy for unusual and exceptional circumstances within the terms of the ICSID Convention.\textsuperscript{22} Ad hoc Committees are not courts of appeal, so they are not authorized to review the substantive correctness of the Awards, either in fact or in law. Moreover, Ad hoc Committees are not entitled to substitute the Tribunals’ determination on the merits for their own.

It is incumbent upon Ad hoc Committees to resist the temptation to rectify incorrect decisions or to annul unjust Awards. Annulment is not a remedy against an incorrect decision, so even the most evident error of facts in an Award is not

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\textsuperscript{20} Partial annulment is also possible. Art. 52/3 of the ICSID Convention stipulates that “… The Committee shall have the authority to annul the awards or any part of thereof on any of the grounds set forth in paragraph (1).”
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\textsuperscript{22} \textit{CDC v. Seychelles}, Annulment Decision, 29 June 2005, para 34.
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itself a ground for annulment.\textsuperscript{23} As stated in the Annulment Decision of \textit{TECO Guatemala Holdings, LLC v. Republic of Guatemala} “An Ad hoc Committee’s mandate is strictly circumscribed by the five grounds for annulment, listed within the ICSID Convention and an Ad hoc Committee may not, under the guise of applying them, reverse an Award on the merits\textsuperscript{24}”. The Annulment Decision of \textit{Amco Asia Corporation and others v. Republic of Indonesia} also stated that “The law applied by the Tribunal will be examined by the Ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the Ad hoc Committee is not\textsuperscript{25}.”

The Annulment Decision of the \textit{Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais} similarly stated that “It should be recalled that as a rule an application for annulment cannot serve as a substitute for an appeal against an Award and permit criticism of the merits of the judgments rightly or wrongly formulated by the Award. Nor can it be used by one party to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments\textsuperscript{26}”. The Annulment Decision of \textit{Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru} case also stated that “An ad hoc Committee, which is not an appellate body, is not called upon to substitute its own analysis of law and fact to that of the arbitral tribunal\textsuperscript{27}.”

As stated by the Ad hoc Committee on the \textit{M.C.I. Power Group, L.C. and New Turbine, Inc v. Republic of Ecuador} case, “It is an overarching principle that Ad hoc Committees are not entitled to examine the substance of the Award, but are only allowed to look at the Award in so far as the list of grounds contained in Article 52 of the Washington Convention. … Consequently, the role of an Ad hoc Committee is strictly limited and circumscribed”.

\textsuperscript{23} Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Annulment Decision, 18 January 2006, para 222.
\textsuperscript{24} TECO Guatemala Holdings, LLC v. Republic of Guatemala, ICSID Case No. ARB/10/23, (hereinafter “TECO v. Guatemala”), Annulment Decision, 5 April 2016, para 73.
\textsuperscript{25} Amco Asia Corporation and others v. Republic of Indonesia (hereinafter “Amco I”), ICSID Case No. ARB/81/1, Annulment Decision, 16 May 1986, para 23.
\textsuperscript{26} Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, (hereinafter “Klöckner I”), Annulment Decision, 3 May 1985, para 83.
Committee is a limited one, restricted to assessing the legitimacy of the Award and not its correctness. The Committee cannot for example substitute its determination on the merits for that of the Tribunal. The Ad hoc Committee in *Alapli Elektrik B.V. v. Republic of Turkey* case also emphasized that “The annulment procedure is not a mechanism to correct alleged errors of fact or law that a Tribunal may have committed, but a limited remedy meant to ensure the fundamental fairness of the arbitration proceeding.”

1. Three Generations of Annulment Decisions

Although it is easy to draw the line between appeal and annulment in principle by stating the differences between two systems of review, in practice Ad hoc Committees have been struggling to find their proper scope of review stipulated in the ICSID Convention. Commentators accept three generations of Annulment Decisions based on the Ad hoc Committees’ approaches to their scope of review.

The first generation of Annulment Decisions was looking actively into the merits and substance of the Awards, thereby blurred the line between annulment and appeal. The Annulment Decisions of *Klöckner I* and *Amco I* were criticized severely. Because these two Ad hoc Committees had exceeded their scope of mandate by reexaming the merits of the cases, thereby transgressing the line between annulment and appeal. It is argued that in these two cases, although the Committees annulled the Awards, there was no ground for annulment in terms of ICSID Convention. The Tribunals did not fail to apply the proper law, they only misapplied the law, which is not a ground for annulment under Art. 52/1 of the ICSID Convention.

In the second generation of Annulment Decisions, the Ad hoc Committees had pulled back on the appeal-like review seen in *Klöckner I* and *Amco I*, and

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30 This categorization was made by Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, and this is given high credits and followed by many other commentators.
preferred to take a more restrained, procedurally oriented approach to reviewing the Awards.\footnote{Christoph Schreuer, \textit{Three Generations of ICSID Annulment Proceedings}, p.18.} In the third generation\footnote{Ibid.}, Ad hoc Committees abandoned the early activism. It is argued that the ICSID annulment process found its proper balance with the third generation.\footnote{Benjamin M. Aronson, “A New Framework for ICSID Annulment Jurisprudence: Rethinking the ‘Three Generations’”, (www.icl-journel.com, vol.6, 1/2012), p. 38.}

2. Problems with the Current Approaches of Ad Hoc Committees

Although it is claimed that the Ad hoc Committees found their \textit{“proper place”}\footnote{CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, (hereinafter “\textit{CMS v. Argentina}”), Annulment Decision, 25 September 2007, para 136.} with the third generation, the following Annulment Decisions have been still criticized by commentators and it is claimed that the Ad hoc Committees are still struggling to find the proper place in terms of their mandate prescribed in ICSID Convention.

The main reason for this criticism is the frequent and lengthy obiter dicta rendered by the Committees to criticize the Awards. Although the Committees do not ultimately annul the Award based on the misapplication of the law, they may engage excessive obiter dicta and harshly criticize the Award for misapplication of the law. This extensive criticism severely weakens credibility of the Award and overall the ICSID system.\footnote{Ibid.}

In the Annulment Decision of \textit{CMS Gas Transmission Company v. Argentine Republic} case, the Committee engaged in arguably forbidden substantive review of the Award, characterizing the Award as a product of cryptically and defectively applied law.\footnote{Ibid.} This conclusion significantly weakened the legitimacy of the Award in the eyes of Argentina and other ICSID member states. The Committee, despite scrupulous criticism and a recital of its numerous legal errors, eventually did not annul the Award stating that “the Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by
the Committee. However, the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention.41

The Annulment Decision of the CMS v. Argentina case was criticized that the Committee exceeded its powers by its unwarranted obiter dicta and the Committee is responsible for the absurd result that a state was forced to pay US$130 million in damages on grounds of a flawed Award entirely delegitimized by ICSID’s own internal mechanism.42

The Committees’ obiter dicta may have been an attempt to reduce the precedential effect of the Tribunals’ allegedly flawed reasoning. However, there is no such duty or responsibility for the ad hoc Committees to provide the coherence of ICSID awards or to improve quality of ICSID awards. The Committees should strictly stay within their mandate stipulated in the ICSID Convention. Any attempt for the extension of the Committees’ mandate would weaken the ICSID system. For the sake of the credibility of the ICSID system, the Committees should refrain from excessive obiter dicta and stay within the scope of the review prescribed in the ICSID Convention.

Hence, the ICSID Convention offers an annulment remedy which is only possible under certain conditions and exceptional cases. Such remedy is designed only to protect the integrity and the legitimacy of the decision process. Ad hoc Committees are not courts of appeal and annulment is not a remedy against incorrect decisions. Art. 52 of the ICSID Convention should be interpreted in accordance with its object and purpose considering with the preparatory work of the Convention, in accordance with the pertinent rules of interpretation, neither narrowly nor broadly.43

II. The Tribunal’s Manifest Excess of Powers

Art. 52/1/b states that if a Tribunal manifestly exceeds its powers, it would be a ground for annulment. Due to the broad wording of the provision, it is really hard to interpret and apply this provision properly.

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43 Art. 31 and Art. 32 of the Vienna Convention.
A Tribunal derives its powers from the Parties’ agreement and the agreement to arbitrate delimitates the Tribunal’s powers. If the Tribunal deviates from the Parties’ agreement to arbitrate, there would be an excess of powers. In other words, excess of powers exists where the Tribunal would have gone beyond the scope of the Parties’ agreement to arbitrate or would have decided points not or improperly submitted to it. The powers of the Tribunal are not listed exhaustively within the terms of the ICSID Convention. However, it is generally accepted that, the excess of powers claims arise jurisdictional decisions or the Tribunal’s failing to apply the proper law.

To be a ground for annulment under ICSID Convention, such excess of powers has to be a manifest one. The wording of the Art. 52/1/b of the ICSID Convention makes no difference for issues related to the competence or substance of the Award. The requirement of to be ‘manifest’ applies equally both jurisdictional and substantive matters.

A. The Meaning of Manifest

An excess of powers must be manifest to be a ground for annulment under ICSID Convention. This qualifier is a distinctive feature. The wording of manifest gives a discretion to Ad hoc Committees when deciding to annul an Award based on an excess of powers allegation. The last paragraph of the Art. 52/3 of the ICSID Convention states that “the Committee shall have the authority to annul the Award” and this wording also shows that Committees have discretion to assess whether or not the defect is enough to justify the annulment.

45 In ICSID arbitration, the agreement to arbitrate is incorporated within the ICSID Convention, so the powers of the tribunal are decided by the ICSID Convention and parties to the convention agree on the arbitration by signing the ICSID Convention.
47 Put differently, as stated by of the Ad hoc Committee in Soufraki v. UAE case, “the powers of ICSID tribunals are defined by three parameters which are the jurisdictional requirements, the applicable law, and the issues raised by the parties” (Annulment Decision, 5 June 2007, para 37).
48 Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, [hereinafter “Soufraki v. UAE”], Annulment Decision, 5 June 2007, paras 118-119.
To be manifest, an excess of powers should be realized with little effort and without any deeper analysis. There is a reasonable consensus in practice and doctrine regarding the meaning of manifest as easy to perceive and/or to be obvious. The dictionary meaning of manifest is “plain”, “clear”, “obvious”, “evident”, and “easy to see”, “evident to the senses, especially to the sight, 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”. Considerable number of Committees stated that the manifest means “plain on its face”, “textually obvious”, “obvious by itself simply by reading the award”. Although some Committees and commentators argue the opposite, manifest is not related to the seriousness or gravity of the excess. It is more related to the appearance.

In *Wena v. Egypt* case, the Ad hoc Committee stated that “The excess of powers must be self-evident rather than the product of elaborate interpretations one way or another. Where the latter happens, the excess of powers is no longer manifest”. The Ad hoc Committee in *Continental Casualty Company v. Argentine Republic* case reaffirmed that the error must be “manifest, not arguable” and the Committee in *AES Summit Generation Limited v. Hungary* case, noted that such excess must be “discerned with little effort and without deeper analysis”.

Some Ad hoc Committees have interpreted the meaning of manifest as the excess should be serious or material for the outcome of the case. Supporters of

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53 Although some Committees and Commentators have different positions.
59 *Repsol v. Petroequador*, ICSID Case No. ARB/01/10, Annulment Decision, 8 January 2007, para 36.
64 Klöckner I, para. 52(e) “the [Tribunal’s] answers seem tenable and not arbitrary”; *Vivendi I*,
this position argue that manifest is related to the degree of how the Tribunal had exceeded its powers. They argue that the wording does not necessarily imply that the error must be detected easily and manifest excess of powers is not synonymous with prima facie excess of powers.65 For instance, in *Vivendi I* case, the Ad hoc Committee interpreted manifest as extent and seriousness of the excess of powers rather than its clarity.66 Supporters of this view claim that the degree of correctness of the Award should be reviewed in terms of manifest excess of powers.67

In *Soufraki v. UAE* case, the Ad hoc Committee reconciled these two views on the meaning of manifest and stated that “The Committee believes that a strict opposition between two different meanings of manifest either obvious or serious is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should be at once be textually obvious and substantively serious.”

**B. The Methodology used by the Committees to Decide on Manifest Excess of Powers**

There is no presumption either in favor of or against annulment.69 If the excess of powers is manifest, the Committee may annul the Award. Ad hoc Committees have been using, mainly, two different methodological approaches to determine whether or not to annul the Award based on the manifest excess of powers.

The first approach is the two-step analysis. In that approach, the first step is to decide that there is any excess of powers. If there is an excess of powers, the Committee then decide whether or not the excess is manifest. For instance, in *Sempra v. Argentina* case, the Committee used the two-step approach. It firstly determined the excess of powers and then, decided whether or not the excess of mandate was manifest. The Committee found that the Tribunal had failed to identify and apply the correct law, and this failure constituted an excess of powers within

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the terms of the ICSID Convention. Later, it analyzed whether the excess of powers was manifest. The Committee decided that it was obvious from a simple reading of the reasoning of the Tribunal that it did not identify or apply Article XI of the BIT as the applicable law.\textsuperscript{70}

The second one is the \textit{prima facie} test. While the Committees are using the \textit{prima facie} approach, they make a summary examination to determine that any of the excesses of power claims can be deemed as manifest, an extremely bad and noticeable.\textsuperscript{71}

In addition to these to main approaches, the third approach is to be tenable, but this approach has been criticized harshly due to its subjective nature and lack of objectivity. The Committee in \textit{Klöckner I} case was the first Committee applied tenable standard to decide whether or not the excess of powers was manifest. The Committee stated that “It is possible to have different opinions on these delicate questions, or even…to consider the Tribunal’s answers to them not very convincing or inadequate. But since the answers seem tenable and not arbitrary, they do not constitute a manifest excess of powers which alone would justify annulment under Article 52/1/b\textsuperscript{72}”. The Committee found that the Tribunal had exceeded its powers by assuming jurisdiction over a contract which contains an arbitration clause in favour of the International Chamber of Commerce arbitration. However, it refused to annul the Award because the findings of the Tribunal on jurisdiction were tenable. The Committee continued its legal reasoning as “In any case, the doubt or uncertainty that may have persisted in this regard throughout the long preceding analysis should be resolved ‘in favorem validitatis sententiae’ and lead to rejection of the alleged complaint\textsuperscript{73}” and based it decision on the \textit{in favorem validitatis sententiae}. However, there is no presumption either in favor of or against annulment of Awards in the ICSID Convention.

In \textit{Caratube International Oil Company LLP v. Republic of Kazakhstan} Case, the Committee also referred to the tenable test by stating “If the Tribunal’s legal interpretation is reasonable or tenable, even if the Committee might have taken a different view on a debatable point of law, the Award must stand – otherwise the

\textsuperscript{70} \textit{Sempra v. Argentina}, Annulment Decision, 29 June 2010, paras 213-214.


\textsuperscript{72} \textit{Klöckner I}, Annulment Decision, 3 May 1985, para 6.36.

\textsuperscript{73} \textit{Ibid.}
annulment procedure would expand into an appeal mechanism, in contravention of the clear wording of the Convention. Other example is *Helnan International Hotels A/S v. Arab Republic of Egypt* case, which states that “An Ad hoc Committee will not annul an Award if the Tribunal’s disposition is tenable, even if the Committee considers that it is incorrect as a matter of law.”

Indeed, what these two Committees have done was not a tenable test. In their reasoning, they put the distinction between annulment and appeal mechanisms and clarified the scope of the review by the Committees. The main point of these two Annulment Decisions is, the Committees cannot replace the Award with their own interpretation. However, when they refer to the “tenability” the subjectivity criticism arises. “Tenability” test leads many unanswered questions (e.g. what is tenable, on which standards, how the Committee decide whether or not it is tenable, based on which legal rules).

Whichever methods the Committees use, they should restrain themselves from undertaking significant substantive review of the Awards.

**C. Manifest Excess of Powers On Jurisdictional Matters**

Although there is no specific ground for annulment based on jurisdictional errors, it is widely accepted that manifest excess of powers is an appropriate ground for analyzing jurisdictional errors on ICSID awards. If a Tribunal decides on the merits of the case, despite the fact that it lacks of jurisdiction or it exceeds its jurisdiction that would be an excess of powers. On the other hand, if a Tribunal does not exercise its existing jurisdiction and rejects to decide on the merits of the case, that would be also an excess of powers.

Jurisdiction of an ICSID Tribunal is decided in accordance with the Art. 25 of the Convention which states that the jurisdiction of the Tribunal extends to any legal dispute arising directly out of an investment, between a contracting state and a national of another contracting state. The Parties to the dispute should consent in writing to submit the dispute to the Center. The dispute has to be a legal one and it has to arise directly from an investment. When the Parties have given their consent

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74 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Annulment Decision, 21 February 2014, para 144.

75 *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Annulment Decision, 14 June 2010, para 55.

to submit the dispute to the Center, none of the Parties may withdraw its consent unilaterally.

In general, the most disputed terms on jurisdiction in investment arbitration are the “nationality” of the investor and definition of the “investment”. The article defines the “National of another Contracting State” in the second paragraph, however “investment” is not defined within this article or any other part of the Convention. So, what investment is in terms of ICSID is a hotly debated issue among commentators and Tribunals. There are two approaches on that. First one is the subjective approach which argues that the Parties have a great extent discretion to define what investment is. They can agree on the definition of the investment in the BIT which is executed between the states and relied on the dispute, or the any other agreement between the Parties without any limitation. This subjective approach gives importance to the definitions in the BITs or any other agreement between the Parties.

The second one is the objective approach. Supporters of the objective approach argue that there are some certain criteria to define an investment within the terms of ICSID Convention. There is an objective limitation to ICSID tribunal’s jurisdiction which is distinct from the mere consent of the Parties. These criteria are known as Salini criteria which are a substantial commitment, a certain duration, an element of risk, and significant for the host state’s development. The criteria are not fully agreed on. Some Tribunals reject a requirement of the significant contribution to the host state’s development because of its subjectivity and hardness to decide in the time of the dispute.

1. Requirement of Manifest in Jurisdictional Matters

Art. 52/1/b makes no difference for the jurisdictional matters. To be a ground for annulment, the Tribunal’s failure to exercise its jurisdiction properly also has to

78 Although the ICSID Convention contains no express definition of ‘investment,’ some ICSID tribunals have nonetheless created a set of criteria for the ICSID definition of ‘investment’, independent of any definition under the pertinent investment treaty. This definition, known as the ‘Salini test’ (from Salini Construttori SpA and Italstato SpA v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52), requires a contribution by the investor; performance of the project for a certain duration; the existence of a risk for the investor; and a significant contribution to the economic development of the host state. However, recently a number of ICSID tribunals have taken a more flexible approach.
79 Ibid., p. 290.
be a manifest one. As stated by the Committee in *Duke v. Peru* case “An Ad hoc Committee must also be satisfied that the Tribunal’s excess of powers is manifest. … No distinction is to be drawn in this regard between the standard to be applied to determining an excess of power based on an alleged excess of jurisdiction and any other excess of power. In both cases, the excess must be manifest”. However, there are different opinions among commentators and Committees on how an excess of mandate can be manifest in terms of jurisdictional issues.

A few commentators maintain the view that a Tribunal ‘either has jurisdiction or it does not; there is nothing in between…any exercise of jurisdictional power without proper jurisdiction is a manifest excess of power and 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 there is no such degree with jurisdictional decisions. The jurisdictional decisions are either right or wrong. The supporters of this view argues that the term ‘manifest’ as qualifying the excess of powers is irrelevant in cases involving jurisdiction, because the Tribunal’s jurisdiction is a matter with either an affirmative or a negative outcome. They reason their view on Article 36/3 of the ICSID Convention which states that the Secretary-General must register a request for arbitration unless it finds that the dispute is ‘manifestly’ outside ICSID jurisdiction. After the ICSID Secretary had decided, it would not be reasonable for committees to merely duplicate that prima facie analysis. However, Art. 41 of the Convention states that the Tribunal shall be the judge of its own competence.

Some commentators argue that the manifest requirement is always satisfied when a decision is wrong on jurisdiction. This approach is based on the assumption that manifest is related to the severity, not the appearance.

The more credible approach is, if the jurisdiction can be decided only by interpretation, it would not be a manifest excess of power, it would be just a misapplication of rule of interpretations. This approach agrees the fact that Art. 52/1/b makes no difference for jurisdictional issues, so jurisdictional matters also has to be manifest. However, if the jurisdiction can be decided by only interpretation, then it is not a manifest excess of power. Even if it leads to a wrong

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conclusion. This viewed based on the fact that the wording of Art. 52/1/b makes makes no exception regarding jurisdictional issues and Art. 41 of the Convention states that the Tribunal shall be the judge of its own competence.

The Ad hoc Committee of the Continental Casualty Company v. Argentine case stated that “The Committee considers that erroneous application of principles of treaty interpretation is also in itself an error of law, rather than a manifest excess of powers, at least where the error relates to the substantive issue before the Tribunal for decision, rather than to an issue of the Tribunal’s jurisdiction”. The Committee in Tza Yap Shum v. Peru has the same approach and decided that a misinterpretation of the arbitration clause does not amount to a manifest excess of powers.83

To sum up, to be ground for annulment, excess of powers including jurisdictional has to be manifest in accordance with the Art. 52/1/b, and Ad hoc Committees may annul the Award only if the Tribunal’s decision on competence was manifestly wrong. If there is any question, uncertainty or doubt as to whether or not a Tribunal has jurisdiction, that question should be settled by the Tribunal itself.

2. De Novo Trial for Jurisdictional Matters within ICSID System

The courts in major jurisdictions conduct a de novo review of arbitral tribunals’ decisions on jurisdiction. The question they examine is whether the tribunal was right in assuming or refusing jurisdiction. The review can include issues of treaty interpretation (e.g. whether the requirements of investor and investment are met) or whether dispute is within the scope of consent clause, as well as other issues of fact and law that are of significance to the jurisdictional decision.

However, within ICSID system if there is an uncertainty or doubt on whether or not the Tribunal has jurisdiction, that question should be settled by the Tribunal itself in exercise of its compétence compétence prescribed in the Art. 41 of the Convention. The Tribunal shall be the judge of its own competence. The ICSID Convention does not stipulates a mechanism for de novo consideration of the jurisdictional matters or any appeal system against the Award.84

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82 Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9, Annulment Decision, 16 September 2011, para 90.
83 Tza Yap Shum v. Peru, Annulment Decision, 12 February 2015, para 80
84 Enron v. Argentine, Annulment Decision, 30 July 2010, para 69.
Articles 41, 52/1/b, and 53 of the Convention shows that the Committees shall not make a complete reassessment on judicial decisions. Pursuant to the Art. 41 of the ICSID Convention, the Tribunal shall be the judge of its own competence. Under Art. 52/1/b, the Committee can intervene only if the Tribunal has manifestly acted without jurisdiction or has not performed its existing jurisdiction.

The Committee in *Malaysian Historical Salvors Sdn Bhd v. The Government of Malaysia* case found that the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it was endowed by the terms of the BIT and the Convention and added that it “manifestly” did so for several reasons which included completely disregarding the applicable BIT’s definition of ‘investment’ and the preparatory work of the ICSID Convention. However, this Annulment Decision is criticized that the Committee reassessed the jurisdiction of the Tribunal *de novo* which contravenes the provisions of the ICSID Convention.

To sum up, the ICSID Convention clearly contains a limited inquiry in jurisdictional matters of an Award and the Committees do not have the authority to examine a Tribunal’s jurisdictional decision on a de novo basis, as if they were appellate courts or superior tribunals. The decision as to whether a dispute falls within the jurisdiction of the Tribunal is subject to the interpretation of each individual Tribunal.

3. **Excess or Lack of Jurisdiction**

If a Tribunal makes a decision on merits, although it did not have a jurisdiction or it exceeds its jurisdiction and decides on matter which are not within the scope of its mandate, there would be an excess of powers.

In *Mitchell v. Congo* case, it was argued that the Tribunal had committed a manifest excess of powers by assuming jurisdiction although the dispute had not arisen from an investment. The Ad hoc Committee decided that an essential element of the concept of investment was a contribution to the host State's economic development. So, the Committee ruled that due to the fact that there is no contribution to the host State's economic development, there is no investment within the terms of the ICSID Convention. So, the Committee annulled the Award.

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based on the manifest exceeds of powers. The Committee explained that the Tribunal's jurisdictional error could not be identified as a manifest excess of power. Yet, the combination of flaws compounded the issue such that the error was considered annulable. However, such logic runs counter to the self-evident nature of the word of manifest.

This Annulment Decision has been criticized that the Committee crossed the line between annulment and appeal as it reexamined the Tribunal's findings on facts regarding the existence of an investment. The Committee also lacked clear grounds to find a manifest excess of powers in the Tribunal's finding that it had jurisdiction over the dispute. In this case, the definition of the investment within the applicable BIT was broad enough, every kind of investment, to cover a legal consulting firm. Therefore, the Tribunal's finding of jurisdiction was not obviously incorrect and did not necessarily constitute a manifest excess of powers. While the Tribunal seems to stand for the subjective theory based on the BIT between the US and the Democratic Republic of Congo, the Committee chose the objective approach to define investment within the terms of ICSID Convention. So, the Committee stepped beyond its limited reviewing authority and replaced the Tribunal's decision with its own judgment on what should be the proper test for investment.

In Mr. Tza Yap Shum v. Republic of Peru case, Republic of Peru alleged that although the Tribunal did not have the jurisdiction, it has decided on the merits of the case. The dispute was about the interpretation of the Art. 8 of the BIT between Republic of China and Republic of Peru which stipulates the dispute settlement clause. The Republic of Peru argued that Art. 8 is clearly states that only disputes about the amount of compensation owed to an investor after a finding of wrongful

88 Ibid., para 46.
92 Mr. Tza Yap Shum v. Republic of Peru ICSID Case No. ARB/07/6 (hereinafter “Tza Yap Shum v. Peru”), Annulment Decision, 12 February 2015.
expropriation can be submitted to the ICSID arbitration.\textsuperscript{93} The Committee agreed that the jurisdiction of a Tribunal rests on the Parties’ consent and ignoring the terms of the Parties’ agreement as expressed in the arbitration clause constitutes an excess of powers.\textsuperscript{94} However, the Committee stated that a misinterpretation of the arbitration clause does not amount to a manifest excess of powers.\textsuperscript{95} The Committee referred to the Annulment Decision of the the Committee of \textit{Duke v. Peru} Case which stated that “When a Tribunal engages in interpretation of a written instrument of consent in light of the surrounding circumstances or in the context of other documents, its final construction of the meaning of the document in the light of all the evidence and submissions of the Parties is unlikely to amount to a manifest excess of powers. Interpretation, which leaves room for discussion […], is not likely to give rise to a manifest excess of powers.” The Committee found that the meaning of the phrase is not textually obvious. The Tribunal interpreted the expression “dispute involving the amount of compensation for expropriation” in the overall context of Article 8. The Tribunal went through an interpretative process mandated by the Vienna Convention. It looked at the ordinary meaning of the word “involving”, considered the context of Article 8(3) and then looked at subsidiary sources. So, an appeal body might well find fault as a matter of law with some aspects of the Tribunal’s application of the Vienna Convention, but an Ad hoc Committee does not have such mandate and cannot replace the Tribunal’s findings as a result of interpretation by its own and dismissed the request for annulment on the basis of manifest excess of powers.\textsuperscript{97}

4. Failure to Exercise an Existing Jurisdiction

Failure to exercise an existing jurisdiction is also an excess of powers. If a Tribunal rejects the case without analyzing the merits, despite the fact that it had jurisdiction, this would be an excess of powers. As stated by the Committee in \textit{Vivendi I} case, a Tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have, but also if it fails to exercise a jurisdiction which it possesses.

\begin{itemize}
\item \textsuperscript{93} Ibid., para 73, footnote 38.
\item \textsuperscript{94} Ibid., para 76.
\item \textsuperscript{95} Ibid, para 80
\item \textsuperscript{96} Duke v. Peru, Annulment Decision, 1 March 2011, para. 160
\item \textsuperscript{97} Ibid., para 98-99.
\end{itemize}
The ad hoc Committee in the *Vivendi I* case stated that “the failure by a Tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers”\(^98\). The Committee concludes that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims and exceeded its powers in the sense of Article 52/1/b.\(^99\)

In this case, there was a contractual forum selection clause for contractual claims which stipulates the exclusive jurisdiction of the local Tucumán courts. The Tribunal decided that it has jurisdiction on the BIT violations, but it found impossible that to separate potential breaches of contract claims from BIT violations without interpreting and applying the concession contract and declined to decide the BIT claims.\(^100\) The Committee annulled the Award and stated that the Tribunal had manifestly exceeded its powers by failing to decide on the Tucumán claims, even though it had found that it had jurisdiction over them.

**D. Failure to Apply the Proper Law**

Although Art. 52/1/b of the ICSID Convention does not expressly states failure to apply the proper law as an annulment ground, the applicable law is an essential element of the Parties’ agreement to arbitrate\(^101\) and failing to apply the proper law constitutes an excess of powers. As explained in the Part I of this thesis, during the ICSID Convention’s drafting process, the proposal to insert a “manifestly incorrect application of the law” as a ground for annulment was rejected.\(^102\) Misapplication of the proper law does not constitute a ground for annulment, even if it leads to an incorrect decision.

Valuation of the evidences and the facts are not a ground for annulment. Ad hoc Committees may not reexamine the facts of the case to determine whether a Tribunal erred in appreciating or evaluating the available evidence or not. The ICSID system recognizes the Tribunal’s discretion in appreciation and evaluation of evidences. If an Ad hoc Committee reexamines the facts of the present case and

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\(^98\) *Vivendi I*, Annulment Decision, 3 July 2002, para 86.

\(^99\) Ibid., paras 102-115.

\(^100\) *Vivendi I*, paras 79-81.


makes an assessment of how the Tribunal evaluated the evidence before it, it would act as an appellate body which is not a function envisaged for it by the ICSID Convention. In Duke v. Peru case, the Ad hoc Committee held that “An Ad hoc Committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the Parties”.

1. Determination of the Applicable Law

The applicable law in ICSD cases is stipulated in the Art. 42/1 of the Convention. By incorporating the ICSID Convention to their agreement to arbitrate, the Parties had already agreed that the Art. 42/1 of the ICSID Convention will be applied their dispute. In terms of this article, if the Parties agreed on a law, the Tribunal has to apply that law. In case of the Parties failed to agree on a law to apply the dispute, second paragraph of the Article states that the law of the contracting state Party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable to the dispute.

The wording of the article does not state any superiority between the law of the contracting state Party to the dispute and such rules of international law. This provision is interpreted differently by the Tribunals and the commentators.

The mainstream approach among commentators and Tribunals is to apply the law of the state Party, firstly. Then, the result of the application of that law should be tested against international law to detect any unfair outcomes. In case of inconsistency with or violation of international law the Tribunal may decide not to apply the host state’s law or part of it. International law merely sets the minimum standard against which provisions of domestic law must be checked. A Tribunal may give a decision based on the host state's domestic law, even if it finds no positive support in international law as long as the decision is not prohibited by any rule of international law.

After the Annulment Decision of the Wena v. Egypt case, the role of international law as a body of substantive rules directly accessible without initial

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103 Adem Dogan v. Turkmenistan, ICSID Case No. ARB/09/9, Annulment Decision, 15 January 2016, para. 129.
105 Christoph Schreuer, “Failure to Apply the Governing Law in International Investment Arbitration”, Austrian Review of International and European Law, p. 156.
analyze the law of the host state has started to gain more supporters.\textsuperscript{107} The Committee in \textit{Wena v. Egypt} case stated that “What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42/1 allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So, international law can be applied by itself if the appropriate rule is found in this other ambit\textsuperscript{108}. The Committee found that the rules of international law can be applied as the proper law in the same way as the law of the host State. In investment treaty arbitration, certain issues can be determined only with the application of international law. On the other hand, some questions can be resolved by domestic law. The two systems of law may apply depending on each distinct issue to be determined on the merits.\textsuperscript{109}

Hence, the applicable law will be decided by the Tribunal in accordance with the Art. 42 of the ICSID Convention. However, there are some different views on the application of this article. The Tribunals should interpret this article in accordance with the pertinent rules of interpretation. If the applicable law requires interpretation and the Tribunal showed reasonable effort to apply the proper law, the Committees should not annul the Award based on manifest excess of powers. Even if the Committee interprets the Art. 42 in a different way from the Tribunal’s.

A decision based on equity, rather than based on law, without authorization by the Parties will constitute an excess of powers. Art. 42/3 of the ICSID Convention stipulates that the Tribunal may decide on \textit{ex aequo et bono} if the Parties agree so. However, it should not be disregard that not every reference to the equity in reasoning indicates that the Tribunal disregard the proper law and decided on \textit{ex aequo et bono}.

\textbf{2. The Distinction Between Fail to Apply and Misapply the Proper Law}

Although the distinction between misapplication of the law and failed to apply the proper law is recognized in principle, it may be challenging to decide on the dividing line between non-application and misapplication of the proper law.\textsuperscript{110}

\begin{thebibliography}{9}
\bibitem{108} \textit{Wena v. Egypt}, Annulment Decision, 5 February 2002, para 941.
\end{thebibliography}
Up to date, no Committee has explicitly annulled an Award based on erroneous application of law, but several Committees have openly suggested that there may be situations where a misconstruction of a law amounts to a failure to apply the proper law and some Committees argued that a misapplication of the proper law may amount to an annulable error if the misapplication objectively constitutes a non-application.\textsuperscript{111}

The Committee in \textit{Amco II}, stated that “misapplication or incorrect interpretation of law does not normally provide a proper ground for annulment, and that it might be the case that the misapplication…of national law is of such nature or degree as to constitute objectively (regardless of the Tribunal’s actual or presumed intentions) its effective non-application\textsuperscript{112}”.

In \textit{Soufraki v. UAE} case, the Ad hoc Committee stated that “Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law. Such gross and consequential misinterpretation or misapplication of the proper law which no reasonable person (“\textit{bon père de famille}”) could accept needs to be distinguished from a simple error – or even a serious error – in the interpretation of the law which in many national jurisdictions may be the subject of ordinary appeal as distinguished from, e.g., an extraordinary writ of certiorari\textsuperscript{113}”.

In \textit{Sempra v. Argentina} case, the Ad hoc Committee stated that ”As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers\textsuperscript{114}”. In this case, Argentine invoked the necessity based on the BIT terms. The Tribunal stated that the problem in this case is that the treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity. The rule governing such questions will thus be found under customary law.\textsuperscript{115} The Tribunal also stated that it had to interpret the word necessity in the light of international customary law, particularly in Art. 25 of the Articles on State Responsibility.\textsuperscript{116} The Committee accepted that

\textsuperscript{112} \textit{Amco II}, Annulment Decision, 17 December 1992, paras 7.19-7.21
\textsuperscript{113} \textit{Soufraki v. UAE}, Annulment Decision, 5 June 2007, para 86.
\textsuperscript{114} \textit{Sempra v. Argentina}, Annulment Decision, 29 June 2010, para 164.
\textsuperscript{116} \textit{Ibid.}, para 376.
customary international law could be used to interpret the treaty provisions. However, according to the Committee, this could not lead to the conclusion that the necessity defense as defined in customary international law (and codified in Article 25 of the ILC Articles) established “the conditions for its operation” in a peremptory way for all kinds of emergency situations.\textsuperscript{117} The Committee noted that Article XI differed from Article 25. Article XI and Article 25 operated at different levels and the latter cannot be used for interpreting the former.\textsuperscript{118} So, the Committee stated that “The Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law” and this failure constitutes a manifest excess of powers within the meaning of Art. 25 of the ICSID Convention.\textsuperscript{119} The Committee ruled that a treaty regime specifically dealing with a given matter will prevail over more general rules of customary law and the Tribunal was bound to apply the treaty provisions.\textsuperscript{120}

The Committee found that the Tribunal had failed to identify and apply the correct law, and this failure constituted an excess of powers within the meaning of the ICSID Convention. After deciding the existence of an excess of powers, analyzed whether the excess of powers was manifest or not. The Committee ruled that it was obvious from a simple reading of the reasons of the Tribunal that it did not identify or apply Article XI of the BIT as the applicable law.\textsuperscript{121} In this case, the Tribunal found the proper law and applied it. However, the Ad hoc Committee reviewed how the Tribunal interpreted the applicable law and replaced the Tribunal’s decision with its own interpretation of the law. In practice, the Committee abandoned the distinction between failure to apply proper law and the misapplication of the law.

In \textit{Enron v. Argentina} case, the Ad hoc Committee blurred the line between non-application and misapplication of the proper law. The Ad hoc Committee stated that “The Committee considers it sufficiently implicit that the Tribunal’s reasoning was that the Claimants (via the Edwards Report) had identified alternative ways in which Argentina could have sought to address the economic crisis, that the Tribunal

\textsuperscript{117} \textit{Sempra v. Argentina}, Annulment Decision, 29 June 2010, para 197.
\textsuperscript{118} Ibid., para 200.
\textsuperscript{119} Ibid., para 208-209.
\textsuperscript{120} Ibid., 189.
\textsuperscript{121} Ibid., paras 208-209, 213-214.
was not satisfied that none of these alternatives would have been available to Argentina, and that the Tribunal was therefore not satisfied that the “only way” requirement in Article 25(1)(a) of the ILC Articles was satisfied. …. From this, without any further analysis, the Tribunal immediately concluded that the measures adopted by Argentina were not the “only way” and concluded that “the Tribunal did not in fact apply Article 25(1)(a) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue. In all the circumstances the Committee finds that this amounts to a failure to apply the applicable law, as ground of annulment under Article 52/1(b) of the ICSID Convention. This Annulment Decision has been highly criticized. It is argued that the Tribunal had correctly identified the applicable law and had applied it. However, the Ad hoc Committee found an excess of powers because it disagreed with the Tribunal’s interpretation.

As clarified by the Committee in the *MCI Power Group v. Ecuador* when several interpretations of a legal norm or rule were possible and the Tribunal chose one of them, no manifest excess of powers occurred. The Committees should not annul the Award based on the misinterpretation of the law and not transgress the line between annulment and appeal.

3. Failure to Apply Some Provisions in the Proper Law

The challenging question should be answered is, whether or not non-application of some provisions or one specific provision of the proper law has the same effect with the non application of the proper law in total. Missing a detail provision in the proper law is one of the most made errors. It is argued that missing a provision of the proper law should not be deemed as the non application of the proper law in total, but it can be deemed as misapplication of the law.

In *Amco I* case, the Committee found that the Tribunal had correctly identified the applicable law but it had failed to apply that law when calculating the shortfall of the amount that had been invested and its calculation of the investment faulty. So, the Committee ruled that the Tribunal failed to apply the relevant provisions of

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123 Ibid., para 377.
Indonesian law\(^{127}\) and annulled the Award based on the ground of manifest excess of powers. The Committee based its decision on the non-application of the relevant provisions for the calculation of damage to failure to apply the proper law. The Tribunal had identified the applicable law, including Indonesian law, correctly. It had even identified and analyzed the relevant legislation, the Foreign Investment Law, but it had not applied a particular provision of that law. In the ad hoc Committee’s view, the non-application of one important rule of Indonesian law dealing with the approval and registration of invested capital was enough to annul the Award.

In \textit{CDC v. Seychelles} case, the Seychelles argued that, Although the dispute is governed by English law, the Tribunal had failed to consider various English judicial decisions, legislative acts, and legal doctrines. So the Tribunal exceed its powers by non-application of the proper law. However, the Committee ruled that such errors did not warrant annulment. The Committee stated that “Regardless of our opinion of the correctness of the Tribunal’s legal analysis … our inquiry is limited to a determination of whether or not the Tribunal endeavored to apply English law … It is not the duty of this Committee to parse the meanings of English legal authorities. Rather, we are supposed to make a procedural review to determine whether or not the Tribunal honored the intent of the parties to have their dispute decided under English law. Clearly it did\(^{128}\)”.

In the Annulment Decision of \textit{Malicorp Limited v. The Arab Republic of Egypt} case, the Committee stated that “Whether the Tribunal should have subjected specific provisions of Egyptian law to closer scrutiny and analysis, or whether the Tribunal should have invoked and examined different provisions of Egyptian law, is not a question that should be dealt with in an annulment proceeding\(^{129}\)”.

The Committee in \textit{Daimler Financial Services AG v Argentine Republic} case had the same position and stated that what the Committee is supposed to do is to determine whether the Tribunal correctly identified the applicable law and endeavored to apply it.\(^{130}\) “When an allegation is made that there was a manifest excess of powers for failure to apply the applicable law, it is not the role of an ad

\(^{127}\) \textit{Amco I}, Annulment Decision, 16 May 1986, para. 95.


\(^{129}\) \textit{Malicorp Limited v. The Arab Republic of Egypt}, ICSID Case No ARB/08/18, Annulment Decision, 3 July 2013, para 160.

\(^{130}\) \textit{Daimler Financial Services AG v Argentine Republic}, ICSID Case No. ARB/05/1, Annulment Decision, 7 January 2015, para 191.
hoc Committee to verify whether the interpretation of the law by the Tribunal was correct, or whether it correctly ascertained the facts or whether it correctly appreciated the evidence. These are issues relevant to an appeal, but not for annulment proceedings in view of the limited grounds provided for under the ICSID Convention\textsuperscript{131}.

In the terms of the ICSID Convention, if an Award identifies the applicable law correctly and contains a minimum analysis of the principal legal issues under this law, it should be deemed as the Tribunal applied the applicable law (regardless of whether or not the analysis is adequate or correct).\textsuperscript{132}

**Conclusion**

The ICSID Convention is an autonomous dispute resolution mechanism and the finality is the prevailing principle. The Convention prescribes annulment process as the only available post Award remedy. The Ad hoc Committees are the only authority to review Awards and their authorization is strictly limited by the grounds which are exhaustedly listed in Art. 52/1 of the ICSID Convention. The annulment process was designed purposefully to confer a limited scope of review which would safeguard against violation of the fundamental principles of law governing the Tribunal’s proceedings. The remedy has been characterized as concerning procedural errors in the decisional process rather than an inquiry into the substance of the Award. The ICSID Convention prescribes annulment as an extraordinary remedy just for important and unusual cases. So, this exceptional remedy should maintain the exceptional character, in line with the initial intention of the drafters of the ICSID Convention. The Committees should adhere to the scope of their mandate which is prescribed by the ICSID Convention and should refrain from unpredictable decisions and analyzing the merit of cases via obiter dicta. Some Committees do not annul the Award, but render *obiter dicta* which are unnecessary length and deep analysis on merits of the Awards. These *obiter dicta* eventually harms the overall credibility of the ICSID system.

The manifest excess of powers is one of the most invoked grounds for annulment under the ICSID Convention. Failure to exercise existing jurisdiction, decide on the merits in spite of lack of jurisdiction and failure to apply the proper

\textsuperscript{131} Ibid., para 189.

law are the typical examples of the excess of powers. To be a ground for annulment, the excess of powers must be manifest. The majority of the Committees deem manifest as “obviousness” of the excess of powers in the Award. While deciding on the manifest excess of powers Committees mainly use *prima facie* or two step approaches. Whichever approach is used, the important issue for the Committees is not to review the merit of the Award like an appeal mechanism and not to substitute their own view or interpretation with the Tribunal’s.

The text of the Art. 52/1/b of the ICSID Convention does not make any difference between jurisdictional matters and substance issues. So, to annul an Award based on excess of powers in jurisdictional terms, the excess of powers has to be manifest. Although there are some different views on that, if there is an uncertainty or doubt on whether or not the Tribunal has jurisdiction, that question should be settled by the Tribunal itself. If an interpretation is required to deciding on jurisdiction, it means that it is not manifest. Although the Committee does not agree on the finding and interpretation of the Tribunal, the Committee should refrain from to replace the Tribunal’s interpretation with its own. The decision as to whether a dispute falls within the jurisdiction of the Tribunal is subject to the interpretation of each individual Tribunal.

The ICSID Convention clearly contains a limited inquiry in jurisdictional matters of an Award and the Committees do not have the authority to examine a Tribunal’s jurisdictional decision on a de novo basis, as if they were appellate courts.

The applicable law is an essential element of the Parties’ agreement to arbitrate and failing to apply the proper law constitutes an excess of powers. However an incorrect application of the law is not a ground for annulment, even if it was a gross one. Although the distinction between misapplication of the law and failed to apply the proper law is recognized in principle, it may be challenging in practice to decide the dividing line between non-application and misapplication of the proper law. Some Committees have blurred the line between these two concepts and transgressed the line between annulment and appeal.

One of the most challenging issue is whether or not a non-application of some provisions or one specific provision of the proper law has the same effect with the non application of the proper law in total. Missing some provisions in the proper law is one of the most made errors by Tribunal. Within the terms of the ICSID
Convention, if the Tribunal identifies the proper law correctly and makes a minimum analysis of the principal legal issues under this law, non application of some provisions should not be deemed as a non application of the proper law, in total. This failure may be deemed as a misapplication which is not a ground for annulment under ICSID Convention.

The ad hoc Committees should strictly stay in the scope of their limited review prescribed in the ICSID Convention. They should resist to the temptation to annul incorrect decisions based on misapplication of law or different interpretations.
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