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LAW**

# **Interpretation of manifest excess of powers with regard to jurisdictional and applicable law matters in the ICSID annulment proceedings within the meaning of Article 52(1)(b) of the ICSID Convention**

**BACHELOR THESIS**

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**DECLARATION OF HONOUR:**

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) .....  
RIGA, 2019

## **ABSTRACT**

There are a limited number of post-award remedies available, the annulment mechanism being the only plausible way to challenge the award. The annulment provision, Article 52, allows challenging the award with regard to the procedural matters only. The most frequently ground for annulment is “manifest excess of powers” as listed in the said provision. However it is not identified what errors of a Tribunal fall within this ground, as well as there is nothing about applicable law and jurisdictional matters in the provision. The thesis aims to analyze how the “manifest excess of powers” is interpreted and applied with regard to jurisdictional and applicable law matters. While some of the errors relating to applicable law and jurisdiction could constitute “manifest excess of powers”, the other do not for reasons elaborated on by the ad hoc Committees. The ad hoc Committees are often criticized for their lengthy commentary which sometimes crosses the thin borderline between appeal and annulment.

**Keywords:** Article 52(1) ICSID; annulment; manifest excess of powers; ad hoc committees.

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## SUMMARY

The current Bachelor thesis aims to analyze the interpretation and methodology of “manifest excess of powers” ground for annulment used by the *ad hoc* Committees in the ICSID annulment proceedings within the meaning of Article 52(1)(b) with relation to jurisdictional and applicable law matters. The particular ground for annulment is the most invoked one, but the Convention does not provide for any additional explanations and comments, leaving discretion of interpretation for the *ad hoc* Committees. As the line between annulment and appeal is thin and the crossing it poses a threat for the review system of ICSID, since this would undermine the whole idea of annulment, the *ad hoc* Committees are often severely criticized by jurists for giving lengthy and unwarranted elaborations usually reviewing also substantive matters.

The self-contained nature of the ICSID annulment mechanism, its drafting history, as well as the distinction between the principles of finality and correctness give the *ad hoc* Committees their scope of review. In terms of jurisdiction and applicable law the scope of review is limited to deciding whether the Tribunal has exceeded its jurisdiction or failed to apply it, and whether the Tribunal failed to apply the proper law, its provisions, misinterpreted them or failed to apply specific provision of the proper law. Failure to apply specific provision of the proper is hard to distinguish from misapplication of the proper law, and the two are not considered to be manifest excess of powers. Thus, they are not annulable errors.

The methodology used by the *ad hoc* Committees to determine manifest excess of powers varies, with *prima facie* and the two-step approach being the main, and the “tenable” approach as an alternative opinion. The latter is quite subjective. With such subjective matters the *ad hoc* Committees should act with caution, as it might eventually end up reviewing the substantial questions of the Award, which is not intended to be that way and is not allowed. As the annulment ground “manifest excess of powers” lacks further explanation, the best solution is to seek for its interpretation in the *ad hoc* Committees’ decisions and reasoning. It is also found that there are different generations of the annulment decisions, depending on their approach to the whole process of annulment.

In order to answer the following research question: how do the *ad hoc* Committees interpret manifest excess of powers with relation to jurisdictional and applicable law matters? To answer this research question, the work is divided into two main chapters.

The first chapter aims to analyze the annulment mechanism as such. The author will look at the *travaux préparatoires* of the annulment provision. Textual interpretation, as well as intention of the drafters of the Convention will be analyzed. Scholarly debate and monographs will be addressed for better analysis. It is essential to understand what, firstly, “excess of powers” is and how it can be “manifest”.

The second chapter aims to analyze several annulment decisions by the *ad hoc* Committees, focusing on their interpretation of “manifest excess of powers”. Sub-chapters subsequently deal with applicable law and jurisdictional matters that might fall under the annulment ground.

## INTRODUCTION

The author of this thesis focuses on the most used ground for annulment of ICSID awards, which is stated in Article 52(1)(b) – manifest excess of powers. The goal is to answer the research question. The work itself shall be divided into two chapters. The first chapter of the thesis will analyze the process of review under the ICSID regime – annulment process. It will introduce the reader to the self-contained nature of review system under the Convention on Settlement of Investment Disputes Between States and National of Other States (hereinafter “the Convention” or “the ICSID Convention”), referencing to *travaux préparatoires* of the relevant articles, as well as to a large extent jurisprudence. In addition to that, there is a need to provide information on difference between appeal and annulment, as well as to elaborate on the review scope of the *ad hoc* Committees to set up which matters are under their control, and what is outside of their scope. The second chapter will in particular analyze Article 52(1)(b), focusing on its wording and interpretation by the *ad hoc* Committees. On this matter, the author will firstly see the nature of the annulment ground “manifest excess of powers” and then with reference to jurisprudence discuss its meaning, as well as discuss the methodology of the *ad hoc* Committees.

### Background and Actuality of the Research

The political and economic landscape of our world has changed significantly during the 20th and the beginning of the 21st century. Various aspects and areas of international law have significantly contributed to relative peace, security and prosperity in the modern world, as they create certain framework, within which the states have to act. It is an argument that fits very well for support of liberal school of thought of international relations. International organizations such as the United Nations, World Trade Organization, World Bank Group, Council of Europe, as well as many others, have contributed to creating this international system of law.

The growing level of globalization and economic development could be connected to the previously mentioned ideas of the liberal school of thought of international relations. In addition, the author would like to mention interdependence that is created with economic cooperation and globalization. International investments play an essential part in creating such connections and contribute largely to economic development, as well as to political and economic processes within countries.

Even diplomacy nowadays to a high extent is linked with economic processes and involves a long list of activities that are aimed at cooperation within business and financial areas, improving nation’s positions to attract more investment (both for the host state and the sending state) and, subsequently, maintaining relations with the investors themselves.<sup>1</sup>

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<sup>1</sup> An argument that the author has concluded after spending several months in 2018 as an intern in the Economic Relations and Development Cooperation Department of the Ministry of Foreign Affairs of the Republic of Latvia, as well as 3 months in 2019 as an intern in the Political and Economic Section of the United States Embassy in Riga, Latvia.

Taking into considerations the vast amounts of funds, resources and interest of both investors and host states involved in the field of investment, it becomes clear that there is certain need for some sort of regulation and framework, as arguments and disputes are inevitable.

Establishment of the International Centre for Settlement of Investment Disputes (hereinafter “ICSID”) is what one could call a milestone for international investment law and economic development. While disputes between private parties are settled before national courts or commercial arbitration, and economic disputes between different nations are settled through international organizations, international tribunals and inter-state arbitration, a gap existed for mixed disputes, disputes between private parties and states. It is absolutely clear that ICSID was created in order to cover this gap. This contribution to the order of international investment law is now seen in the fact that almost 60% of investment arbitrations are concluded within the framework provided by the Convention.<sup>2</sup>

Direct Investor-State arbitration gives investors opportunities to protect their right in an independent matter, signifying a major progress and a leap in development of international investment and international economic law.

The ICSID Convention is unique, as the available post-awards remedies are very limited and the only strong way to challenge the award is the annulment mechanism provided for in Article 52. The wording of this provides room for interpretation and different approaches, while it also limits grounds to annul an ICSID award.

Article 52(1) lists “manifest excess of powers” as a ground for annulment, while not elaborating anywhere else what this ground for annulment is supposed to mean, how to interpret it and what issues it covers. At the same time, the said provision does not list jurisdictional and applicable law matters separately.

## **Goals and Methods of the Research, Sources**

The main goal of this thesis is to give an answer to the following research question – how do the *ad hoc* Committees interpret manifest excess of powers with relation to jurisdictional and applicable law matters? The author shall argue for a conclusion that the jurisdictional and applicable law issues fall within the scope of Article 52(1)(b), but there are certain questions that do not constitute manifest excess of powers such as failure to apply a provision of the proper law, as it is not serious enough.

The author shall apply doctrinal research in order to discover the meaning behind the said Article. When looking at the methodology and interpretation used by different *ad hoc* Committees, comparative research method would be used as it gives an opportunity to see differences between various decisions on annulment and compare them. The cases are picked on the basis of their subjective importance for the annulment mechanism of ICSID, as some of them are widely referenced in the jurisprudence, as well as in other annulment decisions.

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<sup>2</sup> Marc Bungenberg, Jörn Griebel, Stephan Hobe, and August Reinisch, *International Investment Law: A Handbook.*, Edited by Marc Bungenberg, et al. (Baden-Baden: Nomos Verlagsgesellschaft, 2015), p. 2.

It must be noted that the current thesis and its author are not aimed to suggest *de lege ferenda*, as the goal of this legal research is to give analysis of *de lege lata* and its interpretation and usage in *ad hoc* Committees. After all, the goal is to discuss different interpretation of one of the grounds for annulment in Article 52(1) of the Convention and see what errors on jurisdictional and applicable law matters constitute manifest excess of powers under the provision.

In order to address the question, research it properly and provide answers, the author will rely on several monographs by renowned legal scholars. Main source of reference shall be the second edition of “The ICSID Convention: A commentary” edited by Christoph H. Schreuer, et al. since it provides a deep article-by-article analysis of the Convention, as well as serves as a compendium of relevant sources and cases, which the author shall address, as well. Another monograph used is “International Investment Law: A Handbook” edited by Bungenberg, et al., which also has a list of relevant sources and cases for the further research. Law dictionaries and other dictionaries shall be used for textual interpretation, as they would allow looking into meaning of certain words and concepts. In addition, academic journals constitute a substantial part of the bibliography.

## **1. REVIEW OF INVESTMENT AWARDS UNDER ICSID**

In this chapter the author will introduce the reader to the annulment process prescribed by the ICSID Convention. Sub-chapters subsequently will deal with important principles related to the annulment, which explain why there is such a remedy at all, a self-contained nature of the revision system of the Convention, the drafting history of the provision responsible for annulment, difference between appeal and annulment and scope of review of the *ad hoc* Committees.

International legal documents have provisions on enforcement and setting aside of the award, among other points listing grounds for refusal of recognition and thus enforcement.<sup>3</sup> When it comes to a dispute between the states themselves, there is no established institutional way of review, but the states may consent and second the review to, for example, International Court of Justice. The rules on review of arbitral awards in relation to investment disputes are not uniform; they are quite diverse on both national and international levels. On domestic level, the difference is clear; as every jurisdiction sets up framework according to their own legal system, tradition and needs.

At the same time, the reason behind this non-uniformity on international scale is to be found in the various IIAs, as the dispute settlement provisions are usually agreed under different applicable law and arbitration laws. Mainly, these are ICSID, UNCITRAL rules or

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<sup>3</sup> “Awards, where enforcement of foreign arbitral awards is set out, including possibility to set aside an award or refuse enforcement under certain conditions.”

UNCITRAL Secretariat, *the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral*, New York, 1958.

Available at: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>  
Accessed on: 12 April, 2019.

See also Articles 34 and 36 of the UNCITRAL Model Law on International Commercial Arbitration of 1985,

ICSID Additional Facility rules, which in turn treat review in different manner. One of the main advantages of ICSID is finality of its awards, which is ensured in part by the review system in place. Article 52, which sets up the grounds and process for annulment, has significantly contributed to this state of affairs. One could even say it is a unique and important feature of the Convention and the ICSID as such.

### **1.1. Self-Contained Nature of Annulment within the ICSID regime**

In the international arbitration it is a norm that awards are final and binding for the parties, the same is true for the Convention.<sup>4</sup> Essentially it means that the court system in a country where the party seeks enforcement has to comply with the award and provide what is requested, as if it was a decision of a domestic court of the country.<sup>5</sup> Article 52, which sets up the procedure and grounds for annulment, is the last out of three Articles in Section 5 of the ICSID Convention's Chapter on Arbitration. Besides annulment, post-award remedies available to the parties are interpretation allowed for in Article 50 and revision allowed for in Article 51.

The meaning and intent behind interpretation provided for in Article 50 is clear and gives an opportunity to clarify the scope of award or its meaning, as well as Revision provided for in Article 51 regulates possible discovery of important facts after the award was rendered that would affect the decision of the tribunal. Article 52 and the whole annulment process it establishes is essentially the only one available mean to set aside an award, out of the three it is the most substantial form of review. It is also different from the previous two, as the process of annulment is directed to a separately constituted body, an *ad hoc* Committee, whereas interpretation and revision tend to be made by the tribunal that has rendered the award, if circumstance allow for that.

One of the features of ICSID is that it has a self-contained review system without interference from domestic courts, making it a preferable institutional and legal framework since the cases are de-politicized and distanced from any influence of governments, politicians or international organizations. International investment arbitration within the ICSID regime is aimed to provide a framework, where economic interests of the parties are respected and put at one of the highest positions.

Article 52 providing for annulment constitutes the only serious way for review of an award. Thus, it is important to understand the nature of this Article and the annulment system in place as such. It could be described as self-contained system, which excludes any intervention or participation of domestic courts. Article 53 of the Convention proclaims that there are no appeals or post-award remedies available that are not listed in the Convention

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<sup>4</sup> “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. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

International Center for Settlement of Investment Disputes, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1966* [hereinafter “ICSID Convention”] 575 UNTS 159.

Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%20575/volume-575-I-8359-English.pdf>

Accessed on: 12 April, 2019.

<sup>5</sup> *Ibid.*

itself.<sup>6</sup> Thus, it expressly excludes such mean of review as appeal. Differently from other international awards, there is no possibility to challenge an ICSID award before national courts. Domestic courts in any country do not have the right to intervene, review or invalidate an ICSID award at any stage, an ICSID award is not even connected to domestic arbitration laws. The Convention has its own self-contained system, which is delocalized, depoliticized and autonomous, as well as does not fall within any hierarchical order of any institution.

According to Article 52, which establishes the only way to challenge an ICSID award, “(...) any Party may request annulment of the Award (...)”.<sup>7</sup> It gives no priority to private investors or sovereign states and treats them equally, as they are parties to an agreement. To the opinion of the author, this point again contributes to the previously expressed idea that ICSID is preferred in many cases, as it gives equal opportunities both for states and private investors.

## 1.2. Drafting of the Annulment Provision

The emergence of ICSID annulment mechanism is often and mistakenly connected to the review of commercial arbitration awards. However, it does not come from commercial arbitration, but from public international law, it is not only inspired by that but actually is based on it. Drafting of the ICSID Convention took five years of negotiations, consultations and constant corrections, changes before it was approved by the Executive Directors board of the World Bank in 1965. After the approval in 1965, the Convention came into force in 1966.<sup>8</sup> With relation to the previously said, it must be noted that the base of Article 52 of the ICSID Convention happens to be Article 36 of the International Law Commission’s Model Rules on Arbitral Procedure of 1958 (hereinafter “ILC’s Model Rules”), which was an attempt to codify diverse laws and rules for State-to-State arbitration.<sup>9</sup> Apparently, the ILC has come to a conclusion, that an international award cannot be appealed, but there is possibility to challenge the validity of an award on the basis of certain limits.

And so, the development of the ICSID Convention and its annulment mechanism has started. It should be mentioned that there was no provision for annulment in the very beginning of the development of the Convention, in the Working Paper in the form of a Draft Convention (hereinafter “the Working Paper”).<sup>10</sup> To the opinion of the author, this can be

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Supra* note. 4, Article 52.

<sup>8</sup> International Center for Settlement of Investment Disputes, *History of ICSID Volume I*, New York, 1986

Accessed on: 10 April, 2019.

Available at: <https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20I.pdf>

<sup>9</sup> The United Nations, Yearbook of the International Law Commission, 1958, Volume II, Part One. New York, 1986., p.11.

Accessed on: 12 April, 2019.

Available at: [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1958\\_v2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1958_v2.pdf).

<sup>10</sup> International Center for Settlement of Investment Disputes, *History of ICSID Convention Volume II, Part 1*, New York, 1986, pp. 19-46.

explained by the fact that there was need to establish the general framework, both legal and institutional, before deciding on the matters of review and other issues. It could be seen throughout the Working Paper, that there are certainly placeholders and provisions intended to undergo significant change. After all, the ILC Model Rules were aimed at peaceful settlement of dispute between the states, while the goal of this particular Convention was to boost economic development, especially to assist developing countries.

The annulment process of ICL's Model Rules was transferred to the Convention at the stage of the Preliminary Draft of the Convention in 1963, and the first draft of Article 52(1) did not list the grounds for annulment.<sup>11</sup> After comparing the actual Convention and ILC's Model Rules, one can conclude that the provision on annulment from ILC's Model Rules saw significant changes and additions, undergoing process of transformation during which the provision has been crafted into a strong review mean for the Convention.<sup>12</sup> The appearance of such provision did not face serious opposition, nor its purpose was questioned, but there was "[...] a considerable number of detailed suggestions of a technical character."<sup>13</sup>

The development continued at the Regional Consultative Meetings, where among other questions, legal experts from various states have discussed and suggested changes to the grounds for annulment with attention to detail.<sup>14</sup> Here one could notice the unique character of international investment arbitration, where public law meets private law, as the ILC's Model Rules, which served as a base, were used to establish direct Investor-State dispute settlement system. For this, experts from different countries also took a look at the different principles related to international commercial arbitration.

Overall, the grounds for annulment in the following development have undergone some important changes and additions, as well. The following paragraphs will briefly describe each of them without going into deep detail, as space limits and scope of the research would not allow for a deep analysis of each of the grounds for annulment.

The provision lists several grounds for annulment, the first of which allows to annul the award if "(...) the Tribunal was not properly constituted [...]"<sup>15</sup> It is an important fact that invalid constitution of the tribunal was introduced only in the First Draft of the Convention, having a bit wider wording to cover several issues, as seen in the current wording of the convention. In addition, this ground of annulment was not mentioned in the ILC's Model Rules. This ground for annulment was brought before *ad hoc* Committees only few (at least

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Available at: <https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf>

Accessed on: 10

<sup>11</sup> Ibid.

<sup>12</sup> Supra note. 8, p.216

<sup>13</sup> Supra note. 8, p.573, para 73. 73.

<sup>14</sup> Background Paper on Annulment For the Administrative Council of ICSID, ICSID Review - Foreign Investment Law Journal, Volume 27, Issue 2, Fall 2012, Pages 443–492.  
<https://doi.org/10.1093/icsidreview/sis024>

<sup>15</sup> Supra note. 4 (ICSID), Article 52

four) out of 65 annulment decisions published at the moment of writing this thesis.<sup>16</sup> Another point is that the Convention does not specify what is considered to be a “proper” constitution of a tribunal within Article 52. It is done on purpose, as it leaves space for *ad hoc* Committees to decide. In one of the annulment decisions, however, an *ad hoc* Committee provided with an important guide on this matter in its application in practice. Apparently, “proper constitution” is to be interpreted as “compliance with the provisions of the ICSID Convention (...) dealing with the constitution of the tribunal.”<sup>17</sup>

During the period of development of the Convention, a legal expert from Germany expressed worries that the grounds for annulment in then-current wording<sup>18</sup> could easily turn the annulment mechanism into an appeal. This same legal expert has said that for this reason there is a need to make the provision more restrictive and limiting in terms of grounds for annulment.<sup>19</sup> Exactly this ground for annulment, especially the very important feature suggested by the German expert and accepted into the final version of the Convention, will be discussed in detail in the second chapter of this thesis.<sup>20</sup>

### 1.3. Conflicting Principles of Finality and Correctness

Before going into a deeper discussion on the matters of Article 52 and annulment-related issues, the author would like to introduce the reader to the reason why there is a review system at all. After all, arbitration is a form of alternative dispute settlement, which covers different types of disputes that are related to disputes between different subjects, and the object of arbitration stems from different legal relations between the parties.<sup>21</sup> Parties in such disputes give their consent to arbitrate and resolve the dispute by appointing the tribunal themselves, or delegating power to appoint arbitrators to an institution. In its initial form, international arbitration was a way for states to resolve their dispute by “judges of their own choice, and on the basis of respect for law.”<sup>22</sup> From only this provision from the times of

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<sup>16</sup> ICSID webpage, Decisions on Annulment  
Available at: <https://icsid.worldbank.org/en/Pages/process/Decisions-on-Annulment.aspx>  
Accessed on: 16 April, 2019.

<sup>17</sup> Jean-Christophe Honlet, Barton Legum and Anna Crevon, *ICSID Annulment*, in “International Investment Law: A Handbook”, edited by Marc Bungenberg, et al., (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 2015), p. 1442.

<sup>18</sup> *Supra* note. 4 (*ICSID*), Article 52(1):  
“The validity of an award may be challenged by either party on one or more of the following grounds:  
(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.”

<sup>19</sup> <https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf> p.423

<sup>20</sup> *Infra.*, Chapter 2 of this Thesis, p.18.

<sup>21</sup> Vladimír Balaš, *Review of Awards*, in The Oxford Handbook of International Investment Law, edited by Peter Muchlinsk, et.al, (Oxford: Oxford University Press, 2008), p. 1128

<sup>22</sup> League of Nations, *Convention For The Pacific Settlement Of International Disputes*  
Available at: <https://likumi.lv/ta/en/starptautiskie-ligumi/id/20-convention-for-the-pacific-settlement-of-international-disputes>

League of Nations it is possible to conclude that there is connection between State-to-State arbitration and investment arbitration, even though it is a mixed type of arbitration. Indeed, it is possible to see that one of the main principles of international arbitration is consent of both of the parties, as well as good faith when it comes to the awards of arbitration.

In addition, one should note that there is an important principle at work in relation to the investment awards, as well as any other arbitration. That is principle of finality that holds high significance for international arbitration, be it commercial or investment arbitration, including and especially under the ICSID regime.<sup>23</sup> In relation to the principle of finality, one should mention the connecting idea of consent to arbitration under the Convention, which provides exclusive jurisdiction to the tribunal.<sup>24</sup> By precluding any other court or tribunal of interfering or taking on the case, the Convention ensures that the ICSID tribunal will produce the only decision, an award, on the matters of the case, as well as the award will not be challenged in compliance to Articles 53 and 54 of the Convention.<sup>25</sup> The ILC, which, as it was established earlier in the work, in their Model Rules created the foundation for the ICSID Convention, also state the following: “in accordance with arbitral practice, the award is considered as final without possibility of appeal.”<sup>26</sup> This fact underlines the whole principle of finality.

The other principle at work is the principle of correctness, which might seem to be conflicting with the principle of finality, and in fact they are considered competing, as it in its essence means that the award produced is correct in terms of substantive matters. However, in practice it might not always be correct, as mistakes are inevitable in all the areas and spheres of law. A good example of correctness holding much importance and having priority would be the system of domestic courts, where an appeal court may decide on matters whether the lower court has adjudicated wrongly. To the opinion of the author, this provides an insight, that there should be certain amount of control and restraint maintained through various mechanisms to achieve the principle of correctness, such as the appellate courts in domestic court system. Such mechanisms would certainly slow down the process, but in turn would bring a just and correct in all terms award.

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Accessed on: 16 April, 2019.

<sup>23</sup> Christoph Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair, *The ICSID Convention: A Commentary*. 2<sup>nd</sup>. (New York: Oxford University Press, 2009), p.903

<sup>24</sup> *Supra* note. 4 (*ICSID*), Article 26:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

<sup>25</sup> *Supra* note. 4 (*ICSID*), Article 53,

Article 54: “(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.”

<sup>26</sup> FIFTH SESSION INCLUDING THE REPORT OF THE GENERAL ASSEMBLY 2 YEARBOOK OF THE ILC p.202 A/CN.4/SER.A/1953/Add.1

In international investment arbitration the principle of finality is often preferred over the principle of correctness of the award.<sup>27</sup> The principle of finality is more attainable, and for this is more preferable when it comes to practice, just as well as the principle of correctness is often overlooked, as it is a bit more ephemeral, perhaps sometimes even subjective, and thus harder to achieve.<sup>28</sup> It is clear that the conflict between the two principles is related to the principle of correctness requiring a review system, perhaps even an extensive one, an appeal mechanism of several layers. An approach where the preference is given to the principle of finality makes ICSID more attractive forum for dispute settlement, as in the end there is an enforceable and binding award produced in a timely manner, which cannot be challenged in domestic courts, international institutions or tribunals. It supports the idea that ICSID arbitration is so popular for its time-saving procedures, which ensure that economic interests of the parties are preserved in the best manner by not having an extensive review system for awards in order to ensure and provide the highest level of correctness. The need of a dispute being settled, it turns out, is more important than correctness of the award's substantive matters.

What brings balance between these two principles, which may seem in conflict, is a review mechanism, something domestic court systems employ, as it was established before in the text. Essentially, a review system of either a court decision or an arbitration award means that there is a possibility for the party that is not satisfied with the result to challenge, oppose and attack the result.<sup>29</sup> The annulment possibility, provided under Article 52, with the help of the exhaustive grounds for annulment strengthens the principle of the finality of an award, as well as provides for more stability. It is important to note, that the Convention does not provide for review of substantive matters of an Award. The annulment mechanism essentially serves as a defence against any possible violation of fundamental rules and principles of procedure.

The Annulment provision in this sense could be compared to international public law, as the Convention itself was drafted, basing its foundation on the public international law. At the same time, out of the Section 5 of the Convention, the Annulment provision is what jurists and practitioners have been arguing about for decades, since the first two annulment decisions were rendered by *ad hoc* Committees and the debate is related to the thin borderline between annulment and appeal.<sup>30</sup>

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<sup>27</sup> *Supra* note. 23 (Schreuer)

<sup>28</sup> *Supra* note. 23 (Schreuer)

<sup>29</sup> *Supra* note. 23 (Schreuer)

<sup>30</sup> See the debate between Michael Reisman and Aaron Broches dating back to the early 1990s.

See Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, *Duke Law Journal*, pp. 739-807 (1989).

Accessed on: 19 April, 2019.

Available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3082&context=dj>

See also, Aron Broches, *Observations on the Finality of ICSID Awards*, *ICSID Review - Foreign Investment Law Journal*, Volume 6, Issue 2, Fall 1991, Pages 321-380,

Accessed on: 19 April, 2019. <https://doi.org/10.1093/icsidreview/6.2.321>

## 1.4. The Difference between an Appeal and Annulment

The line between annulment and appeal is indeed thin. It must be highlighted again, that the Convention does not provide for any appeal mechanism, but provides for annulment. The ICSID regime is built in such a way to ensure the finality of an award, giving only limited possibility for review. Only serious and important procedural issues are to be regulated by the annulment mechanism, while substantive matters are not within its scope. Furthermore, the limited nature and exhaustive list of grounds for annulment that could be called as exceptions prohibits any intervention or questioning of the substantive or factual matters of each particular case.

The *ad hoc* Committees themselves have indicated this in their decisions, stating that they are not acting in capacities of appellate courts, as well as their functions are limited. For example, in the annulment decision *Mitchell v. DRC* the *ad hoc* Committee have stated the following:

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.<sup>31</sup>

Vast amount of statements relating to the nature of the annulment, as well as its difference from the appeal system lies within the annulment decisions rendered by *ad hoc* Committees, basically in every decision on annulment this point stressed. The *ad hoc* Committee in *Amco Asia Corporation and Others v. the Republic of Indonesia*<sup>32</sup> (hereinafter “*Amco I*”) annulment decision also states the following:

Such scrutiny [in reviewing laws applied and interpretation methods used by the Tribunal] is properly the task of a court of appeals, which the *ad hoc* Committee is not.<sup>33</sup>

Similar argument appears in the annulment decision of the *Compañía de Aguas Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* case (hereinafter “*Vivendi I*”):

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.<sup>34</sup>

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<sup>31</sup> *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Annulment Decision, 1 November 2006, , para 19.

Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0537.pdf>

Accessed on: 19 April, 2019.

<sup>32</sup> *Amco Asia Corporation and Others v. the Republic of Indonesia*, Annulment Decision. (16 May 1986), ICSID Case No ARB/81/1 reported in *ICSID Report: Reports of Cases Decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume 1*, edited by Rosemary Rayfuse, Cambridge: Grotius Publications Limited, 1993. [hereinafter, “*Amco I*”]

<sup>33</sup> *Ibid.*

<sup>34</sup> *Compañía de Aguas Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Annulment Decision (3 July, 2002), ICSID Case No ARB/97/3. [hereinafter, “*Vivendi I*”]

In principle there are two main differences between an appeal and annulment. The first that needs to be highlighted is the fact that the annulment mechanism is aimed only to review the process of rendering an award, its lawfulness, while leaving the questions on substance outside of the scope. Appeal, however, deals with both the procedural and substantial matters of an Award. This is, perhaps, the most important distinction between annulment and appeal, as it means that the annulment mechanism does not review the award based on its merits, but based on a limited and exhaustive list of procedural issues.

The second distinction lies within the result the mechanism is intended to bring. While annulment is aimed at avoiding the original award by declaring it null, the appeal mechanism usually results with a new decision replacing the old one, again basing the decision not only on procedural questions, but also on the merits of a particular case. While after the annulment the dispute can be resubmitted for settlement to a newly-constituted Tribunal, the appeal renders a new decision.

It seems that the distinction between the annulment and appeal mechanisms is clear. However, there is a high risk of crossing this very thin line, especially when the *ad hoc* Committee deals with the “excess of powers” ground for annulment.

### **1.5. The *Ad hoc* Committees and Their Scope of Review**

The annulment mechanism of the Convention could be described as and in fact is of limited nature, only listing very specific grounds to challenge the award. It was not designed to function in a role of and is different from an appeal, as it was discussed in sub-chapter 1.4 of this work. These specific grounds are listed within the provision itself and do not include any possibility to review of a produced award on merits.<sup>35</sup> From the wording of Article 52 it is clear that the list of grounds is exhaustive and any other allegations against the award will be refused. After the *ad hoc* Committee finds that there is a ground for annulment, the *ad hoc* does not have to continue looking for other grounds, as the full annulment of the award “(...) leads to the loss of the *res judicata* effect of all matters adjudicated by the Tribunal[.]”<sup>36</sup>

Moreover, an *ad hoc* Committee does not have to consider, analyse or even address such grounds. In addition to that, the parties may use one or several grounds for annulment, but it is enough to satisfy only one out of the list, each of the grounds for annulment is in

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Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0210.pdf>

Accessed on: 20 April, 2019.

<sup>35</sup> Article 52(1) of the ICSID Convention: “(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or 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.”

<sup>36</sup> *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Decision, 29 August, 2010. [hereinafter “*Sempra v. Argentine*”], para 78.

Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0776.pdf>

Accessed on: 20 April, 2019.

general freestanding. From a practical perspective, the parties usually claim several grounds for refusal in order to have some sort of insurance in the form of an additional ground.

Limitations put on Article 52 of the Convention with regard to the functions of the annulment mechanism caused different opinions when it comes to the interpretation of the said provision. In their decisions, *ad hoc* Committees addressed a list of possible principles of interpretation that they have encountered.

In the annulment proceedings *Amco I* the *ad hoc* Committee underlined that when there are issues with interpretation or gaps in a law, they should be dealt with “in accordance with the principles and rules of treaty interpretation generally recognized in international law.”<sup>37</sup> It would be logical to conclude that the Vienna Convention on the Law of Treaties (hereinafter “VCLT”) represents the generally accepted and recognized principles of interpretation. In fact, the VCLT does establish rules and principles of interpretation in Section 3 of its Part III. However, what that very same Section 3 creates an obstacle to use the VCLT in interpreting the ICSID Convention, as Article 28 of the said Section states:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.<sup>38</sup>

In turn, interpretation is left to discretion of the *ad hoc* Committees, meaning they may employ their own methodology, when deciding on different matters. However, the *ad hoc* Committees usually interpret different issues with reference to the previous *ad hoc* Committees. Sometimes, when it comes to the scope of review, it might cause certain issues, as the *ad hoc* Committees can go engage into extensive, lengthy and opinionated discussions.

### 1.5.1. Reisman vs. Broches Debate

On the matters of the scope of review, the academic debate between renowned legal scholars and practitioners is significant. These are Michael W. Reisman, who is a distinguished international legal scholar and professor at the Yale Law School, and Aron Broches, who served at several high-ranking positions within the World Bank, as well as was in charge in developing the ICSID Convention.

Reisman in his works extensively discussed and commented the annulment decisions of the *ad hoc* Committees in *Klöckner I*, *Amco I* and *MINE* cases.<sup>39</sup> Among many questions raised by the professor, there are several important points introduced in relation to the review scope of the *ad hoc* Committee in *Klöckner I* annulment decision. Firstly, an *ad hoc* Committee should side with the award by upholding it in case of doubt.<sup>40</sup> Secondly, after

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<sup>37</sup> *Supra* note. 32., *Amco I*, paras. 18-22

<sup>38</sup> The United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Available at: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

Accessed on: 20 April, 2019.

<sup>39</sup> *Supra* note. 30 (*Reisman*), p.761

<sup>40</sup> *Supra* note. 30 (*Reisman*), p.761

interpreting the third paragraph of Article 52<sup>41</sup>, Reisman establishes that the *ad hoc* Committee does not essentially have to nullify an award, it rather has only authority to annul the award.<sup>42</sup> Thirdly, criticizing the approach taken, the legal scholar reminds that the *ad hoc* Committee's role is only to test the award on grounds listed in Article 52.<sup>43</sup> Finally, the Committee shall not annul an award on grounds that did not significantly influence the outcome.<sup>44</sup> Overall, Reisman applies a stricter interpretation of the Convention, which when followed would not allow a lot of awards to be nullified, thus making the annulment mechanism of truly limited nature. The criticism is justified on the basis of a belief, that such decisions and arguments in the Klöckner I annulment decision possess a risk of transforming the limited nature of the ICSID annulment mechanism into “something broader and potentially more disruptive.”<sup>45</sup>

Aron Broches in his works gave counter-arguments, using the *MINE* annulment decision as an example. On this matter Broches states that two of the most arguable statements from *Klöckner I*, which are the automatic nullification award and the requirement for sufficient reasons, were reversed in the *MINE* decision.<sup>46</sup> In the rest of the questions, both scholars have minor disagreements, mainly with the influence such decisions would wield over the upcoming annulment proceedings and their *ad hoc* Committees.

The debate does not end on these arguments, but because of limited space and scope of this research, the author will not go any further into discussing the present matter. It could be understood from the presented excerpts of the debate that there are different approaches to and opinions on the annulment mechanism.

### 1.5.2. Generations of the Annulment Decisions

While it does not pose a problem to formulate and distinguish annulment from appeal, when it comes to practice *ad hoc* Committees faced certain issues with determining their own scope of review. Already from the abovementioned debate one could conclude that there are annulment decisions and *ad hoc* Committees that employ different approaches. Another renowned international law scholar, Christoph Schreuer, has designated the annulment

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<sup>41</sup> (3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

<sup>42</sup> *Supra* note. 30 (Reisman), p.762

<sup>43</sup> *Supra* note. 30 (Reisman), p.763

<sup>44</sup> *Supra* note. 30 (Reisman), p.764

<sup>45</sup> Michael W. Reisman, *Repairing ICSID's Control System: Some Comments on Aron Broches' "Observations on the Finality of ICSID Awards"*, ICSID Review - Foreign Investment Law Journal, Volume 7, Issue 1, Spring 1992, Pages 196–211., p.196.

Available at: <https://doi.org/10.1093/icsidreview/7.1.196>

Accessed on:

<sup>46</sup> *Supra* note. 30 (Broches)

decisions into three generations with accordance to approach the *ad hoc* Committees have employed.<sup>47</sup>

The first generation consists of several cases<sup>48</sup> that during the review process looked not only into the procedural issues, but also into the substance, merits of the award. The first generation was exactly what worried Michael W. Reisman and what he extensively criticized. The scope of review in the first generation was exceeded and the line between appeal and annulment was crossed and made ambiguous. The *ad hoc* Committees of this generation have annulled awards, while there were no grounds for this, as the Tribunals did not apply the law correctly, which in turn does not equate to the “failure to apply proper law” ground of Article 52(1).<sup>49</sup> Perhaps, this has happened due to the lack of previous experience, as this was the first annulment decisions rendered and there were no decisions to refer to.

The *ad hoc* Committees of the second generation<sup>50</sup> have stepped away from the appeal-like approach of the first generation. They have employed an approach with more control, paying closer attention to procedure rather than substance while reviewing the awards.<sup>51</sup> The third generation<sup>52</sup>, according to Christoph Schreuer, found the balance for the ICSID annulment, as well as left the approach of being too proactive as in the previous generations, it is more of reserved nature.<sup>53</sup>

Despite the expressed opinion that the ICSID annulment finally stabilized and found the right approach, there is still criticism present, claiming that the *ad hoc* Committees still wander trying to establish their authority in the ICSID Convention. One of the arguments is that the *ad hoc* Committees often engage into giving extensive and usually unwanted and

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<sup>47</sup> Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, p. 17-18.  
Available at: <http://www.univie.ac.at/intlaw/wordpress/pdf/69.pdf>  
Accessed on: 19 April, 2019.

<sup>48</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*. ICSID Case No. ARB/81/2 (3 May 1985), reported in *ICSID Report: Reports of Cases Decided under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Volume 2*, edited by Rosemary Rayfuse, Cambridge: Cambridge University Press, 1994. [hereinafter “*Klöckner I*”]

See also, *Amco I supra* note 32.

<sup>49</sup> *Supra*. note 47

<sup>50</sup> *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, (hereinafter “*MINE v. Guinea*” or “*MINE*”), Annulment Decision, 14 December 1989;

Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8608.pdf>

Accessed on: 19 April, 2019.

See also *Amco Asia Corporation v. Republic of Indonesia*, Resubmitted the case, ICSID Case No. ARB/81/1, Annulment Decision, 17 December 1992., [hereinafter “*Amco II*”]

Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8887.pdf>

Accessed on: 19 April, 2019.

<sup>51</sup> *Supra* note. 47, p.18.

<sup>52</sup> *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Annulment Decision, 5 February 2002. [hereinafter “*Wena v. Egypt*”]

Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0903.pdf>

Accessed on: 23 April, 2019.

Also, *Vivendi I. Supra* note. 34

<sup>53</sup> *Supra* note. 47, p. 42.

unnecessary remarks on the Award, sometimes even claiming that the Award was rendered improperly as the law was applied in a defective way. In turn, this puts at risk and weakens not only the Award at question, but the whole ICSID system. The Award loses portion of its credibility after such criticism in the annulment process.

Some scholars also suggest that there is the fourth generation<sup>54</sup>, which connected with the growing amount of the annulment proceedings.<sup>55</sup> This generation is characterized with different approaches used. These decisions and *ad hoc* Committees would criticize an award and its Tribunal, while also denying the annulment. In addition, this new generation of annulment decisions moves legal scholars to a thought that there is a need for a reform of the ICSID annulment mechanism, the whole review system should be revisited.<sup>56</sup> To the opinion of the author, *ad hoc* Committees should refrain from discrediting the awards by providing extensive commentary and criticism of the awards, their scope should be limited in accordance with prescribed annulment grounds of the Convention.

On this matter, Article 52(1) of the Convention should be interpreted as it was intended by the drafting history of the Convention and legal experts that took part in the process. If referencing to the Reisman-Broches debate, the author would side with the arguments of Michael W. Reisman, as this approach strictly dictates the *ad hoc* Committees to

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<sup>54</sup> Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Annulment Decision, 1 November 2006. [hereinafter “*Mitchell v. Congo*”]

Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0537.pdf>

Accessed on: 19 April, 2019.

Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/01/10, Annulment Decision, 8 January 2007. [hereinafter “*Repsol v. Petroecuador*”]

Available at: [https://www.italaw.com/sites/default/files/case-documents/italaw7998\\_0.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw7998_0.pdf)

Accessed on: 19 April, 2019.

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Annulment Decision, 21 March 2007. [hereinafter “*MTD v. Chile*”]

Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0546.pdf>

Accessed on: 19 April, 2019.

Hussein Nuaman Soufraki v. The United Arab Emirates, ICSID Case No. ARB/02/7, Annulment Decision, 5 June 2007, [hereinafter “*Soufraki v. UAE*” or “*Soufraki*”]

Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0800.pdf>

Accessed on: 19 April, 2019.

CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Annulment Decision, 25 September, 2007. [hereinafter “*CMS v. Argentine*”]

Available at: <https://www.italaw.com/sites/default/files/case-documents/ita0187.pdf>

Accessed on: 19 April, 2019.

<sup>55</sup> Ieva Kalnina, Domenico Di Pietro, *The Scope of ICSID Review: Remarks on Selected Problematic Issues of ICSID Decisions*, in “International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer”, edited by Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich. (Oxford Scholarly Authorities on International Law).

Available at: <https://opil.ouplaw.com/view/10.1093/law/9780199571345.001.0001/law-9780199571345-chapter-14>

Accessed on: 20 April, 2019.

<sup>56</sup> *Ibid.*, p. 224.

act within the limits imposed on it by the annulment mechanism of the ICSID Convention. In turn, the said provision should not be interpreted too narrowly or too broadly.<sup>57</sup>

## 2. ANALYSIS OF THE MANIFEST EXCESS OF POWER GROUND FOR ANNULMENT

In case, when the Tribunal has manifestly exceeded its powers, according to Article 52(1)(b) of the Convention, there is a ground for annulment established. However, one would find it hard to understand and describe what the meaning behind “manifest excess of powers” is. Thus, the interpretation of this ground for annulment, as well as its application might be problematic.

To understand and properly interpret the said provision it is essential to see where the power of a Tribunal comes in the first place. Sources of power of the Tribunal stem from the agreement between the parties, as well as agreement to arbitrate. This is what both gives the powers and limits them. It is important to note that the ICSID regime of arbitration has the agreement to arbitrate incorporated within the Convention, so the parties to the convention with their signature of the Convention agree to arbitration as established in the relevant provisions. From this approach, excess of powers means that the Tribunal in its actions has gone beyond what was approved by the parties, as well as the Tribunal in such situation would go outside of its scope. Deciding, for example, on the matters that were not submitted to it would also constitute excess of powers. This concept might seem at some point as ambiguous, since there is no full and exhaustive list that would cover this matter within the Convention itself. Though, on this matter the annulment decisions of *ad hoc* Committees help to establish those powers. In *Soufraki v. UAE* case, the *ad hoc* Committee in their annulment decision established that:

[T]he powers of ICSID tribunals are defined by three parameters which are the jurisdictional requirements, the applicable law, and the issues raised by the parties.<sup>58</sup>

After looking at Article 52(1)(b) one becomes clear – the wording requires the excess of powers to be “manifest”. In the very same *Soufraki v. UAE* annulment decision it is stated that this requirement is related to substantive and jurisdictional matters equally.<sup>59</sup>

### 2.1. Requirement of Excess of Powers to be “Manifest”

As it was established previously, “manifestly” appeared in the Convention after suggestion by the German legal expert in order to make the ground stricter and more of limiting nature,

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<sup>57</sup> Nikolaos Tsolakidis, *ICSID Annulment Standards: Who Has Finally Won the Reisman v. Broches Debate of Two Decades Ago?* in “Reshaping the State-Investor Dispute Resettlement System: Journeys for the 21st Century” edited by Jean E. Kalicki and Anna Joubin-Bret (Leiden: Brill | Nijhoff, 2015), p. 847

<sup>58</sup> *Supra* note. 54, (*Soufraki v. UAE*), para. 37

<sup>59</sup> *Supra* note. 54, (*Soufraki v. UAE*), paras. 118, 119

which in turn would strengthen the annulment mechanism, ensure its stability and prevent it from shifting towards the appeal-like mechanism.<sup>60</sup>

The expression “manifestly” also appears in Article 36(3) of the ICSID Convention, which deals with the duty of Secretary-General refusing to register the request for arbitration, if the case in question is “manifestly” outside of ICSID jurisdiction.<sup>61</sup> Its meaning there matches the meaning provided for in the dictionaries – “obvious”, “evident”, “apparent” and “easily understood or recognized by the mind”.<sup>62</sup> So, on this matter it is manifest that this requirement has a subjective side, which also complicates the application of Article 52(1)(b). However, Article 52(3), which proclaims that “the Committee shall have the authority to annul the award.”<sup>63</sup> Wording of this provision, as concluded by Michael W. Reisman, gives the *ad hoc* Committee the authority to also decide whether the excess of powers is manifest, as well as to decide if the award should be annulled on this ground or not.

The *ad hoc* Committees also stated that “manifest” within the meaning of Article 52(1)(b) means “textually obvious”<sup>64</sup> and “obvious my itself simply by reading the award”<sup>65</sup>. The “manifest” requirement of excess of powers is satisfied if it can be recognized without much effort and a deep analysis.<sup>66</sup>

However, there is also another opinion, which argues that “manifest” is related to the seriousness of the excess of powers.<sup>67</sup> From this perspective, the wording does not mean that the error should be visible on plain sight. The *ad hoc* Committee in *Soufraki v. UAE* made an attempt to combine these two views:

[T]he 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 at once be textually obvious and substantively serious.<sup>68</sup>

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<sup>60</sup> *Supra* note. 19

<sup>61</sup> *Supra* note. 23 (Schreuer), p. 939.

<sup>62</sup> Merriam-Webster Online Dictionary, “manifest”  
Available at: <https://www.merriam-webster.com/dictionary/manifest>

Accessed on: 25 April, 2019

<sup>63</sup> Article 52(3) of the ICSID Convention: “(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. *The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).*” [emphasis added]

<sup>64</sup> *Supra* note. 54, (*Soufraki v. UAE*), para 40

<sup>65</sup> *Supra* note. 54, (*Repsol v. Petroecuador*), para 36.

<sup>66</sup> *Supra* note. (Schreuer) 23, p. 938. Para 135.

<sup>67</sup> The Respondent’s Submissions in *Supra* note. 54, (*Soufraki v. UAE*), para 38.

<sup>68</sup> *Supra* note. 54, (*Soufraki v. UAE*), para 40: “(...) at once be textually obvious and substantially serious[.]”

The *ad hoc* Committee's arguments in *Wena v. Egypt* offers a two-step approach on deciding whether the manifest excess of power, first determining whether there was an excess of powers, and then whether it was of manifest nature:

The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens, the excess of power is no longer manifest.<sup>69</sup>

The *ad hoc* Committees have the authority to define whether there is this ground for annulment on their own discretion. There are, however, established in the case law approaches that the *ad hoc* Committees employ with regard to manifest excess of powers.

## 2.2. Methodology of the Committees with regard to Manifest Excess of Powers

As it was briefly mentioned in the previous sub-chapter, there are different approaches to methodology of establishing manifest excess of powers. It is possible to distinguish the two main methodological approaches to determining manifest excess of powers within the meaning of Article 52(1)(b), both of them seems reasonable and the *ad hoc* Committees can use either. It must be mentioned again, that an *ad hoc* Committee may – meaning it has such authority to decide, but does not have to annul – an award if it finds at least one of the grounds to be satisfied. Just as the decision to annul the award, determining whether there is an excess of powers and where or not it is manifest is left on discretion of the particular *ad hoc* Committee.<sup>70</sup>

The first methodological approach is the two-step one. Here the first step for the *ad hoc* Committee would be determining whether there is an excess of powers in the actions of the Tribunal and the award at question within the meaning of Article 52(1)(b). If the result on this step is positive, the *ad hoc* Committee then shall proceed to determining whether this exact excess of powers is manifest.

An example of this approach used in practice could be found in the *Sempra v. Argentina* annulment decision, where the *ad hoc* Committee first established that the Tribunal did not identify properly and subsequently did not apply the correct law, which constitutes an excess of powers as understood in Article 52(1)(b) of the ICSID Convention.<sup>71</sup> When determining if the excess of powers was of manifest nature, the Committee concluded that the Tribunal did not apply Article XI of the US-Argentina Bilateral Investment Treaty<sup>72</sup>, which was the applicable law:

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<sup>69</sup> *Supra* note. 52 (*Wena v. Egypt*), para 25.

<sup>70</sup> *Supra* note. 30 (*Reisman*).

<sup>71</sup> *Supra* note. 36, (*Sempra v. Argentine*) para 213.

<sup>72</sup> Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, November 1991.

Available at: [https://www.italaw.com/sites/default/files/laws/italaw6017%2810%29\\_0.pdf](https://www.italaw.com/sites/default/files/laws/italaw6017%2810%29_0.pdf)

Accessed on: 1 May, 2019.

On the basis of the above, the Committee considers that it is 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<sup>73</sup>

There is also the second widely accepted and established methodological approach, the *prima facie* approach. It is a test, where the *ad hoc* Committees assess and examine whether any of the excess of power claims could be described as manifest, meaning those should be outstanding and seen at plain sight. This approach is supported by the comments of the *Mitchell v. DRC ad hoc* Committee, which states as following:

If an excess of powers is to be the cause of annulment, the *ad hoc* Committee must so find with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award.<sup>74</sup>

In addition to the previously mentioned approaches, there is the third one, a different one. The *ad hoc* Committee in *Klöckner I* annulment decision used an approach, where the concept of “tenable” wields certain importance.<sup>75</sup> The methodological approach used in this particular question to determine the manifest excess of powers used by the *ad hoc* Committee includes a long and detailed analysis of the Award with relation to excess of powers, where the *ad hoc* Committee apparently used the two-step approach. The analysis criticizes to a high extent the Award and the reasoning it has.<sup>76</sup> The Committee in its reasoning found that the Tribunal indeed exceeded its power in jurisdictional matters, as it assumed jurisdiction over the matters of contract, where the arbitration clause called for International Chamber of Commerce arbitration. At the very same time, the Committee declined to annul the award on the basis of this ground. The *ad hoc* Committee has found the Tribunal’s reasoning in the award to be justifiable:

[S]ince 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).

To the opinion of the author, this “tenable” approach deserves certain criticism, as it has a highly subjective nature within it. It is also not quite clear on what basis it is decided that the Tribunal’s actions are “tenable” and what standards should be applied to determine this. However, most of the Committees use the two-step approach rather than *prima facie* or “tenable” approaches.<sup>77</sup>

Again, the *ad hoc* Committees should stay within the framework delegated to them, act and decide on the basis of grounds for annulment provided for in Article 52(1) and refrain from extensive commentary and criticism towards the Awards.

### 2.3. Manifest Excess of Powers and Applicable Law

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<sup>73</sup> *Supra* note. 36, (*Sempra v. Argentine*).

<sup>74</sup> *Supra* note. 54, (*Mitchell v. Congo*) paras 20, 47.

<sup>75</sup> *Supra* note. 23 (*Schreuer*), p. 938. Para 143

<sup>76</sup> *Supra* note. 23 (*Schreuer*), p. 940

<sup>77</sup> *Supra* note. 17 , p.1447

One of the most important forms of excess of powers is related to applicable law and violations of Article 42, which governs the applicable law matters. These include non-application of the law, which the parties agreed to be governing (or the law of the host state, in case when the applicable law was not agreed upon).<sup>78</sup> Article 52(1) itself does not list failure to apply the proper law as a ground for annulment, but “(...) the provisions on applicable law are essential elements of the parties’ agreement to arbitrate.”<sup>79</sup>

The applicable law for the ICSID arbitration is set out in the Convention’s Article 42(1).<sup>80</sup> This Article is applicable to the ICSID arbitration, since with the agreement to arbitrate, the parties gave their consent to this. The provision itself states that the Tribunal shall apply the law which was agreed by the parties themselves to be applied in a dispute. In case, when the parties did not agree on a law, Article 42(2) provides that the Tribunal shall apply the law of the host state, as well as applicable international law. The provision itself does not give any priority to international law or the law of the host state.

However, in practice, the law of the state is usually applied first and only then international law is consulted in order to cover any existing gaps. Also, if the law of the host state comes into conflict with international law or even violates it, the Tribunal may decide not to apply it in part or at all.<sup>81</sup> Even when there is no support from the side of international law, the Tribunal may still render a decision basing only on the host state law. However, this decision must not contradict or be prohibited by international law.<sup>82</sup>

Article 42(3) also gives the Tribunal powers to decide on *ex aequo et bono* principle. At the same time, it allows for such actions only if the parties agree for this, or otherwise it falls within the meaning of excess of powers. Here is also an important point that the Tribunal may use both the *ex aequo et bono* and the applicable law together in a combination.

By looking at the drafting history of Article 52(1), it is established that there were suggestions to add to the ground for annulment on “serious departure from a fundamental rule of procedure” additional provision that would emphasize “a serious misapplication of the law”.<sup>83</sup> Even more, a separate ground for annulment was suggested dealing with “manifestly incorrect application of the law”, but was voted out against.<sup>84</sup> From this, a conclusion comes that there is difference between failure to apply proper law and incorrect application of a law.

### **2.3.1. Failure to Apply a Proper Law or Incorrect Application of the Proper Law**

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<sup>78</sup> Supra note. 23 (Schreuer), p. 938 para 133

<sup>79</sup> Supra note. 23 (Schreuer), p. 954 para 192

<sup>80</sup> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply 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.

<sup>81</sup> Christoph Schreuer, “Failure to Apply the Governing Law In International Investment Arbitration.” *Austrian Review of International and European Law* 7 (2002): 147-198., p. 156.

Available at: [https://www.univie.ac.at/intlaw/pdf/cspubl\\_70.pdf](https://www.univie.ac.at/intlaw/pdf/cspubl_70.pdf)

Accessed on: 8 May, 2019.

<sup>82</sup> Ibid., p. 161.

<sup>83</sup> Supra note. 10 (History Vol II), p.423.

<sup>84</sup> Supra note. 10 (History Vol II), pp. 853-854.

Indeed, there is distinction between failure to apply a proper law and misapplication of a proper law, which is widely accepted, and they should not be confused. The former may lead to annulment, the latter – cannot.<sup>85</sup> There is no basis for the *ad hoc* Committees to decide on the erroneous application of the proper law, as it is an incorrect decision of the Tribunal in substantive terms, and it is outside of the scope of review of the *ad hoc* Committees. This idea is also supported by the two annulment decisions of the first generation, *Amco I* and *Klöckner I*, which were extensively criticized for blurring the line between the annulment and appeal exactly when reasoning and deciding on the matter of manifest excess of powers in relation to the failure to apply the proper law and erroneous application of the proper law.<sup>86</sup>

The *ad hoc* Committee in *Klöckner I* annulment decision also paid attention this distinction between erroneous application of the proper law and non-application of the proper law.<sup>87</sup> In *Wena v. Egypt* the *ad hoc* Committee also emphasized that there is a need to keep in consideration the differences between the failure to apply the proper law and misapplication of the proper law, as crossing the line between them would require considering the merits of the case and subsequently turning an annulment into an appeal.<sup>88</sup>

However, there is an interesting development seen in the peculiar case is *Amco II*, which has employed a different approach than the first *ad hoc* Committee, even though they both were tasked with determining whether there was manifest excess of powers from the side of the Tribunal within the meaning of Article 52(1)(b) of the Convention. The question at stake is failure to apply the proper law and review of the Tribunal's legal conclusions on substantive matters. It should be mentioned that both of the Committees (*Amco I* and *Amco II*) agree on the fact that misapplication of the proper law does not constitute a manifest excess of powers.<sup>89</sup> However, the *Amco II ad hoc* Committee provides with a somewhat novel approach, stating the following:

[T]he incorrect application of national law, its “misapplication” or incorrect interpretation does not normally provide a proper ground for annulment. (...) [A]n Ad Hoc Committee may find that the misapplication, etc. of national law is of such a nature or degree as to constitute objectively (regardless of the Tribunal's actual or presumed intentions) its effective non-application.<sup>90</sup>

The *ad hoc* Committee also with their statements has expressed a point of view, which would secure the ICSID awards from annulment:

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<sup>85</sup> *Supra* note. 23 (*Schreuer*), p. 959 para 210

<sup>86</sup> *Supra* note. 23 (*Schreuer*), p. 960 para 214

<sup>87</sup> *Supra* note. 23 (*Klöckner I*), paras 60, 61.

<sup>88</sup> *Supra* note. 52 (*Wena v. Egypt*), para 22.

<sup>89</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Annulment Decision, 3 December, 1992.

Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8887.pdf>

Accessed on: 5 May, 2019.

See also, *Supra* note 32, (*Amco I*) para 23.

<sup>90</sup> *Ibid.* (*Amco II*) para 7.19

[T]he Ad Hoc Committee does not have to agree with or to approve the manner in which the Tribunal has applied the law. It only has to inquire into the extent to which it has in fact applied legal principles (and not decided the issue *ex aequo et bono*, something which would constitute manifest excess of powers) as well as into the identity of the law the Tribunal has applied. Errors in law or misunderstandings of its import do not fall under the heading of non-application of applicable law, subject to the caveats already mentioned.<sup>91</sup>

From this point of view, it could be concluded that in case when the misapplication of the proper law causes impossibility to apply the proper law, only then there is manifest excess of powers. The author would like to note that the *ad hoc* Committee has only mentioned incorrect application of national law, leaving aside the international law. On this matter, one could also refer to another case, which contains similar statement in the annulment decision – *Soufraki v. UAE*, where the *ad hoc* Committee stated the following with regard to national:

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 (“*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*.<sup>92</sup>

In *Soufraki* is the *ad hoc* Committee has found that the Tribunal applied the domestic law of the country in good faith, wh. Indeed, it might be wrong on certain questions, but not to the extent to create an annulable error. As stated in the annulment decision, the improper application of the domestic law was “an error quite marginal in reaching the final decision” and “[not] so egregious as to amount of failure to apply the proper law”.<sup>93</sup>

This approach is ambiguous, because it lacks clear standard on how to decide whether the misapplication is such serious to the extent it might amount to non-application, and subsequently constitute a manifest ground for annulment. Perhaps, it is as subjective as the previously-mentioned “tenable” test. Moreover, to the opinion of the author, such approach requires review of the substantive matters (e.g. how the Tribunal applied the law), as well as involves criticism of the Awards, which, given the extensive opinionated commentary and criticism coming from the *ad hoc* Committees. In turn, this decreases the appeal and credibility of the annulment mechanism of ICSID and ICSID itself, creating certain risks for the regime.

Another case with similar approach is the annulment decision in *Sempra v. Argentine*, where the *ad hoc* Committee. In this case the *ad hoc* Committee reviewed how the Tribunal applied international law to deal with the “necessity” concept invoked by Argentine taking basis from the Bilateral Investment Treaty.<sup>94</sup> The Tribunal decided to refer to international

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<sup>91</sup> *Ibid.* (*Amco II*), para 7.28

<sup>92</sup> *Supra* note. 54, (*Soufraki v. UAE*), para 86.

<sup>93</sup> *Supra* note. 54, (*Soufraki v. UAE*), paras 99, 101.

<sup>94</sup> *Supra* note. 36, (*Sempra v. Argentina*), para 197.

law, as from their perspective there was lack of needed elements within the Bilateral Investment Treaty for the said concept. At the very same time, the meaning and intention of the provision in Bilateral Investment Treaty and the international law that the Tribunal has applied (ILC Articles) were of different nature, and the ILC's Article on "necessity" could not be used to interpret the provision in the Bilateral Investment Treaty.<sup>95</sup>

To the opinion of the author, the *ad hoc* Committees should refrain from concluding that the award shall be annulled on the ground of manifest excess of powers ground, when this ground is based on misapplication or misinterpretation of the proper law, as it involves review of the substantive matters of the case and essentially violates the limits established by Article 52(1). With this, such actions and decisions of the *ad hoc* Committees, the annulment mechanism is put at risk of moving towards the appeal or appeal-like mechanism.

Keeping in mind that annulment and appeal are distinct, but the line between them is thin and easily blurred by such decisions, the author believes that a strict approach is what ensures the annulment mechanism stability.

### **2.3.2. Non-Application of Separate Provisions of the Proper Law**

Another not quite obvious point related to non-application of the proper law is related to the non-application of specific provisions of the law. While it was established in the previous sub-chapter that non-application of a particular law constitutes the manifest excess of powers, the partial non-application of specific provisions within a law – that generally has the same effect on the case – has some chance to lead the award to annulment.<sup>96</sup> Logically, it would be one of the errors that are frequently made, as certain details, such as a very specific provision in a code, could go unnoticed, while the whole legal body is applied.

This opinion of the author could be supplemented by the *ad hoc* Committee in *Amco I*, which has noted that the Tribunal did not apply relevant provisions while calculating sum of investments required from the investor. The *ad hoc* Committee found Tribunal's calculations wrong, as it did not correspond with the Indonesian Foreign Investment law, which only recognizes amounts of investment that were registered through official system, through Indonesian authorities.<sup>97</sup> This finding of the sum was annulled by the Committee.<sup>98</sup> In the opinion of the Committee, non-application of certain rule of Indonesian Law on registration of investments created enough ground to annul the Award.

At the very same time, it is clear that the Tribunal paid close attention, examined and examined the Indonesia's Foreign Investment Law in detail. On a side note, in the following commentary by the *Amco I ad hoc* Committee it could be seen why this particular Committee was criticized, as it provided explanation to the mistake of the Tribunal, elaborating on substantive issues and giving comments that would not be needed.<sup>99</sup> It seems that the *ad hoc*

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<sup>95</sup> *Supra* note. 36, (*Sempra v. Argentina*), para 200.

<sup>96</sup> *Supra* note. 23 (*Schreuer*), p. 960, para 214.

<sup>97</sup> *Supra* note. 32, (*Amco I*), para 95.

<sup>98</sup> *Supra* note. 32, (*Amco I*), para 95.

<sup>99</sup> *Supra* note. 32, (*Amco I*), para 96.

Committee simply did not agree with the approach taken by the Tribunal, as well as applied the tenable approach.

Again, this non-application of an individual provision could be equated with the erroneous application of the proper law, as distinction is almost impossible. In turn, it does not constitute manifest excess of powers and, thus, is not an annulable error. As long as it does not wield the same volume as non-application of the proper law as a whole legal body, the manifest excess of powers ground for annulment is not satisfied.

In another annulment decision, in *CDC v. Seychelles*, the Tribunal allegedly has failed to apply a list of English court decisions, laws and doctrines.<sup>100</sup> The *ad hoc* Committee at the same time stated the following:

[O]ur 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.<sup>101</sup>

This point of view is also supported by the *MTD v. Chile ad hoc* Committee, where it has stated that

[T]he Tribunal applied Chilean law to issues governed by it ... Whether it got Chilean law (or for that matter international law) right on a matter falling within its jurisdiction is not for the Committee to decide on an annulment application.<sup>102</sup>

To conclude, the *ad hoc* Committees have adopted the approach and view, where the Tribunal has applied the applicable law, if the Award has identified the applicable law in a correct way, as well as there is a minimal analysis and discussion of the legal issues related to the law. The *Amco II* annulment decision has largely contributed to this change in determining manifest excess of powers in relation to the It is also hard to distinguish misapplication of a law with failure to apply specific provisions of the law.

## 2.4. Manifest Excess of Powers and Jurisdiction

Even though there is no specific ground for annulment related to jurisdiction and errors committed in connection to jurisdiction, the manifest excess of powers ground may be used to address jurisdictional errors of the Awards.

The jurisdiction of ICSID is marked with the Article 25 of the ICSID Convention.<sup>103</sup> There should be agreement to settle the dispute in ICSID. The dispute itself has to be of legal

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<sup>100</sup> David D. Caron, et al., *Practising Virtue: Inside International Arbitration*. Oxford: Oxford University Press, 2015.

<sup>101</sup> *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Annulment Decision, 29 June 2005, paras 45-47.

Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw6344.pdf>

Accessed on: 5 May, 2019.

<sup>102</sup> *Supra* note. 54, (*MTD v. Chile*), para 54

<sup>103</sup> Article 25 of the ICSID Convention: (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the

nature and has to arise directly from the investments. Finally, when the consent is given, no one can withdraw it.

There are several possible errors related to jurisdiction that would amount to manifest excess of powers. Tribunal deciding on a case, where it lacks jurisdiction or exceeds jurisdiction, both of these errors do fall under the excess of powers ground for annulment.

When it comes to deciding on jurisdiction, there are two concepts that are essential and are often encountered: jurisdiction *ratione personae* as in the cases with “nationality” of an investor and *ratione materiae* as in cases determining what the “investment” is.<sup>104</sup> While the nationality of an investor is defined in Article 25, “investment” is not given a definition anywhere in the Convention. It is a norm in international investments that the “investment” is defined in the Bilateral Investment Treaty or other IIA. Here, the parties do not have any limitations on how to define the term and this approach sets importance of the agreement between the parties.

From the IIA stems another question of jurisdiction, which is – whether the parties have agreed or gave consent to the jurisdiction of ICSID. This notion is also expressed by the *ad hoc* Committee in the *Klöckner I* annulment decision:

“Clearly, an arbitral tribunal’s lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an “excess of powers” under Article 52(1)(b).

Consequently, an applicant for annulment may not invoke lack of jurisdiction *ratione materiae* or *ratione personae* under Articles 25 and 26 of the Convention, but may contend that the award exceeded the Tribunal’s jurisdiction as it existed under the appropriate interpretation of the ICSID arbitration clause.<sup>105</sup>

It is an accepted norm that the priority is given to the agreement between the parties as long as does not breach the laws. In fact, it could be compared to the party autonomy principle in, for example, international commercial law or international contract law. As ICSID certainly is a significant institution for the international investment regime, one could say that it respects the way of conduct of investors and states, as well as it represents this respect in its dispute settlement system, including the annulment mechanism.

#### **2.4.1. “Manifest” in terms of Jurisdiction**

Just as in case with the applicable law, Article 52(1)(b) does not provide any further elaborations and does not give any difference to the jurisdictional issues. Again, improper exercise of jurisdiction, just as any other error attributable to the said provision has to be of manifest nature in order to be annulable.

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parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

<sup>104</sup> *Supra* note. 23 (*Schreuer*), p. 960, para 156.

<sup>105</sup> *Supra* note. 48 (*Klöckner I*), para 4.

There is also another approach, where there are certain criteria that would help to define what an “investment” is.<sup>106</sup> This approach, however, is highly subjective, as the criteria are not quite agreed on and the test can be applied independently from the definitions given in the IIAs.

One of the most subjective parts of the criteria is the development of the host state, as it is quite hard to decide on it. To support this, one could refer to the *Duke v. Peru ad hoc* Committee, where it states the following:

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.<sup>107</sup>

It seems that the jurisdiction in the two abovementioned cases over relevant matters rises from interpretation, which does not satisfy the “manifest” requirement of the annulment ground. In turn, this leads that the error is not annulable.

However, there are also views that any improper exercise of jurisdiction is manifest, as the Tribunal either does have jurisdiction to decide on certain matters or it does not.<sup>108</sup> Taking into consideration that there are only two answers to the question on whether the Tribunal has jurisdiction – either negative one or a positive – the manifest requirement seems to be odd on this matter. It is supported by Article 36(3), where the Secretary-General is given a duty to decline an arbitration request if it is “manifestly” outside of the scope of ICSID.<sup>109</sup> The argument lies within the *prima facie* test, as the supporters of this position say that there is no need to use the test again, as the dispute was already admitted to the arbitration through this test.

The author of this work does not agree with the above-stated position, as, from logical perspective, even when the Secretary-General has found that the dispute falls within the scope and jurisdiction of ICSID, there is always possibility that the Tribunal will exceed its powers and competences. Moreover, there is a clear distinction between jurisdiction of an ICSID tribunal and jurisdiction of ICSID itself, which the Secretary-General exactly is determining when seeing the request for arbitration. The Tribunal’s jurisdiction has little to do, if anything, with the Secretary-General’s decision.

With regard to the competence and jurisdiction of an ICSID Tribunal, it must be mentioned that just as in other arbitration proceedings, the Tribunals of ICSID decide on their

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<sup>106</sup> The criteria mainly stems from the awards of different tribunals. For example, there is a *Salini*, which requires that there is a contribution by the investor, performance taking place for some period of time, there also has to be a risk existent for the investor and the contribution should be meaningful and important for the development of the host state.

<sup>107</sup> *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Annulment Decision, 1 March 2011, para 98. [hereinafter “*Duke v. Peru*”]  
Available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9309.pdf>  
Accessed on: 12 May, 2019.

<sup>108</sup> *Supra* note. 17.

<sup>109</sup> Article 36(3) of the ICSID Convention: “The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.”

own competences and jurisdiction, with accordance to Article 41<sup>110</sup> of the Convention and the *kompetenz-kompetenz* doctrine. Some authors argue, that the manifest requirement is satisfied, only when the decision on the Tribunal's jurisdiction is incorrect, as from this perspective "manifest" means not "obvious", but "serious".<sup>111</sup>

However, for the sake of preserving the nature of the annulment mechanism of ICSID, it would be better to use approach that proclaims that there is no difference stated in Article 52(1)(b) for jurisdictional matters and, thus, any errors with jurisdiction have to be manifest. To support this, one should look at Article 41 again, where it says, that the Tribunal rules on its own competence, jurisdiction, as well as on the Article 52(1)(b), where nothing is stated with regard to jurisdiction. Thus, there are no exceptions.

If an error of jurisdiction derives from interpretation of the arbitration provision in a treaty, this means that it is rather misapplication or misinterpretation of the treaty provision, which does not always fall within the manifest excess of powers ground for annulment as it exists in Article 52(1)(b). Again, if a question arises whether the Tribunal has jurisdiction, this question should be left for the Tribunal itself to decide, as it is a doctrine in international practice.

#### **2.4.2. Lack, Excess or Failure to Apply of Tribunal's Jurisdiction**

There is an excess of powers in the case, when the Tribunal decides on the merits, facts and substance of the case, despite the situation, when it does not have a jurisdiction or exceeds its jurisdiction. Legal scholars describe this error to be the most serious and important way or form the Tribunals excess the powers mandated to them.<sup>112</sup>

On this matter it is useful to take a look at the *Mitchell v. DR Congo* annulment decision. The Tribunal in that case came to a conclusion that the operations the investor had in the host state (i.e. his law office) were amounting to "investment", while in the annulment proceedings the investor claimed it was not an "investment" and the Tribunal asserted jurisdiction over the matters it was not supposed to. The *ad hoc* Committee then turned to the mentioned test:

One should avoid confusing the economic operation or project – which, if it fulfills certain characteristics, becomes the investment within the meaning of the Convention and the Treaty, even if it is "smaller" or of "shorter duration and with more limited benefit to the host State's economy" – with all the rights and assets protected by the Treaty because they are part of the operation or project, or concern the same in one way or another.<sup>113</sup>

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<sup>110</sup> Article 41 of the ICSID Convention: "(1) The Tribunal shall be the judge of its own competence. (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

<sup>111</sup> Philippe Pinsolle, *Jurisdictional Review of ICSID Awards*, The Journal of World Investment & Trade Volume 5, Issue 4 (2004), p. 620.

<sup>112</sup> *Supra* note. (*Schreuer*), p. 938, para 132

<sup>113</sup> *Supra* note. 54, (*Mitchell v. Congo*), paras 23-49.

The *ad hoc* Committee, basing their decision on jurisdiction determined with the help of a test rather than the agreement between the parties, stated that there is an annulable error on the said matter in the Award, as well as the Award was annulled. Indeed, it took some interpretation for the *ad hoc* Committee to come to a conclusion. As the BIT did not give any definition, the Committee had to refer to interpretation, specifically the test already mentioned previously. In the opinion of the author, this particular instance could not really be equated to referencing to the agreement between the parties and trying to establish jurisdiction based on it. The error at the same time does not satisfy the “manifest” requirement. Some state, that the mistakes constituting the issue at stake can be considered annulable.<sup>114</sup>

The author would like to discuss a bit more in detail this particular annulment decision, as it seems to be crossing the line between an appeal and an annulment. The *ad hoc* Committee engaged in establishing what an “investment” is, reviewing the Tribunal’s factual findings, which, of course, does not quite correspond with what the annulment mechanism of ICSID is supposed to represent and do.

In addition to that, the author believes that the *ad hoc* should not have declared that there is manifest excess of powers, as it was not “manifest”. Of course, the relevant applicable law –the BIT between the US and Congo – did not contain exhaustive list or a stable definition of what an “investment” is. However, it does not justify the *ad hoc* Committees substitution of the Tribunal’s judgment on this matter with its own. It was unwarranted for the Committee to define the “investment”, as it is exactly what the Tribunal has to do.

In addition, one should also refer to the *Duke v. Peru*, where the *ad hoc* Committee and its comment on interpretation. The author of this thesis adheres to the opinion expressed by the *ad hoc* Committee:

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.<sup>115</sup>

In the opinion of the author, this reasoning allows to understand that the interpretation of jurisdiction should be left on behalf of the Tribunal rather than on one of the Committee, as it poses risk to moving to a more appeal-like system. Exactly for such actions, the annulment decisions of different *ad hoc* Committees are often criticized.

The *Soufraki v. UAE* case also presents some interest on this matter. The Tribunal in this case had to determine the nationality of the investor as to establish its competence. The investor stated that the documents presented were enough to establish the nationality and could not be disregarded, while in fact the investor also had another citizenship. On this matter, the jurisdiction of the Tribunal was dependant on the nationality of the investor, so

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<sup>114</sup> Benjamin M. Aronson, “A New Framework for ICSID Annulment Jurisprudence: Rethinking the 'Three Generations'”

<sup>115</sup> Supra note. 107, (*Duke v. Peru*), para. 160.

they were competent to address this question the way they did.<sup>116</sup> The *ad hoc* Committee on this matter concluded the following:

[T]he Tribunal did not manifestly exceed its powers, but on the contrary asserted a power which it was bound to exercise in order to verify its competence under the ICSID Convention and the Italy-U.A.E. BIT.<sup>117</sup>

To sum up, with regard to excess or lack of jurisdiction the *ad hoc* Committees may only accept as manifest excess of powers and subsequently annul the Award on this ground, if the Tribunal has exceeded its jurisdiction.

The Tribunals are able to judge on their own jurisdiction in accordance to the Convention and the competence-competence doctrine. Meaning, the Committees should not review what the jurisdiction should be, but merely decide whether the Tribunal stayed within the jurisdiction when deciding the case.

There is also an example, when a Tribunal fails to exercise the jurisdiction it has, which in turn constitutes an excess of powers and may lead to the annulment of an award. This might happen in case, when the tribunal denies deciding on the merits and facts of the case, even when it has jurisdiction to do so.

In the *Vivendi I* annulment decision, the *ad hoc* Committee states that not exercising the jurisdiction the Tribunal has is the same excess of powers as in the case of lack or excess of jurisdiction. The Tribunal in this case failed to decide certain claims over which it had the jurisdiction. Furthermore, it has concluded the following:

[F]ailure 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.<sup>118</sup>

There is certainly one more issue with regards to the jurisdiction and excess of powers, which is also related to the applicable law. It is essential for the Tribunals to understand where their jurisdiction comes from. To the opinion of the author, it is of high importance, as at the same time relates to both of the most serious errors under that might constitute manifest excess of powers.

One should look at the case of *CMS v. Argentina*, where the host state claimed that the Tribunal has exceeded its powers in terms of jurisdiction on the basis that it addressed and allowed the investor to introduce a claim for breach of an “umbrella clause”.<sup>119</sup> The host state claimed that CMS was not a party to the applicable document dealing with this issue. The *ad hoc* Committee upheld the Tribunal’s ruling that the jurisdiction is governed by Article 25 of the Convention and the Bilateral Investment treaty, rather than any other provision or law.<sup>120</sup>

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<sup>116</sup> *Supra* note. 23, (*Schreuer*)

<sup>117</sup> *Supra* note. 54, (*Soufraki v. UAE*), para 75.

<sup>118</sup> *Supra* note. 34 (*Vivendi I*), para 86.

<sup>119</sup> *Supra* note. 54, (*CMS v. Argentine*), para 62-67.

<sup>120</sup> *Supra* note. 54, (*CMS v. Argentine*), para 48.

When comparing to the failure to apply or misapplication of the applicable proper law, both excess and lack of jurisdiction, as well as failure to apply jurisdiction seem to be far more appealing to the manifest excess of power annulment ground. Errors with regard to jurisdiction have stronger chance to be found annulable.

## CONCLUSION

To conclude, the author would like to firstly state that the Convention and ICSID itself are of high importance for the international economic law, as well as economic development in the world. It is a unique, autonomous and de-politicized institution that allows for direct dispute settlement between a private person and a State. There is a need to stress that the Convention only allows for limited post-award remedies, out of which the annulment mechanism is the only plausible way to challenge the award. The research was mainly aimed at looking into interpretation and application of the annulment provision by the *ad hoc* Committees.

The annulment mechanism is of self-contained nature, completely internal, which ensures that there is no challenge or intervention from the domestic courts with regard to the ICSID Awards. Review of the awards by the *ad hoc* Committees is limited to the grounds for annulment as listed in Article 52(1).

From this provision a limited scope of review of the Committees stems that ensures the finality of award, since finality of an award in international investment disputes yields much more importance than the correctness, as it was well established even in the drafting history of the Convention.

The annulment mechanism is limited to review of procedural matters, rather than substantial and factual. The *ad hoc* Committees have the discretion to decide whether the Award at question satisfies any of the grounds for annulment as listed in Article 52(1). However, they should not go into lengthy opinionated analyses of the Tribunal's decision, as there is a high chance of blurring and crossing the line between annulment and appeal, which are of course distinct concept, but it is possible to sabotage annulment into an appeal by simply looking at substantial matters. Such actions undermine the credibility of not only the ICSID Tribunals but ICSID as such. *Amco I* and *Klöckner I*, the first two annulment decisions, which also constitute the first generation of the decisions, as put by scholars, were severely criticized for transgressing this line between annulment and appeal.

Out of the grounds listed in Article 52(1), "manifest excess of powers" is one of the most invoked grounds in the annulment proceedings. There are two competing positions with regard to this ground for annulment, which consider that "manifest" could mean "obvious" or "serious", respectively. When deciding whether there was excess of powers or not, the *ad hoc* Committees employ either *prima facie* approach or a two-step approach.

On this matter it is important that the *ad hoc* Committees should review only procedural issues and not merits of the Award, as it is not appeal and the *ad hoc* Committee should not offer their own view instead of the Tribunal's.

Failure to apply the proper law and lack or excess of jurisdiction is the two types of errors that characterize the most of the annulment proceedings address. These are good examples of excess of powers. There is no distinction made between jurisdictional matters

and substantive in Article 52(1)(b), as well as applicable law and jurisdiction are not mentioned at all as a ground for annulment.

The applicable law is usually set in an agreement to arbitration between the parties, so it is not surprising that failure to apply the law is an excess of power. At the same time, misinterpretation or incorrect application of the proper law do not constitute excess of power and, thus, the award cannot be annulled. There is also an issue of distinguishing erroneous application of the proper law and failure to apply the specific provision.

In cases, where the Tribunal correctly identifies and applies the proper law except for certain provisions of the said law, it could be equated to incorrect application rather than non-application, and, thus, is not an annulable error. At the very same time, if such non-application of a provision, as well as misapplication of the law has such weight that would amount to non-application of the law as whole, and would definitely influence the rendering of an Award, then this might be an excess of powers and, thus, an annulable error.

It is true that the arbitration Tribunal in accordance to competence-competence doctrine, as well as to Article 41 of the ICSID Convention, has the competence to rule on its own jurisdiction. If there is a question whether the tribunal should have jurisdiction over certain matters of the case, it should be left for the Tribunal itself to decide. The jurisdictional error also has to be “manifest” in order to become an annulable error, so if jurisdiction arises from interpretation, then it is not “manifest”, for example.

To sum up, the *ad hoc* Committees may decide on jurisdictional and applicable law matters, but not all of them and not at all circumstances, interpretations and approaches could amount to manifest excess of powers and be annulable errors. The *ad hoc* Committees should refrain from lengthy and opinionated elaborations on the Tribunal’s decision, as it deals damage to the reputation of ICSID system and makes and less appealable to some. Moreover, it poses a risk for the annulment mechanism, as the extensive discussions and comments from the Committees may touch upon substantive issues, which the Committees have no right to review under the existent system.

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