Leiden Journal of International Law (2020), **33**, pp. 57–75
doi:10.1017/S0922156519000554

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings

Attila M. Tanzi*

Department of Legal Studies, University of Bologna, Viale Filopanti 9, 40126 Bologna, Italy
Email: attila.tanzi@unibo.it

Abstract

The article addresses the relationship between judicial autonomy and the autonomy of the parties principles. The issue is not addressed so much through the lens of the procedural rules on the conduct of the proceedings, as through the prism of the general principles of adjudication which dictate the boundaries of judicial, or arbitral, decision-making. The focus will be on the combination between the principles *ne*, *ultra* and *infra*, *petita* and *non liquet* as they flow from the consensual nature of international adjudication and arbitration, on the one hand, and the principle *jura novit curia* which mirrors the autonomy of the judicial function, on the other. The analysis does not draw from national legal systems, nor from commercial arbitration. Due to the significantly different configuration of the principles at issue in different jurisdictions, it will focus on international litigation as an autonomous phenomenon. It will address firstly inter-state adjudication and then international investment arbitration. Special attention will be given to the ICSID system in consideration of its unique annulment mechanism. The article draws from researched case law an encouragement, if not simply the need, for international adjudicative bodies to undertake a proactive attitude in the conduct of the proceedings. More generally potentials emerge from the analysis, to the effect that not only inter-state adjudication may impact on investor-state arbitration, but also *vice versa*.

Keywords: annulment; general principles of international adjudication; investment arbitration; *jura novit curia*; *ne ultra petita*

1. Introduction

The present article addresses the relationship between the autonomy of the parties and judicial autonomy in international adjudication, with special regard to international investment arbitration.

The topic will not be addressed in relation to the rules on the conduct of adjudicative proceedings having purely procedural relevance, e.g., those on production of evidence, nor on the organization of written and oral pleadings; it will, rather, be looked at through the prism of the

*Chair of International Law, Department of Legal Studies, University of Bologna – Alma Mater Studiorum; Associate Member, 3VB Chambers, London. The present article elaborates the presentation given by the Author in the seminar on 'The Ne Ultra Petita Principle and International Investment Arbitration', co-organized by Wilmer Cutler Pickering Hale and Dorr LLP and Investment Treaty Forum, BIICL, held on 25 January 2018. The Author is grateful to Sir Franklin Berman and Professor Maurice Mendelson for their remarks as discussants in that event. Acknowledgments are also due to Gian Maria Farnelli, Martins Paparinskis and Raymundo Treves for their useful comments on a previous version of the present article, as well as to the reviewers of the LJIL for their suggestions. The usual disclaimer applies.

general principles that govern the good administration of justice. Namely, *ne ultra* and *infra petita*, and *non liquet* – which give effect to the mandate of the adjudicative body produced by the consent of the parties – and *jura novit curia* – which enhances the judicial autonomy of adjudicative bodies in reaching their decisions. Since such principles are not spelt out in the statutes and rules of procedure of permanent international courts and tribunals, nor in the rules of procedure adopted by *ad hoc* international arbitration tribunals in consultation with the parties, they deserve to be studied equally with regard to both sets of international adjudicative bodies.

The analysis will not proceed from the assumption that the principles at hand are introduced into international law and adjudication as 'general principles of law recognized by civilized nations' under Article 38(1c) of the ICJ Statute.[1] To that end, due consideration has been given to the differences in the configuration of the principles at hand between civil and common law systems – thus between domestic inquisitorial and adversarial approaches to adjudicative proceedings.[2] Account has also been taken of the distinguishing features of international adjudication which find no comparator in domestic adjudication, with special regard to the consensual nature of international jurisdiction. This confers, basically, an arbitral nature also to the permanent international adjudicative bodies, such as the ICJ and the International Tribunal for the Law of the Sea (ITLOS),[3] thus limiting the binding force of their judgments exclusively to the disputing parties.[4] Such differences account for the more acute tension between the autonomy of the parties and judicial autonomy in international adjudication with respect to domestic adjudication and commercial arbitration to the extent that the latter is regarded as embedded in some national *lex arbitri*.

The article relies upon, and aims to contribute to, an emerging common law of international adjudication based on persuasive jurisprudential elements drawn from inter-state, human rights, and investment arbitration case law, which converge towards common trends[5] much more than the domestic case law from different jurisdictions. As already alluded, investment arbitration will be addressed on the premise set out by Aron Broches, the founding father of the ICSID Convention, that '[t]he parallel if any lays with the International Court of Justice rather than

[1]Referring to 'the general principles of law recognized by civilized nations' as a source of the law applicable by the ICJ under Art. 38(1c) of the ICJ Statute, Judge McNair observed that 'the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions' (*International Status of South-West Africa*, Separate Opinion of by Sir Arnold McNair to the Advisory Opinion of 11 July 1950, [1950] ICJ Rep. 146, at 148). This is all the most appropriate with regard to principles of adjudication. See in the same direction also A. P. Sereni, *Principi generali del diritto e processo Internazionale* (1955); P. Weil, 'Le droit international en quête de son identité', (1992/VI) 237 RCADI 9, at 146; O. Schachter, *International Law in Theory and Practice* (1991), 54.

[2]See G. Cordero-Moss, 'Tribunal's Powers versus Party Autonomy', in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook of International Investment Law* (2008), at 1207. While the Author applies private international law and international commercial law parameters to the analysis of international investment arbitration, for the purposes of the present article, neither the adversarial nor the inquisitorial models are regarded as the matrix of international adjudication and arbitration, which are considered to have their own independent international configuration. See also G. Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know it? Apply It? How? And a Few More Questions', (2005) 21 *Arb. Int.*, at 632.

[3]G. Morelli, 'La théorie générale du procès international', (1937) 61 RCADI 253, at 311 ff. See also H. Thirlway, *The International Court of Justice* (2016), at 38 ff.

[4]To the contrary, on the nuanced differences between international adjudication and arbitration – though, focusing on the procedural rules on the conduct of proceedings, rather than on principles of adjudication – see S. Forlati, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body?* (2014), 23 ff. See also R. Kolb, 'General Principles of Procedural Law', in A. Zimmerman et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), at 876.

[5]See C. Brown, *A common law of international adjudication* (2007). Kolb similarly refers to 'principles common to the ICJ, international arbitrations (inter-state and possibly also commercial), standing international tribunals (e.g. the ITLOS, the ECHR, etc.) and possibly also bodies such as the Human Rights Committee under the International Covenant on Civil and Political Rights' (Kolb, *supra* note 4, at 875).

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

with commercial arbitration'.[6] Inevitably, international investment arbitration law presents its modulations and variations with respect to inter-state adjudication.[7] The differences, though, seem to bear on the procedural rules of conduct of proceedings rather than on the principles of adjudication under consideration.[8] The research focuses on ICSID, since its annulment mechanism provides a unique form of third-party review of the way the principles at hand are applied.

The article comes in five parts, next to the present introduction. First, it draws the main contours of the general principles in question in relation to inter-state litigation. The premise is that the mandate of all adjudicative bodies will reflect the parties' autonomy. It is argued that such autonomy is given effect to by the *ne ultra petita* principle, in combination with the inherently related *ne infra petita* and *non liquet* principles. At the same time, the judicial autonomy principle is found to be reflected in *jura novit curia*, as a counterbalance to the autonomy of the parties and *ne ultra petita*,[9] while its complementary role with respect to *ne infra petita* and *non liquet* is also emphasized. The right of the parties to be heard is shown as a key requirement for balancing a proactive attitude by an adjudicative body with the autonomy of the parties principle. Secondly, the general principles at hand are addressed in relation to ISDS, with special regard to the ICSID system particularly in consideration of its unique annulment mechanism. Thirdly, the way in which such principles apply, or not, is analysed in relation to the jurisdictional provisional measure phases, as well as to annulment proceedings. Fourthly, it is illustrated how infringements of the autonomy of the parties principle in investment arbitration may be redressed through the grounds for annulment under Article 52(1) of the ICSID Convention. The risk is singled out that annulment powers could be expanded *ultra petita*, thus trespassing onto the boundaries of appellate jurisdiction. By way of conclusion, it is emphasized how the proper application of the principles under consideration is key to balancing the autonomy of the parties with judicial autonomy in international adjudication. The bi-univocal potentials will be stressed for cross-fertilization between inter-state adjudication and investor-state arbitration.

Due to space constraints, the article will not address the application of the principles at hand to the assessment of the forms and contents of reparation, which would deserve a separate analysis.

2. The relevant principles in inter-state adjudication

2.1 The mandate of the international adjudicative body and ne ultra petita

The importance of the role of the parties in international proceedings emerges from the degree of control that they exert on the three pillars of the mandate of an adjudicative body in any given case. Namely: (i) its jurisdictional competence; (ii) the applicable law; and (iii) the claims put forward by the parties, which delineate the scope of the dispute. Whilst the consensual factor behind the claims of the parties is self-evident, in inter-state litigation the boundaries of the jurisdictional competence of the adjudicative body, as well as the scope of the law applicable by it, also stem from

[6]'Consultative Meeting of Legal Experts, Fifth Session 19 February 1964', in ICSID (ed.), *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention* (1968), Vol. II-1, at 423, available at icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf. See also E. De Brabandere, *Investment Treaty Arbitration as Public International Law* (2014).

[7]T. W. Walde, 'Procedural Challenges in Investment Arbitration under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Proactively, the Equality of Arms', (2010) 26 *Arb. Int.*, at 3. See also S. Wittich, 'The Limits of Party Autonomy in Investment Arbitration', in C. Knahr, C. Koller and A. Reinisch (eds.), *Investment and Commercial Arbitration. Similarities and Divergences* (2010), 47, at 50 ff.

[8]As stressed by Eric De Brabandere, also with a view to distinguishing investment treaty arbitration from international commercial arbitration, '[b]eing founded in public international law, investment tribunals and arbitrators are subjected to some specific principles imported from public international litigation' (De Brabandere, *supra* note 6, at 100).

[9]As recently put by the ILC Special Rapporteur on Protection of the Atmosphere, Professor Shinya Murase, '*jura novit curia* puts a limit on the restriction imposed by *non ultra petita*' (S. Murase, Fifth report on the protection of the atmosphere, UN Doc. A/CN.4/711 (2018), at 45, para. 90).

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

the consent of the parties. Such consent may have been expressed through their ratification of a disputed treaty which encompasses a jurisdictional clause, the unilateral declaration of acceptance of the jurisdiction of the adjudicative body in question, or the *compromis*.

Ne ultra petita appears to be the principle which mainly reflects the constraints that the autonomy of the parties exerts on the judicial powers of an international adjudicative body through its mandate. As observed by Judge Fitzmaurice, it is precisely 'a derivative of the consent principle'.[10] Not only does it give effect to the limitations of the adjudicative function set by the scope of the jurisdictional competence and the applicable law, but also to the curtailment of the dispute by the claims of the parties. Those are key elements of the mandate which are usually not spelt out in the procedural rules governing the functioning of any given adjudicative body.

As observed by the ICJ in interpreting its own decision in the *Asylum* case between Colombia and Peru, 'it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions'.[11] In the same vein in *Barcelona Traction*, the Court abstained from addressing the treatment of shareholders since it noted from the Belgian application and the Spanish reply that the issue had not been raised by the parties.[12]

In line with the above, the Tribunal in the *Boundary dispute between Argentina and Chile* arbitration observed that:

> The competence of international judges is limited by the functions assigned to them by the parties in the case. Their powers are also limited by the extreme claims which the parties put forward in the hearings.[13]

It bears noting that the Tribunal emphasized that '[t]o exceed these functions or powers means deciding *ultra vires* and rendering the decision null by reason of *excès de pouvoir*'.[14]

By confining the power of the tribunal to decide exclusively on the claims advanced by the parties as determinants of the scope of the dispute which it is asked to settle, *ne ultra petita* also reflects the boundaries of the tribunal's jurisdictional competence. Finally, the principle at hand also ties in with the applicable law pillar of the tribunal's mandate, insofar as the tribunal's jurisdictional competence is confined to the application of the applicable law.

2.2 Jura novit curia

Whilst the mandate of any given international adjudicative body curtails the boundaries of its jurisdictional competence, such boundaries also determine the scope within which the adjudicative body is to exercise its judicial function to its full extent, including *sua sponte*.

Indeed, the question arises from the above case law as to whether an adjudicative body is entitled to decide a case on the basis of legal grounds which, even though pertaining to the dispute before it, have not been invoked by the parties. Here, the principle *jura novit curia* may give effect to the autonomy of the judicial function, possibly countervailing *ne ultra petita*. *Jura novit curia*, which literally means 'the judge knows the law', in combination with the adage *narra mihi factum dabo tibi jus*, was originally meant to characterize the allocation of responsibilities in judicial proceedings, whereby it would be for the parties to prove the facts and for the adjudicator to apply the

[10]G. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986), vol. 2, at 524.

[11]*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru)*, Judgment of 27 November 1950, [1950] ICJ Rep. 395, at 402.

[12]*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Preliminary Objections, Judgment of 5 February 1970, [1970] ICJ Rep. 3, at 37, para. 49.

[13]*Boundary dispute between Argentina and Chile concerning the frontier line between boundary post 62 and Mount Fitzroy*, Decision of 21 October 1994, (2006) XXII UNRIAA 3, at 26, para. 77.

[14]Ibid.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

law to such facts.[15] However, as anticipated in the introduction, *jura novit curia* cannot be considered in international law as a 'general principle of law recognized by civilized nations' under Article 38(1c), of the ICJ Statute. This is primarily due to its differing configurations in different civil law jurisdictions and its absence in the common law systems.[16] Its rationale in international adjudication is also different from domestic proceedings, if only for the fact that here the applicable law is always chosen by the disputing parties, whether directly or indirectly. In the same venue, differently from domestic litigation involving conflict of laws considerations and from commercial arbitration,[17] the scope of operation of *jura novit curia* in international adjudication does not in principle encompass the choice of the applicable law,[18] but pertains only to the legal arguments, rules and facts which have not been advanced by the parties, within the ambit of the applicable law accepted by them. Finally, as already alluded, in international adjudication the separation between the facts and the law appears to be more blurred than in domestic litigation.[19]

As observed by Sir Gerald Fitzmaurice, 'the maxim *jura novit curia* implies that the tribunal both knows and will apply the law, whatever the parties say, or omit to say'.[20] Having regard to the identification of the applicable legal standards for the delimitation of the continental shelf between Libya and Malta, the ICJ observed that '[t]he Court must not exceed the jurisdiction conferred upon it by the parties, but it must ... exercise that jurisdiction to its full extent'.[21] After noting that the special agreement did not provide for the methods for the delimitation at issue, it stated that:

> [S]ince the Court is required to decide how in practice the principles and rules of international law can be applied in order that the Parties may delimit the continental shelf ... this necessarily entails the indication by the Court of the method or methods which it considers to result from the proper application of the appropriate rules and principles.[22]

This passage suggests that an international adjudicative body not only has the power, but also the duty, to autonomously rely on any legal argument within the scope of the applicable law which may be necessary to settle the dispute submitted to it. I will revert to this in relation to the application of the *ne infra petita* and *non liquet* principles in the next section.

For the purposes of the present analysis, it bears noting how *jura novit curia* and *ne ultra petita* complement each other whilst reflecting two juxtaposed rationales. *Ne ultra petita* gives effect to the consensual nature of international adjudication by preventing the adjudicator from relying on

[15]See, for all, F. Rosenfeld, '*Iura Novit Curia* in International Law', (2017) 6 EIAR 132. On the different configurations of the principle in hand in domestic and international adjudication see J. Verhoeven, 'Jura Novit Curia et le juge international', in P-M Dupuy et al. (eds.), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat – Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006), 635, at 637 ff.

[16]See also Rosenfeld, ibid., at 132.

[17]Against the application of *jura novit curia* to international (commercial) arbitration on the assumption that there would be no *lex fori* for an international arbitral tribunal, G. Kaufmann-Kohler, '*Iura novit arbiter*: Est-ce bien raisonnable?', in A. Héritier and L. Hirsch (eds.), *De Lege Ferenda. Réflexions sur le droit désirable en l'honneur du Professeur Alain Hirsch* (2004), 71, at 74.

[18]With the exception where the BIT provides for the application of the domestic law of the host state, including its conflict of laws rule.

[19]As recently observed by the ILC, in international adjudication '[t]he line between "fact" and "law" is often obscured', adding that '[b]ased on *jura novit curia*, the Court can in principle apply any law to any fact, and in theory can evaluate evidence and draw conclusions as it sees appropriate as long as the Court complies with the *non ultra petita* rule); these are all legal matters. Given its judicial function and under *jura novit curia*, the Court needs to sufficiently understand the meaning of each related technical fact in the case at hand' (ILC, 'Report of the International Law Commission. Seventieth session' (30 April–1 June and 2 July–10 August 2018) UN Doc. A/73/10 (2018), at 200, note 991).

[20]See Fitzmaurice, *supra* note 10, at 531.

[21]*Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Merits, Judgment of 3 June 1985, [1985] ICJ Rep. 3, at 23, para. 19.

[22]Ibid., at 24, para. 19.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

legal arguments which would re-characterize the dispute as curtailed by the claims of the parties, let alone on rules which fell outside the applicable law. *Jura novit curia*, on the other hand, aims at preserving the autonomy of the adjudicative function by affording the tribunal the jurisdictional power, or even duty, to apply the applicable law to its fullest extent, irrespective of the arguments pleaded by the parties. The calibrated combination between the two principles at hand appears to be key to the proper administration of justice.

2.3 Ne infra petita, non liquet, non licet and jura novita curia

If under *ne ultra petita* 'an international tribunal will not decide more than it is asked to decide',[23] by the same token it should not decide less than it is asked to decide, as expressed by the *ne infra petita* principle. The latter is also complementary to the *non liquet* principle, which is derived from the assumption of the completeness of the international legal system,[24] according to which an adjudicative body may not abstain to decide a dispute submitted to it, or an aspect thereto.[25] That is to say that when an adjudicative body fails to address an aspect of the *petitum*, thus incurring *infra petita*, it can be said also to incur *non liquet*, at least with regard to the individual aspect of the *petitum* in question.

Against this background, *jura novit curia* becomes the commanding principle under the circumstance in which the parties failed to plead all of the necessary legal arguments for the tribunal to decide on all of the aspects of the *petitum*. Here, *jura novit curia* – in combination with *ne infra petita* and *non liquet* – would provide the duty for the tribunal to exercise its full jurisdictional power necessary to settle all the aspects of the dispute, obviously within the boundaries of the applicable law. In doing so, the principles in question would advise, if not require, a proactive attitude of the adjudicative body, possibly in more stringent terms than under the inherent powers doctrine.[26] The shortcomings of the parties may also pertain to the representation of the factual elements essential for the tribunal to decide the case. Considering the entanglement between the disputed factual and legal issues,[27] this circumstance could also be considered to pertain to the application of the *non liquet* principle. Some, conversely emphasizing the distinction between factual and legal issues, regard the same discipline as a separate legal institution under the expression *non licet*, whereby the adjudicative body would not render a decision for want of clearly defined disputed facts.[28] Apart from terminology, such flawed conduct by both parties may be rare, but not impossible. For example, this was the case with the dispute concerning the boundary delimitation between Egypt and Israel which led to the *Taba* award. There, the Tribunal chose to re-characterize the disputed facts, thus giving priority to its duty to settle the dispute with a view of avoiding *non liquet*, or *non licet*.[29] The parties' shortcomings and imprecisions concerning the disputed facts not only depended on their pleadings, but also on the *compromis*.

[23]See Fitzmaurice, *supra* note 10, at 524.

[24]See H. Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law', in F. M. Van Asbeck (ed.), *Symbolae Verzijl: présentées au professeur J. H. W.Verzijl à l'occasion de son LXX-ième anniversaire* (1958), 196, at 217.

[25]See, amongst others, D. Bodansky, 'Non Liquet and the Incompleteness of International Law', in L. Boisson de Chazournes and P. Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999), 153, at 155.

[26]See A. Bjorklund and J. Brosseau, 'Sources of Inherent Powers in International Adjudication', (2018) 6 EIAR 1.

[27]See *supra* note 19; see also M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence before International Tribunals* (1996), at 42–9.

[28]See G. Fitzmaurice, 'The Problem of Non-Liquet: Prolegomena to a Restatement', in C. R. Rousseau and S. Bastid (eds.), *Mélanges offerts à Charles Rousseau: la communauté international* (1974), 89, at 96.

[29]*Case concerning the location of boundary markers in Taba between Egypt and Israel*, decision of 29 September 1988, (2006) X UNRIAA 1, at 65 ff., paras. 238 ff. (*Taba*). See P. Weil, 'Some Observations on the Arbitral Award in the Taba Case', (1989) 23 *Isr. Law Rev.* 1, at 25; E. Lauterpacht, 'The Taba Case: Some Recollections and Reflections', ibid., 443, at 468;

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

In sum, were a tribunal to confine itself strictly to the positions of the parties when they have fallen short of asserting legal arguments or properly adducing facts which are essential to the settlement of the dispute, it would risk laying down an incomplete award, thus incurring a partial, or an outright, *non liquet*.

3. The principles in question in the international investment arbitration context

In international investment arbitration, like in inter-state litigation, the principles in question flow from the three-pronged pillar of an international tribunal's mandate. Namely, with specific regard to an ICSID tribunal, from (i) its jurisdictional competence under Article 25 of the ICSID Convention;[30] (ii) the rules constituting the applicable law, under Article 42(1) of the said Convention; and (iii) the claims put forward by the parties, which define the contents and scope of the dispute. Such are the boundaries within which investment tribunals exercise their adjudicative function and the principles at hand operate by balancing the autonomy of the parties with that of the adjudicative function.

The following analysis aims to qualify Christoph Schreurer's assessment that the annulment-case law has 'uniformly rejected the idea that the tribunals in drafting their awards are restricted to the arguments presented by the parties',[31] as well as Jan Paulsson's assertion, based on inter-state case law whereby 'a tribunal in an investment dispute cannot content itself with inept pleadings, and simply apply the least implausible of the two'.[32] Also, the annulment case law, where the application of the principles at hand are usually under scrutiny, contributes to their clarification in terms which appear to be useful also for purposes of inter-state adjudication.[33]

An exemplary early application of the principles under consideration can be traced back precisely to the first ICSID annulment decision in 1985, *Kloeckner* v. *Cameroon*. The committee stated that:

> It matters little in principle that the Tribunal's legal construction was different from that of one or the other of the parties, so long as the right of each to be heard was respected and ... *so long as it remains within the 'legal framework' provided by the parties*.[34]

Eventually, the committee annulled the award under excess of powers considerations. It found that the Tribunal went beyond 'the legal framework provided by the parties' by deciding on the basis of equity, without the agreement of the parties, thus, beyond the framework provided by Article 42(1) of the ICSID Convention on the applicable law.[35]

Indications also emerge to the effect that investment tribunals are not prevented from legally re-characterizing the facts on record beyond the arguments pleaded by the parties, so long as they keep within the boundaries of the applicable law and of the contours of the claims.[36] Ever since

[30]1965 Convention on the settlement of investment disputes between States and nationals of other States, 575 UNTS 159.

[31]C. Schreuer, 'Three Generation of ICSID Annulment Procedures', in E. Gaillard and Y. Banifatemi (eds.), *Annulment of ICSID Awards* (2004), 17, at 30.

[32]J. Paulson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law', in A. J. van den Berg (ed.), *International Arbitration 2006: back to basics?* (2007), 879, at 879.

[33]See *infra* note 101.

[34]*Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment of 3 May 1985, (1994) 2 ICSID Rep. 9, at 117, para. 56; emphasis added (*Klöckner I*).

[35]Ibid., at 117 ff., paras. 57 ff.

[36]On the inextricable relationship between facts and law in litigation, see *supra* notes 19 and 27. As stated by the sole arbitrator, Giuditta Cordero-Moss, in the oft-quoted *Bogdanov* case '[a]s long as the Arbitral Tribunal limits its evaluation to the facts as presented by the parties, it remains free, within the borders of the applicable law particularly, as long as it remains within the frame of the legal sources mentioned in the proceeding), to give the legal qualifications and determine the legal consequences that it deems appropriate, even if they were not pleaded by the parties' (*Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, Award of 22 September 2005, at 14, available at www.italaw.com/sites/default/files/case-documents/ita0094_0.pdf).

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

Klockner I, the investment case law has consistently emphasized the fundamental importance of the procedural right of the parties to be heard, which is ancillary to their autonomy, as a conditioned license for the tribunals' pro-activeness.

Seventeen years after *Klockner I*, in 2002, the *ad hoc* committee in *Vivendi I* rejected the request for annulment for departure from a fundamental rule of procedure due to an alleged *ultra petita* decision, precisely based on the assessment that 'the parties had a full and fair opportunity to be heard at every stage of the proceedings'.[37]

In 2014, the *Caratube ad hoc* committee maintained that:

> [A] tribunal (and also a committee) is only free to adopt its own solution and reasoning without obligation to submit it to the parties beforehand, if it remains within the legal framework established by the parties.[38]

One can draw from the annulment case law, the reiteration of the two preconditions set out in *Kloeckner I* for a tribunal to follow its autonomous legal reasoning in compliance with the autonomy of the parties principle: i.e., (i) within the confines of the dispute as defined by the application and the reply, and (ii) by the right of the parties to be heard. Even if, as in the above passage in *Caratube*, the two preconditions seem to be considered alternatively, the confines of the dispute as curtailed by the parties are cogent for tribunals, while compliance with the right of the parties to be heard remains *ex abundante cautela* an effective antidote against annulment for *ultra petita* determinations. As observed by the *Quiborax* v. *Bolivia* Tribunal in 2015:

> When applying the law (whether national or international), the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. The principle *jura novit curia* – or better, *jura novit arbiter* – allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not surprise the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate.[39]

Such a cautious approach was corroborated the same year by the *ad hoc* committee in *Daimler* v. *Argentina*.[40]

3.1 Non liquet and ne infra petita, and jura novit curia

As emphasized by Christoph Schreuer: '[t]he requirement that the award must deal exhaustively with the dispute, as submitted by the parties, is one of the general principles underlying

[37] *Compañia de Aguas del Aconquija and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, para. 85, available at www.italaw.com/sites/default/files/case-documents/ita0210.pdf (*Vivendi I*).

[38] *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment of 21 February 2014, paras. 92 ff., available at www.italaw.com/sites/default/files/case-documents/italaw3082.pdf (*Caratube*).

[39] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award of 16 September 2015, para. 92, available at www.italaw.com/sites/default/files/case-documents/italaw4389.pdf. In the same vein, see also *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award of 5 April 2016, para. 118, available at www.italaw.com/sites/default/files/case-documents/italaw7230.pdf; and *Churchill Mining and Planet Mining v. Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14, Award of 6 December 2016, para. 236, available at www.italaw.com/sites/default/files/case-documents/italaw7893.pdf.

[40] The Committee emphasized that '[a]n arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it' (*Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment of 7 January 2015, para. 295, available at www.italaw.com/sites/default/files/case-documents/italaw4092.pdf). And by 'authority' one intends 'a judicial decision, statute, or rule of law that establishes a principle; precedent' (*Collins English Dictionary*, online edition, available at www.collinsdictionary.com/dictionary/english/authority).

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

arbitration'.[41] He goes on to emphasize that '[a]n award that is not comprehensive and exhaustive of the parties' questions amounts to an excess of powers just like a decision on questions that have not been submitted to the tribunal'.[42]

Indeed, Article 42(2) of the ICSID Convention provides that '[t]he Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law'. *Non liquet*, as it has been illustrated above on the basis of inter-state case law,[43] ties in with *ne infra petita* and is inextricably linked to *jura novit curia*. The risk of *non liquet* is considered in the abstract, under Article 42(2) by the 'silence or obscurity of the law' which is relevant to the settlement of the dispute. In practice, such risk consists of the circumstance in which the parties fail to assert or clarify the law substantiating their particular claims under the applicable law. In line with Professor Schreuer's interpretation of *non liquet*, as embedded in the principle whereby 'the award must deal exhaustively with the dispute',[44] it will be for tribunals to assert and clarify the law, possibly even by resorting to a systemic interpretation and application of the relevant general principles of law.[45]

In line with the ICJ *dictum* in *Libya* v. *Malta* referred to above, whereby an international adjudicative body must exercise its jurisdiction 'to its full extent',[46] the *ad hoc* committee in *Vivendi I* observed that:

> [A]n ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments.[47]

This passage adds to the indications – even though not unanimous – militating in favour of an affirmative answer to the vexed question whether, next to the obligation to review all of the legal arguments and the evidentiary record submitted by the parties, tribunals have also the duty to address elements of law and facts that are relevant to the decision of the dispute which the parties have not pleaded. Such indications appear to fall well within, and to give effect to, *ne infra petita*, particularly in combination with the principle of *non liquet*. The *ad-hoc* committee in *Enron* v. *Argentina*, while arguing that '[a] Tribunal is not required to address expressly every argument put by a party, and [that] ... is therefore certainly not required to address arguments that have not been put by the parties',[48] stressed that 'the Tribunal is required to apply the applicable law', finding that the Tribunal had failed to do so, thus, annulling the award.[49]

In fact, under the ICSID Convention, failure to apply the applicable law may be sanctioned with annulment under different grounds. As it will be illustrated in the next section, that is certainly the

[41] C. Schreuer, L. Malintoppi and A. Reinisch (eds.), *The ICSID Convention. A Commentary* (2009), at 816.

[42] Ibid.

[43] *Supra*, Section 2.3.

[44] *Supra*, note 41.

[45] See in general A. Gattini, A. Tanzi and F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration* (2018); A. Tanzi, 'Conclusions: Testing General Principles of Law in International Investment Law: between Principles and Rules of International Law', in M. Andenas et al. (eds.), *General Principles and the Coherence of International Law* (2019), 297.

[46] *Supra*, note 21.

[47] *Vivendi I*, *supra* note 37, para. 86.

[48] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic of 30 July 2010, para. 375. See also, amongst others, the *ad hoc* committee in *Patrick Mitchell*. It argued that an ICSID Tribunal 'is not, strictly speaking, subject to any obligation to apply a rule of law that has not been adduced; this is but an option ... for which reason it is not possible to draw any conclusion from the fact that the arbitral Tribunal did not exercise it' (*Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 57).

[49] *Enron*, ibid., para. 376.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

case under the 'manifest excess of power' and 'failure to state the reasons' grounds, as spelled out in Article 52(1b) and (1d). Accordingly, a tribunal that applies legal arguments, or even rules, that have not been pleaded by the parties, cannot be held to incur *ultra petita* when it does so in order to avoid failure to apply the applicable law. By the same token, it is arguable that the tribunal is bound under *ne infra petita* and *non liquet* to apply such rules and legal arguments, within the applicable law, that are necessary to settle in its entirety the dispute before it, even when such rules and arguments have not been pleaded by the parties.

Given the entanglement between the disputed facts and the applicable law already referred to in the inter-state litigation context,[50] the principles in question can be said to apply also to the facts of the case and their forensic explanation. Again, that is so under three counts: namely, *jura novit curia*, *ne infra petita*, and *non liquet*. As to the first count, as recently observed by the ILC Special Rapporteur on the protection of the atmosphere with regard to the ICJ adjudicative powers, '[*j*]*ura novit curia* ... can enable or even require the Court to consider *factual points* that have not been taken by the parties, by virtue of proper application of international law'.[51] As to the second count, while under Article 43 of the ICSID Convention, the tribunal may require the parties to produce evidence, conversely, when facts adduced by the parties are not addressed by the tribunal which would be determinant for its decision, an *infra petita* problem arises. As to the third count, Article 42(2) on *non liquet* refers to cases of 'obscurity of the law'. Often, such obscurity depends on the complexity or the highly technical nature of the disputed facts. It is arguable that in such cases *non liquet* would justify, and even require, a pro-active attitude on the part of the tribunal to clarify the 'obscurity' of such facts, when the parties have not done so.

4. The principles under consideration in proceedings other than the merits

While the principles under consideration are generally applied in proceedings on the merits, they operate with significant adjustments in incidental proceedings on jurisdiction and admissibility, as well as on provisional measures. It will also be shown how they regularly apply in annulment proceedings, where available.

4.1 The autonomous power to decide over jurisdiction and admissibility

In the assessment of an adjudicative body's jurisdiction, the governing principle is that of *kompetenz-kompetenz*. Here, the principle of judicial autonomy operates to the full extent, even as an obligation for the tribunal to assert its own jurisdiction, or lack of it, *proprio motu*.[52] This excludes the operation of *ne ultra petita*. As stated by the British-US Tribunal in the *Rio Grande* case:

> [T]here is in this and every legal Tribunal a power, and indeed a duty, to entertain, and in proper cases, to raise for themselves, preliminary points going to the jurisdiction to entertain the claim.[53]

The *kompetenz-kompetenz* principle is consistently enshrined in the rules of the ICJ, ITLOS, the European Court of Human Rights (ECtHR), and the Inter-American Court of Human Rights

[50]See *supra*, text at notes 19, 27 and 36.

[51]Murase, *supra* note 9, at 45, para. 90 (emphasis added).

[52]See I. F. Shihata, *The Power of the International Court to Determine its Own Jurisdiction. Compétence de la compétence* (1965); R. Kolb, 'General principles of procedural law', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2006), 794, at 812; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (2013), vol. I, at 755 ff.; Forlati, *supra*, note 4, at 85 ff.

[53]*Rio Grande Irrigation and Land Company, Ltd. (Great Britain) v. United States*, Decision of 28 November 1923, (2006) VI UNRIAA 131, at 135–6.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

(IACtHR), and is equally consistently upheld by their case law.[54] As to ICSID, the principle at hand is set out in Article 41 of the Convention, and Rule 41(2) of the ICSID Arbitration Rules.

In sum, any given international adjudicative body may decide on its jurisdiction or on the admissibility of a claim when the respondent has not raised objections, or beyond the points raised by it.

In its award on jurisdiction in *Micula*, the Tribunal came down expressly on the point at hand by observing that 'a tribunal can rule on and decline its jurisdiction even where no objection to jurisdiction is raised'.[55] The *ad hoc* committee in *Libananco* v. *Turkey* has provided a controversial indication on the matter by restrictively confining the power of tribunals to assess their jurisdiction within the margins of 'the grounds pleaded by the parties'.[56] It seems difficult, if not odd, for a tribunal to comply with the duty to assert its own jurisdictional competence, including *ex officio*, while confining itself to the grounds pleaded by the parties.

Such difficulty would obviously not arise only in case of non-appearance by the respondent, which is addressed by Article 45 of the Convention in line with the extensive adjudicative powers so far described.[57] In *Ickale Insaad Limited Sirketi* v. *Turkmenistan*, the Tribunal took the view that on jurisdictional matters it was not bound by the positions advanced by the parties, not even where they agreed on their mutual positions.[58] There again though, the evergreen right of the parties to be heard steals the spotlight as an essential procedural requirement, as a guarantee against annulment,[59] and possibly also against a stay of execution of the award before domestic jurisdictions in case where the jurisdiction of the investment is upheld.

The discretion afforded to tribunals under the ICSID regulatory framework on the point at hand does not subtract a decision on jurisdiction, or on admissibility of the claim, from annulment

[54]Statute of the ICJ, Art. 36, para. 6; 1982 United Nations Convention on the Law of the Sea Montego Bay, 1833 UNTS 3, Art. 288, para. 4; 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, Art. 49; 1969 American Convention on Human Rights, 1144 UNTS 123, Art. 62, para. 3. Whilst the latter provision does not expressly address the power at issue, the Inter-American Court's case law has considered such power as encompassed by the Court's general power to interpret the Convention (see J. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2003), at 34). As for inter-state case law, see *supra* note 52.

[55]*Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility of 24 September 2008, para. 65, available at www.italaw.com/sites/default/files/case-documents/ita0530.pdf (emphasis added). See also more recently, *1. Vattenfall AB; 2. Vattenfall GmbH; 3. Vattenfall Europe Nuclear Energy GmbH; 4. Kernkraftwerk Krummel GmbH & Co. oHG; 5. Kernkraftwerk Brunsbuttel GmbH & Co. oHG v Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, paras. 18–19, available at www.italaw.com/sites/default/files/case-documents/italaw9916.pdf.

[56]*Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Annulment of 22 May 2013, paras. 222–3, available at www.italaw.com/sites/default/files/case-documents/ita0928.pdf (*Libananco*).

[57]Given space constraints, this circumstance cannot be addressed separately in the present article. See for all in inter-state litigation, S. A. Alexandrov, 'Non-Appearance before the International Court of Justice', (1995) 33 *Columb. J. Transnat'l L.* 41; and the commentary to Art. 45 of the ICSID Convention in Schreuer, Malintoppi and Reinisch, *supra* note 41, at 708 ff.

[58]'Both Parties have therefore taken the position that compliance with Art. VII(2) of the BIT is an issue of jurisdiction rather than admissibility. The question arises whether the Tribunal is bound by the Parties' shared legal position. After a careful consideration of the applicable legal framework, the Tribunal concludes that it is not.' (*Içkale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award of 8 March 2016, para. 239, available at www.italaw.com/sites/default/files/case-documents/italaw7163_1.pdf (*Içkale*)).

[59]Another illustrative case in which the tribunal followed on jurisdictional matters an extensive application of *jura novit curia*, hence compressing *ne ultra petita*, is represented by the decision on jurisdiction in the formerly known case *Mobil* (*Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction of 10 June 2010, available at www.italaw.com/sites/default/files/case-documents/ita0538.pdf (*Venezuela Holding*)). There, the issue was whether Art. 22 of the Venezuelan Investment Law constituted Venezuela's standing consent to ICSID arbitration. Mobil argued that Art. 22 functioned essentially like a treaty whereas Venezuela maintained that it had to be interpreted and applied according to Venezuelan municipal law. The tribunal disagreed with both parties on the point while following instead the ICJ case law on unilateral acts accepting that court's jurisdiction. See also F. G. Sourgens, *A Nascent Common Law. The Process of Decision-making in International Legal Disputes between States and Foreign Investors* (2015), at 56.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

scrutiny. As observed by the *ad hoc* committee in *Lucchetti* v. *Peru*, where tribunals assert their jurisdiction over issues falling outside their competence, or, conversely, when they refuse to exercise their jurisdiction in matters within their jurisdictional competence, they incur an excess of powers.[60] As emphasized by the *Azurix ad hoc* committee, the annulment procedure on the ground of excess of powers under Article 52(1b) of the Convention, 'is general and makes no exception for issues of jurisdiction'.[61]

4.2 The power to order provisional measures

The rules of procedure of the ICJ, ITLOS, ECtHR, and IACtHR[62] all recognize the power to order *motu proprio* provisional measures. Namely when such measures are not requested, as well as the power to order measures other than those requested by a party.[63] Never has the case law of any such adjudicative bodies proved controversial on this point. That is to say that in the incidental proceedings under consideration the judicial autonomy principle is unfettered by either *ne ultra*, or *infra*, *petita*.

In international investment arbitration such a statement appears to be somewhat mitigated. Under the *UNCITRAL Arbitration Rules* as revised in 2010, the *Stockholm Chamber of Commerce Rules*, the *International Chamber of Commerce Rules*, and the *London Court of International Arbitration Rules*, provisional measures may be ordered only at the request of a party, while arbitral tribunals retain the discretion to decide the interim measures they deem appropriate.[64]

The ICSID framework on the other hand, is in concordance with inter-state adjudication. Article 47 of the Convention and Rule 39(3) of the Arbitration Rules afford ICSID tribunals the power to recommend provisional measures *motu proprio*. Such power was recognized to be inherent to the adjudicative function of an ICSID tribunal in the first *Pey Casado* award, even though provisional measures were rejected under the circumstances of the case.[65]

The ample autonomy of the judicial function in the incidental proceedings at hand is further corroborated, in line with inter-state adjudication, by the power of the tribunal to 'recommend

[60]*Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment of 5 September 2007, para. 99, available at www.italaw.com/sites/default/files/case-documents/ita0277.pdf (*Lucchetti*).

[61]*Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment of 1 September 2009, para. 66, available at www.italaw.com/sites/default/files/case-documents/ita0065.pdf (*Azurix*). The tribunal went on to stress that '[t]hus, an award will only be annulled under that provision on grounds that the tribunal lacked jurisdiction or exceeded jurisdiction if the lack or excess of jurisdiction was manifest' (ibid.). In *Enron*, one may not find a criterion for the distinction between a 'manifest' and a 'simple' excess of power in the 'distinction between non-application of the applicable law (which is a ground for annulment), and an incorrect application of the applicable law (which is not), although this is a distinction that may not always be easy to draw' (*Enron*, *supra* note 48, para. 68).

[62]See, respectively, Statute of the ICJ, Art. 41, and Rules of the International Court of Justice, Art. 75, para. 2 (as amended on 14 April 2005); 1982 United Nations Convention on the Law of the Sea Montego Bay, *supra* note 54, Art. 39, para. 1, and Art. 290, para. 1, and Rules of the Tribunal, UN Doc. ITLOS/8, 17 March 2009, Art. 89, para. 5; Rules of the European Court of Human Rights, Rule 39;1969 American Convention on Human Rights, *supra* note 54, Art. 63, para. 2.

[63]See, for all, C. Miles, *Provisional Measures before International Courts and Tribunals* (2017), at 308. On the inter-state courts' and tribunals' power to adopt, as well as amend, provisional measures *motu proprio*, see also Forlati, *supra* note 4, at 90 ff.

[64]The Articles above mentioned state, respectively: '[t]he arbitral tribunal may, at the request of a party, grant interim measures' (UNCITRAL Arbitration Rules, Art. 26, para. 1); '[t]he Arbitral Tribunal may, at the request of a party, grant any interim measures it deems appropriate' (Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, Art. 32, para. 1); 'the arbitral tribunal may, at the request of a party, order any interim or conservatory measures it deems appropriate' (International Chamber of Commerce Arbitration Rules, Art. 28, para. 1); '[t]he Arbritral Tribunal shall have the power, upon application of any party ... to order [interim and conservatory measures]' (London Chamber of Commerce International Arbitration Rules, Art. 25, para. 1).

[65]*Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Provisional Measures of 25 September 2001, para 16, available at www.italaw.com/sites/default/files/case-documents/ita0629.pdf (Spanish).

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

measures other than those specified in the request', as specified in ICSID Arbitration Rule 39(3). Here again, the right of the parties to be heard applies as a procedural evergreen which countervails judicial autonomy, under Rule 39(4).[66] Judicial autonomy is further mitigated by the rule whereby the tribunal, when minded to recommend provisional measures, is bound to give priority to consideration of the measures which may have been requested by either party.[67] In fact, Article 47 of the Convention provides that the power at hand may be done away only with the mutual consent of the parties.

Such mitigations of judicial autonomy on the point at issue under the ICSID framework, next to those under arbitration rules outside such framework, suggest that the autonomy of the parties enjoys in the incidental proceedings at hand a higher degree of recognition in investment arbitration than in international inter-state adjudication.

4.3 Annulment proceedings

Within the ICSID regulatory framework, the scope of application of the principles under consideration encompasses annulment proceedings *mutatis mutandis*. In fact, *ad hoc* committees are bound to confine their findings within the boundaries of any given application for annulment. Within such boundaries though, annulment committees appear to enjoy unfettered discretion in deciding between partial and complete annulment, apart, obviously, from upholding the impugned award. As stated in *Vivendi I*:

> [W]here a ground for annulment is established, it is for the ad hoc committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant's characterisation of its request.[68]

Accordingly, the rationale of annulment jurisdiction seems to favour the autonomy of the exercise of the judicial function over the autonomy of the parties. Obviously, this applies to the annulment (*vel non*) deliberation process while, according to the subject matter of any given application for annulment, a committee may be requested to sanction a tribunal's excess of power, or other deliberative infringements of the parties' mandate. In any case, as observed by the *ad hoc* committee in *Kloechner II*, '[t]he annulment procedure is above all a procedure for the protection of the law. It is not instituted merely in the interest of the parties'.[69]

On the other hand, the committees' discretion is systemically constrained by the ICSID regulatory framework far more than just by the claims of the parties. Namely to the effect that under Article 52 of the Convention, *ad hoc* committees are precluded from reviewing an award on the merits.[70] Indeed, the ICSID system is based on the principle of 'decisional finality'[71] since, under

[66] One may wonder whether the right to be heard would limit the autonomy of the adjudicator also when it would issue a provisional measure *proprio motu*. The inter-state case law seems to indicate against this.

[67] ICSID Arbitration Rules, Rule 39, para. 2.

[68] *Vivendi I*, *supra* note 37, para. 69. See more recently *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment of 1 February 2016, para. 167, available at www.italaw.com/sites/default/files/case-documents/italaw7084.pdf.

[69] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment of 17 May 1990, (2009) 14 ICISD Rep. 8, para. 9.15 (*Klöckner II*).

[70] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment of 17 December 1992, (1993) 1 ICSID Rep. 569, para. 1.17 (*Amco II*).

[71] C. B. Lamm, E. R. Hellbeck and D. P. Rosenberg, 'The Two Annulment Decisions in *Amco Asia* and "Non-Application" of Applicable Law by ICSID Tribunals', in D. D. Caron, S. W. B. Schill and A. Cohen Smutny (eds.), *Practising Virtue: Inside International Arbitration* (2015), 689, at 705.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

Article 53(1), '[t]he award shall be binding on the parties and shall not be subject to any appeal'. As observed by Christoph Schreuer:

> [T]he result of a successful application for an annulment is the invalidation of the original decision. The result of a successful appeal is its modification. A decision-maker exercising the power to annul has only the choice between leaving the original decision intact or declaring it void. It can destroy a res judicata but cannot create a new one. An appeals body may substitute its own decision on the merits for the decision that it has found to be deficient.[72]

Thus, an *ad hoc* committee which does not limit itself to assessing a failure by a tribunal to apply the proper law but goes as far as finding an erroneous application of the law, would incur an *ultra petita* decision.

Even if the distinction between annulment and appellate jurisdiction has been consistently confirmed in the investment case law as a matter of principle, in practice a number of *ad hoc* committees appear to have given in to the temptation of addressing alleged errors of law.[73] The risk for such a trend appears to be increasing, possibly in relation to the call from various quarters towards systemic reform of the ISDS, including the introduction of an appellate mechanism.[74] The critique has been advanced to the effect that annulment committees incur *ultra petita* by reviewing the reasoning of the awards brought before them, both when deciding for annulment,[75] as in the *Sempra* and *Enron* annulment decisions in 2010,[76] and when rejecting applications for annulment, as in *CMS* v. *Argentina*,[77] thus undermining the authority of the awards in question, apart from producing enforcement complications.[78]

It bears noting how the reasoning of annulment committees can in its turn be subject to review in case of resubmission, and potentially, also by a new *ad hoc* committee to which the award stemming from resubmission may be submitted anew. As of the time of publication of the present article, there have been nine resubmissions,[79] four of which produced new awards which, in their turn, have been submitted to annulment proceedings.[80] In theory, this could be an endless process. Thus, whilst the ICSID system purported to establish the annulment procedure in terms which would exclude judicial review on the merits of awards, in practice annulment may pave the way to a fully-fledged review of the merits through resubmission to a new tribunal.

5. Testing the principles in point against the grounds for annulment under the ICSID Convention

The risk of blurring the distinction between annulment and appeal ties in naturally with the question as to whether, and how, an award vitiated by a misapplication of the principles in

[72]Schreuer, Malintoppi, Reinisch, *supra* note 41, at 901, paras. 8 ff.

[73]C. Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', (2011) 10 LAPICT 211.

[74]G. Bottini, 'Reform of the Investor-State Arbitration Regime: the Appeal Proposal', in J. E. Kalicki and A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015), 455.

[75]Schreuer, *supra* note 73, at 222.

[76]D. Caron, 'Framing the Word of ICSID Annulment Committees', (2012) 6 *World Arb. & Med. R.* 173; P. D. Friedland and P. Brumpton, 'Rabid Redux: The Second Wave of Abusive ICSID Annulments', (2012) 27 *Am. U. Int'l L. Rev.* 727.

[77]*CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic of 25 September 2007, available at www.italaw.com/sites/default/files/case-documents/ita0187.pdf (*CMS*).

[78]Caron, *supra* note 76, at 183.

[79]*Amco II*, *supra* note 70; *Klöckner II*, *supra* note 69; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4 (*MINE*); *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (*Vivendi II*); *Enron*, *supra* note 48; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (*Sempra*); *Venezuela Holding*, *supra* note 59; *Victor Pey Casado*, *supra* note 65; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23 (*TECO*).

[80]*Amco II*, *supra* note 70; *Klöckner II*, *supra* note 69; *Vivendi II*, ibid.; *Victor Pey Casado*, *supra* note 65.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

question may be subject to annulment under Article 52(1), of the ICSID Convention. While 'a manifest excess of power' is the prevailing ground for annulment applications involving *ultra* and *infra petita* allegations, the case law shows that 'a failure to state reasons' and 'a serious departure from a fundamental rule of procedure' are also referred to, often on an accumulative basis.

5.1 Manifest excess of power

The 'manifest excess of power' ground for annulment under Article 52(1b) was precisely conceived mainly, if not exclusively, for purposes of sanctioning with nullity awards incurring *ultra petita*.[81] This reflects the rationale of enhancing the protection of the parties from abuses of the adjudicative function. It is, thus, no wonder that this ground for annulment has been regarded as the comparator for Article V(1c) of the 1958 New York Convention.[82] The latter allows for domestic courts precisely to refuse enforcement of an award that is deemed to address a dispute which is different from the one which has been submitted to arbitration, or which decides questions that go beyond the scope of the submissions by the parties.[83]

The annulment case law has shown some difficulty in curtailing the scope of the ground for annulment in question. Such difficulty regards, first of all, the determination of the criteria to assess the threshold between a 'manifest' and a 'non-manifest' excess of power. In practice, the major difficulty, as singled out by the *Enron ad hoc* committee, appears to lie in the distinction 'between non-application of the applicable law (which is a ground for annulment), and an incorrect application of the applicable law (which is not)'.[84]

On the one hand, one finds indications according to which the power of annulment for an error of law is rejected outright, based on the consideration that the scope of annulment jurisdiction is confined to non-application of the applicable law, as stressed by the *ad hoc* committee in *Impregilo* v. *Argentina* in 2014.[85] This stand seems to be in full concordance with the rationale of Article 52 as it emerges from its *travaux* indicated above.[86] On the other hand, one may find *ad hoc* committees which have annulled awards apparently also for misapplication of the law, according to the degree of magnitude of the error of law. For example, the committee in

[81]'[T]he expression "manifestly exceed its powers" concerned the cases referred to ... as *ultra petita*'. Mr. Ghanem went so far as to suggest that 'the expression *ultra petita* [should] be used instead of "excès de pouvoir"', *History of the ICSID Conventionsupra* note 6, vol. II-2, at 850, available at icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-2.pdf. See also, *History of the ICSID Convention*, ibid., at 58.

[82]1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 3 (1958 NY Convention). See M. B. Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards', (1987) 2 ICSID Rev. 85, at 99 ff.

[83]1958 NY Convention, ibid., Art. V, para. 1, let. c).

[84]*Enron, supra* note 48, para. 68.

[85]The committee observed that 'it is necessary to differentiate between a failure to apply the proper law and an error in applying the law. The first is a ground for annulment under Art. 52, the second is not. Reviewing the substantive reasoning by which the tribunal arrived at its conclusions would demand reviewing how the tribunal applied the law or interpreted the same, resulting in the committee acting as a court of appeal, thereby exceeding the powers granted to it by Art. 52 of the ICSID Convention. In order to decide whether the tribunal misapplied or misinterpreted the law to the matter decided, the committee would necessarily have to evaluate the facts and evidence as well as the correctness of the legal principles submitted by the parties, assessed and applied by the tribunal. Obviously, that is the function of an appellate court and not of an annulment committee. Failure to apply the law is part of the concept of manifest excess of powers and ... should be self-evident, clear, obvious, flagrant and substantially serious. As stated above, this committee agrees with the views of Prof. Schreuer that there is a difference between a failure to apply the proper law and the misapplication of the applicable law, and that the latter does not constitute grounds for annulment, even if it is a "manifest error of law", unless it is of such a magnitude as to amount to the non-application of the proper law as a whole' (*Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision on Annulment of 24 January 2014, paras. 131–2, available at www.italaw.com/sites/default/files/case-documents/italaw3044.pdf (*Impregilo*)). See also the passage from *Enron* quoted *supra* note 84.

[86]*History of the ICSID Convention*, *supra* note 6, at 849–52.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

Consortium RFCC v. *Morocco* found that the impugned award incurred a 'manifest error' for the ascertainment of which the committee claimed 'to retain a measure of discretion'.[87] The same approach was followed by the *Vivendi II* committee in 2010,[88] though without offering the parameters by which to determine the boundaries of such discretion.

5.2 A serious departure from a fundamental rule of procedure

Applications for annulment pertinent to the principles under consideration have also been based on 'a serious departure from a fundamental rule of procedure' under Article 52(1d).

Little guidance may be inferred from the case law on the point at issue, except for consistent reference to the procedural right of the parties to be heard, which turns out as a key procedural guarantee for the parties also in relation to the ground for annulment at hand.[89] The *Vivendi I ad hoc* committee, in assessing that the disputed award was not vitiated by 'a serious departure from a fundamental rule of procedure' – in the sense that it 'was in no sense *ultra petita*' – satisfied itself that '[f]rom the record, it [was] evident that the parties had a full and fair opportunity to be heard at every stage of the proceedings'.[90]

However, as already highlighted, some committees have required the right for parties to be heard only with regard to the legal arguments by which the tribunal would re-characterize the claims or causes of action.[91] Whilst this may appear to be a balanced application of the judicial autonomy of tribunals, affording parties the opportunity to be heard on all points of law and fact on which the reasoning of the award is based remains advisable *ex abundante cautela*.

5.3 Failure to state reasons

The third ground for annulment which may be relevant for the purpose of the present analysis, with special regard to *infra petita* awards, is 'failure to state reasons' under Article 52, paragraph 1, let. e). This provision complements Article 48, paragraph 3, of the Convention, according to which '[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based'.[92]

As it has been appropriately emphasized, '[t]he fact that the parties cannot deviate from this requirement under the ICSID Convention is consistent with the public international law

[87]*Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Annulment of 18 January 2006, para. 226, in (2011) 26 ICSID Rev. 184.

[88]*Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007 of 10 August 2010, para. 252, available at www.italaw.com/sites/default/files/case-documents/ita0221.pdf (*Vivendi II*).

[89]As recalled by Aron Broches, a failure to afford a party the opportunity to exercise such a right was envisaged precisely as a ground for annulment consisting of 'a serious departure from a fundamental rule of procedure'. To that end, he argued that one such '[f]undamental rule' would comprise, for instance, the so-called principles of natural justice, e.g. both parties must be heard and that there must be adequate opportunity for rebuttal' (A. Broches, 'Observations on the Finality of ICSID Awards', (1991) 6 ICSID Rev. 320, at 331). See, *inter alia*, *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment of 22 December 1989, para. 5.06, available at www.italaw.com/sites/default/files/case-documents/italaw8608.pdf (*MINE*); *Wena Hotels Ltd. v. Arab Republic of Egypt* ICSID Case No. ARB/98/4, Decision on Annulment of 28 January 2002, para. 57, available at www.italaw.com/sites/default/files/case-documents/ita0903.pdf (*Wena Hotels*); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 49; *CDC Group plc. v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment of 29 June 2005, para. 49, available at www.italaw.com/sites/default/files/case-documents/italaw6344.pdf (*CDC*); *Azurix*, *supra* note 61, paras. 49 ff.

[90]*Vivendi I*, *supra* note 37, para. 85.

[91]See *Caratube*, *supra* note 38, paras. 93–4. See also, *inter alia*, *Klöckner I*, *supra* note 34, para. 91; *Victor Pey Casado*, *supra* note 65, Decision on the Application for Annulment of the Republic of Chile of 18 December 2012, para. 267, available at www.italaw.com/sites/default/files/case-documents/italaw1178.pdf.

[92]This provision is reiterated by Rule 47(1i), of the ICSID Arbitration Rules according to which the award shall contain 'the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based'.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

dimension of the procedure, but also with modern arbitral practice in international law'.[93] In inter-state litigation, the point has been extensively illustrated by the ICJ in its 1991 Judgment on the *Arbitral Award of 31 July 1989* case between Guinea-Bissau and Senegal.[94] The public international law character of investment arbitration accounts for 'a higher threshold for the reasons requirement than is the case in international commercial arbitration'.[95]

As anticipated, when the tribunal falls short of addressing all the relevant 'questions' submitted to it, Article 52, paragraph 1, let. e), in combination with Article 48, paragraph 3, ties in with *ne infra petita*. At the same time, it is arguable that, by requiring the tribunal to address all the questions submitted to it, the provisions at hand equally imply that the tribunal is prevented from dealing with questions that have not been submitted to it. Now, reverting to the two requirements for the tribunal laid down in Article 48, paragraph 3 – i.e., to address all questions submitted to it, and to state the reasons grounding its decision – one is to recall that, under Article 52, paragraph 1, let. e), failure to state reasons is a ground for annulment, but failure to deal with 'every question' is not. In fact, the remedy envisaged for failing to deal with every question is the 'supplementation of the award' by the same tribunal, under Article 49, paragraph 2.

There are clearly 'questions' and 'questions'. In view of a balanced application of the autonomy of parties with judicial autonomy, it seems that for 'a failure to deal with a question' to ground an annulment, the 'question', or 'questions', must bear significantly on the causes of action and on the related claims and defences, thus, on the characterization of the legal dispute by the parties. According to the terminology employed by some *ad hoc* committees,[96] those are 'essential' or 'decisive' questions that exceed the threshold of supplementation under Article 49, paragraph 2, and, thus, fall under the annulment regime as laid down in Article 52, paragraph 1. It would be under such circumstances that the ground for annulment at hand may be considered suitable for applications for annulment.

The prevailing jurisprudential attitude on this point relies on Article 48, paragraph 3, according to which, apart from supplementation, the basic ground for annulment for 'failure to deal with all questions' is 'failure to state reasons'. But confining *ne ultra petita* considerations to this ground for annulment would seem to place very high a threshold for setting aside an *infra petita* award. As argued by the *ad hoc* committees in *MINE* and *Wena Hotels*, an award would be subject to annulment under 'failure to state reasons' only to the extent that the failure in question renders the award unintelligible.[97] In fact, one may well think of fully intelligible awards that incur *infra petita*, nonetheless.

By rendering an award which falls short of addressing essential questions in a dispute, a tribunal fails to fulfil its mandate. Accordingly, there seems to be no imperative reasons preventing the annulment of a similar award, on the basis of either a 'manifest excess of powers', or a 'serious departure from a fundamental rule of procedure' under Article 52, paragraph 1, lets. b) and e).

The *ad hoc* committee in *Klöckner I*, while eventually grounding its annulment decision on 'failure to state reasons', in its didactic approach, left the possibility open to qualify failure to address all questions also as a 'serious departure from a fundamental rule of procedure'.[98] It was the latter ground for annulment which was applied by the *ad hoc* committee in *CDC* v. *Seychelles* in relation to an award alleged to have fallen short of addressing all relevant questions, even though the request for annulment was rejected under the circumstances of the case.[99] In the first *Amco* v. *Indonesia* annulment, the committee also relied, for the same purpose, on the 'failure to state reasons' while maintaining that a 'serious departure from a fundamental rule of

[93] De Brabandere, *supra* note 6, at 90.
[94] *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, [1991] ICJ Rep. 53.
[95] De Brabandere, *supra* note 6, at 91.
[96] *Klöckner I*, *supra* note 34, paras. 114–15; *MINE*, *supra* note 89, paras. 5.11–5.13; *CDC*, *supra* note 89, paras. 50, 56–7.
[97] *MINE*, *supra* note 89, paras. 5.08–5.09; *Wena Hotels*, *supra* note 89, para. 81.
[98] *Klöckner I*, *supra* note 34, paras. 115–16.
[99] *CDC*, *supra* note 89, para. 75.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

procedure', or even 'manifest excess of power' could equally apply[100] as later corroborated by the *Vivendi I* annulment committee.

In conclusion on annulment, one is to note the recurrent assertion by *ad hoc* committees of a significant degree of discretion as to whether to uphold, or reject, an application for annulment, 'even if a ground listed in Article 52(1) exists', as recently maintained by the *ad hoc* committees in *Tulip* v. *Turkey* and *Saur* v. *Argentina*, amongst others.[101] The majority of the annulment case law concurs in finding that such discretion 'is not unlimited', though it falls short of providing criteria for the limitations in question, except for stressing the appropriateness of a case specific approach to the matter. Language attentive to balancing the autonomy of the adjudicative function with the procedural rights of the parties on the point at issue was used by the committee in *EDF* v. *Argentina* which referred to:

> [A]ll relevant circumstances, including the gravity of the circumstances which constitute the ground for annulment and whether or not they had – or could have had – a material effect upon the outcome of the case, as well as the importance of the finality of the award and the overall question of fairness to both Parties.[102]

6. Concluding remarks

The analysis corroborates the methodological assumption made at the outset that the general principles in question are applied in international investment arbitration in line with their public international law configuration, as imported from inter-state litigation. The need for their calibrated application in investment arbitration appears to follow the same rationale which emerges from inter-state adjudication. Namely, that of striking a balance between the autonomy of the parties and judicial autonomy in the pursuit of the proper administration of justice, based on the boundaries of the mandate in any given case. The principles of adjudication in question provide guidance in order to interpret and apply the rules of procedure relevant to any given proceedings, with a view to filling their gaps.

In its turn, international investment arbitration, with special regard to the ICSID annulment case law, has been shown to provide cues having a significant degree of specificity, which may impact on the inter-state adjudication. Looking at one particularly relevant cue, where investment tribunals intend to follow in their *ratio decidendi* arguments that have not been put forward by the parties in their pleadings, compliance with the right of the parties to be heard appears as the major antidote against annulment applications for *ultra petita* determinations. This attitude may be taken just *ex abundante cautela* under the circumstance in which the tribunal's reasoning falls within the scope of the dispute as curtailed by the parties and of the applicable law. This encourages a proactive attitude by international adjudicative bodies, with special regard to eliciting from the parties' post hearing briefs based on pondered written questions from the bench. Indeed, based on inter-state case law, Jan Paulsson observed that 'a tribunal in an investment dispute cannot content itself with inept pleadings, and simply apply the least implausible of the two'.[103] On the one hand, the fact that the parties are not asked to express themselves on arguments other

[100] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment of 16 May 1986, (1993) 1 ICSID Rep. 413, paras. 86 ff (*Amco I*).

[101] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment of 30 December 2015, para. 45, available at www.italaw.com/sites/default/files/case-documents/italaw7037.pdf (*Tulip*); *EDF International S.A. SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment of 5 February 2016, para. 73, available at www.italaw.com/sites/default/files/case-documents/italaw7090.pdf (*EDF*). See also *Amco II*, *supra* note 70, para. 1.20; *MINE*, *supra* note 89, paras. 4.09–4.10; *Vivendi I*, *supra* note 37, para. 66.

[102] *EDF*, ibid., para. 73.

[103] *Supra* note 32.

https://doi.org/10.1017/S0922156519000554 Published online by Cambridge University Press

than those pleaded by them could substantiate the presumption that the arguments followed by the tribunal *sua sponte* are admissible as they do not re-characterize the dispute as curtailed by the claims of the parties, nor that they go beyond the applicable law. On the other hand, affording the parties the opportunity to express their views on new arguments does not provide a license for tribunals to decide *ultra petita*. This would obviously be a matter for assessment on a case by case basis.

Adding to Simma and Pulkowski's recent observation that cross-fertilization flows from inter-state adjudication to investor-state arbitration, one is to note the amount of detail emerging from the latter. This is likely to promote clarification of the general principles of international adjudication in inter-state case law bearing on the balance between the autonomy of the parties and judicial autonomy, thus making the cross-fertilization process biunivocal.[104]

[104]B. Simma and D. Pulkowski, 'Two Worlds, but Not Apart: International Investment Law and General International Law', in M. Bungenberg, J. Griebel and S. Hobe (eds.), *International Investment Law* (2015), 361.

Cite this article: Tanzi AM (2020). On judicial autonomy and the autonomy of the parties in international adjudication, with special regard to investment arbitration and ICSID annulment proceedings. *Leiden Journal of International Law* **33**, 57–75. https://doi.org/10.1017/S0922156519000554