EXCERPT PURSUANT TO ICSID ARBITRATION RULE 48(4)

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

SODEXO PASS INTERNATIONAL SAS

Claimant

and

HUNGARY

Respondent

ICSID Case No. ARB/14/20
Annulment Proceeding

DECISION ON ANNULMENT

Members of the ad hoc Committee
Mr. Andrés Jana Linetzky, President of the *ad hoc* Committee
Dr. Ucheora Onwuamaegbu, Member of the *ad hoc* Committee
Dr. Jacomijn van Haersolte-van Hof, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee
Ms. Leah W. Njoroge

Date of dispatch to the Parties: May 7, 2021

REPRESENTATION OF THE PARTIES

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TABLE OF ABBREVIATIONS/DEFINED TERMS

Achmea Decision	*Slovak Republic v. Achmea BV*, Case C-284/16, CJEU Judgment, March 6, 2018
AF-[#]	Hungary's Exhibit filed with the Application
AL-[#]	Hungary's Legal Authority filed with the Application
Applicant	Hungary
Application	Application for Annulment of the Award, dated May 27, 2019
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	Award rendered by the Arbitral Tribunal, dated January 28, 2019
BIT	Treaty between the Government of the Republic of France and Hungary Concerning the Encouragement and Reciprocal Protection of Investments, dated on November 6, 1986
C-[#]	Sodexo's Exhibit
Counter-Memorial	Sodexo's Counter-Memorial on Annulment, dated March 20, 2020
CL-[#] or CLA-[#]	Sodexo's Legal Authority
Claimant	Sodexo, the Claimant in the original proceeding
Committee	*Ad hoc* Committee constituted on July 30, 2019, composed of Mr. Andrés Jana Linetzky, President, Dr. Ucheora Onwuamaegbu, and Dr. Jacomijn van Haersolte-van Hof
Declarations	Declarations issued by France and Hungary on the effect of the *Achmea* Decision dated January 15 and 16, 2019
Hearing	Hearing on Annulment held on November 17-18, 2020

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Memorial	Hungary's Memorial on Annulment, dated December 20, 2019
R-[#]	Hungary's Exhibit
Rejoinder	Sodexo's Rejoinder on Annulment, dated September 8, 2020
Reply	Hungary's Reply on Annulment, dated June 5, 2020
Respondent	Hungary, the Respondent in the original proceeding
RLA-[#]	Hungary's Legal Authority
Sodexo	Sodexo Pass International SAS
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union, dated December 13, 2007, effective on December 1, 2009
Tribunal	Arbitral Tribunal in the original proceeding composed of Prof. William M. Park, President, Mr. Andrea Carlevaris, and Mr. John Christopher Thomas QC

I. INTRODUCTION AND PARTIES

1. This decision concerns an application for annulment (the "**Application**"), submitted by Hungary ("**Hungary**", the "**Applicant**" or the "**Respondent**"), of the Award rendered on January 28, 2019, by a tribunal composed of Professor William W. Park (President), Mr. Andrea Carlevaris, and Mr. John Christopher Thomas QC (the "**Tribunal**") in ICSID Case No. ARB/14/20 (the "**Award**") in the arbitration proceeding between Sodexo Pass International SAS ("**Sodexo**" or the "**Claimant**") and Hungary. The Award was accompanied by the separate and dissenting opinion of Mr. Thomas dated January 19, 2019 (the "**Separate and Dissenting Opinion**").

2. The Applicant and the Claimant are collectively referred to as the "**Parties**" and individually referred to as a "**Party**." The Parties' legal representatives and their addresses are listed above on page (ii).

3. The Award decided a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Government of the Republic of France and the Government of the People's Republic of Hungary on the Encouragement and Reciprocal Protection of Investments dated November 6, 1986, which entered into force on April 10, 2006 (the "**BIT**" or the "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**") which entered into force on October 14, 1966.

4. In 1993, Sodexo S.A. incorporated its Hungarian subsidiary ("**Sodexo Pass Hungary**" or "**SPH**") to conduct a food and meal voucher business. Three years later, Sodexo S.A. incorporated Sodexo Pass International (Sodexo) as a French company, which is the Claimant in this proceeding.

5. The facts of this case are similar to two other food voucher cases, *Edenred v. Hungary* and *UP and CD v. Hungary*.[1] The investors in all three cases depended on a Hungarian tax regime in place at the relevant time, which was favorable to their business.

6. [redacted]

7. Sodexo brought an expropriation case against Hungary based on Article 9 of the 1986 France-Hungary BIT. The *Edenred v. Hungary* and *UP and CD v. Hungary* cases are based on the same BIT. Article 9(2) defines the scope of arbitration by limiting arbitration to "disputes concerning dispossession measures […]."

8. The award in *Edenred* was rendered on December 13, 2016 and on June 14, 2017, the Tribunal indicated to the Parties that its analysis might benefit from seeing the *Edenred* award. The Claimant did not object to this, but Hungary opposed it on the basis that it would be prejudicial and unfair. On June 26, 2017, the Tribunal directed that the *Edenred* award be disclosed to the Tribunal, redacted with respect to Edenred's confidential information only, but not regarding the facts of the case.

9. The award in *UP* was rendered on October 9, 2018, and on October 11, 2018, Sodexo requested that the Tribunal admit the *UP* award into the record of this case. The Tribunal granted the Claimant's request and ordered the production of the *UP* award by the

[1] *Edenred S.A. v. Hungary*, ICSID Case No. ARB/13/21 and *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35.

Respondent. Because this award was already in the public domain (according to the Respondent, released by unauthorized sources), the Respondent submitted it unredacted.

10. [redacted]

11. In addition, the EC applied to the Tribunal for leave to intervene in the case as a non-disputing party. After reviewing the Parties' comments, the Tribunal granted the EC's request, and the EC submitted its *amicus curiae* brief on September 14, 2018.

12. The EC's submission focused on the impact of the *Slovak Republic v. Achmea BV* case ("***Achmea* Decision**")[2] on the Tribunal's jurisdiction. First, the EC argued that, under the principle of primacy, EU law prevails over the BIT's arbitration clause (Article 9(2) of the BIT) in the event of conflict of laws. Thus, Article 9(2) of the BIT became invalid when Hungary joined the European Union ("**EU**"). Second, the principle of posteriority found at Article 30(3) of the Vienna Convention on the Law of Treaties (1969) ("**VCLT**") supports the EC's view because Article 30(3) provides that when the parties to an earlier treaty are also parties to a later treaty, but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent that its provisions are compatible with the later treaty. Third, the EC argued that *Achmea*'s reasoning that intra-EU investment arbitration is incompatible with EU law is applicable to ICSID arbitrations because the ICSID system precludes review of an award by a national judge of a Member State, thus forestalling any possibility that a judge of a Member State's

[2] S*lovak Republic v. Achmea BV*, Case C-284/16, Judgment of the Court (Grand Chamber), March 6, 2018, EU:C:2018:158 ("***Achmea***") (**RLA-1**).

court could control the substance of an ICSID award. The EC made other arguments such as the sunset clause seeking to prolong the applicability of the arbitration clause being invalid, and that any award in this dispute would be unenforceable because it would be based on an invalid consent.

13. The Tribunal found that the dispute before it did not involve the application of the law of any EU State or of the EU itself. Article 9(3) of the BIT indicates that the Tribunal shall apply the provisions of this Agreement and the rules and principles of international law. This is in contrast to some BITs which refer to the application of the laws of the host State, as in Article 8(6) of the Netherlands-Slovakia BIT that was central to the decision in *Achmea*. Also, the Tribunal noted that there was no allegation of a violation of EU law in this case. Based on this, the Tribunal applied neither Hungarian law nor EU law. In addition, the Tribunal found that the CJEU ruling would not bind the Tribunal but the EU state court in Germany that referred the case, and the ruling's *erga omnes* effect affects EU Member State courts, not an ICSID tribunal. The Tribunal found that the TFEU and the France-Hungary BIT do not share the same subject matter, as required for application of the VCLT's provisions 59 and 30 on conflicts and that neither the TFEU's nor the VCLT's provisions on conflict of laws apply in this arbitration. Thus, the Tribunal found that the *Achmea* Decision did not preclude its jurisdiction in this case.

14. The Majority found that Sodexo's shareholding rights in SPH constituted a protected investment under the BIT, and such rights were the subject of expropriation. The Tribunal proposed a definition of indirect expropriation which the Parties accepted. Based on this definition, the Tribunal found that Hungary's various changes to its tax laws constituted a series of measures leading to the indirect expropriation. The Tribunal also found that these tax law changes substantially deprived the Claimant of the fundamental attributes of property in its investment, including use and enjoyment. The changes rendered the Claimant's investment worthless as its value was transferred to the State. Based on their object, content and intent, the Tribunal found that the tax measures were not made for a public purpose. The Tribunal also found that the severity of the tax measures made them disproportional to their stated objectives. The Tribunal concluded

that all these factors militate in favor of a finding of expropriation rather than *bona fide* regulatory measures.

15. Based on the *Chorzów Factory* principle of full reparation as reflected in Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), the Tribunal found that compensation is the most appropriate form of full reparation in this case. The BIT's own formula for compensation is "prompt, adequate and effective payment." The BIT also refers to "real value" which the Tribunal found to be equivalent to Fair Market Value. Given Sodexo's proven record of profitability, the Tribunal accepted the Discounted Cash Flow method to be an appropriate standard of valuation to determine the investment's fair market value. The Tribunal, thus, awarded to the Claimant compensation in the sum of seventy-eight million, three hundred and sixty-two thousand, four hundred and ninety-five Euros (€78,362,495) plus pre- and post-award interest.

16. The Tribunal decided that each party would bear its own costs based on the fact that neither side pursued its claims or defenses in bad faith, and the fact that difficult questions arose which divided the Tribunal.

17. In his Separate and Dissenting Opinion, Mr. Thomas agreed that there is "dispossession" in the sense of Article 5(2) of the BIT and in that regard, he agreed with the Majority's finding of liability and award of damages. However, finding that the dispossession was "temporary," he disagreed with the finding of expropriation, arguing that a finding of discrimination and disproportionality by the Majority cannot morph "dispossession" into "expropriation." For Mr. Thomas, the Claimant did not have a right to the favorable Hungarian tax regime in question. Hungary would be fully within its rights to do away with the tax regime. Hungary did not commit to maintaining the regime, and the Claimant certainly had no legitimate expectation otherwise. The Majority's rebuttal on this point is that Hungary could have rid itself of the tax regime on which the voucher business depended, and this would have had a devastating effect on the French issuers' investment without any right of action accruing to the French issuers. However, Hungary did not do that. Rather, it put in place a system which, in effect, transferred the

French issuers' market share in the voucher business to the State in a way that was discriminatory, not for a public purpose, and disproportional to its stated purpose and which rendered the French issuers' investment worthless.

II. PROCEDURAL HISTORY

18. On May 27, 2019, Hungary filed the Application with ICSID pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"). The Application was accompanied by Exhibits AF-01 through AF-14 and Legal Authorities AL-01 through AL-39.

19. On May 31, 2019, the Secretary-General of ICSID registered the Application in accordance with Arbitration Rule 50(2) and, pursuant to Article 52(3) of the ICSID Convention, the Chairman of the Administrative Council of ICSID would proceed with the appointment of the *ad hoc* Committee. She further confirmed that the enforcement of the Award was provisionally stayed pursuant to Arbitration Rule 54(2).

20. On July 30, 2019, in accordance with Arbitration Rules 6 and 53, the Parties were notified that an *ad hoc* Committee had been constituted. It composed of Mr. Andrés Jana Linetzky (Chilean), President, Dr. Ucheora Onwuamaegbu (Nigerian/British), and Dr. Jacomijn van Haersolte-van Hof (Dutch) (the "**Committee**"); all members appointed by the Chairman of the Administrative Council. Ms. Leah W. Njoroge, Legal Counsel, ICSID, was designated to serve as Secretary of the Committee.

21. On September 6, 2019, the Committee held a first session with the Parties by telephone conference. Participating in the First Session were:

Committee

Mr. Andrés Jana Linetzky	President
Dr. Ucheora Onwuamaegbu	Member
Dr. Jacomijn van Haersolte-van Hof	Member

ICSID Secretariat

Ms. Leah W. Njoroge	Secretary of the Committee

For the Applicant

Mr. Michael Ostrove	DLA Piper France LLP
Mr. Théobald Naud	DLA Piper France LLP
Mr. Dávid Kőhegyi	DLA Piper Posztl, Nemescsói, Györfi-Tóth & Partners Law Firm
Ms. Zsófia Deli	DLA Piper Posztl, Nemescsói, Györfi-Tóth & Partners Law Firm

For the Claimant

Mr. Philippe Cavalieros	Simmons & Simmons LLP
Ms. Christina Mangani	Simmons & Simmons LLP
Mr. Emmanuel Favier	General Counsel, Sodexo Pass International SAS

22. On the same date, the Committee issued Procedural Order No. 1 recording the Parties' agreement and the Committee's decisions on the procedural matters governing the proceeding.

23. In accordance with Procedural Order No. 1, on September 27, 2019, the Applicant filed its Submission in Support of Hungary's Application for the Continued Stay of Enforcement of the Award, together with Exhibits R-81 through R-84 and Legal Authorities RLA-162 through RLA-178.

24. On October 18, 2019, Sodexo filed its Response to the Applicant's Request for the Continued Stay, together with Exhibits C-96 through C-103 and Legal Authorities CL-158 through CL-171.

25. On November 8, 2019, Hungary filed a Reply on its Request for the Continued Stay, together with Legal Authorities RLA-179 through RLA-193.

26. On November 29, 2019, the Claimant filed a Rejoinder on Hungary's Request for the Continued Stay of Enforcement, together with Exhibits C-104 through C-106 and Legal Authorities CL-172 and CL-173.

27. On December 20, 2019, Hungary filed a Memorial on Annulment, together with Exhibits R-1 through R-16 and Legal Authorities RLA-1 through RLA-64 (the "**Memorial**").

28. On February 10, 2020, the Committee issued a Decision on the Request for the Continued Stay of Enforcement of the Award in which it concluded that the stay should not be continued and that the provisional stay of enforcement should be lifted.

29. On March 20, 2020, Sodexo filed a Counter-Memorial on Annulment, together with Exhibits C-1 through C-23 and Legal Authorities CLA-1 through CLA-33 (the "**Counter-Memorial**").

30. On April 27, 2020, the Parties sought confirmation from the Committee of their agreement to move the due date of Hungary's Reply on Annulment to June 5, 2020, and correspondingly to move the Sodexo's due date of its Rejoinder on Annulment by 11 working days, not counting the month of August. Other deadlines on the procedural calendar would remain unchanged.

31. The Committee approved the proposed modifications to the procedural calendar on the same date.

32. On June 5, 2020, Hungary filed a Reply on Annulment, together with Legal Authorities RLA-65 through RLA-80 (the "**Reply**").

33. On July 6, 2020, the Parties notified the Committee of its agreement to extend Sodexo's deadline for filing of its Rejoinder on Annulment to September 8, 2020. The Committee approved this request on the same date.

34. On September 8, 2020, Sodexo filed a Rejoinder on Annulment, together with Legal Authorities CLA-34 through CLA-40 (the "**Rejoinder**").

35. On October 5, 2020, the Committee held a pre-hearing organizational meeting with the Parties and the following day issued Procedural Order No. 2 concerning organization of the hearing.

36. A hearing on Annulment was held on November 17-18, 2020 by video conference (the "**Hearing**"). The following persons were present at the Hearing:

Committee:	
Mr. Andrés Jana Linetzky	President
Dr. Ucheora Onwuamaegbu	Member
Dr. Jacomijn van Haersolte-van Hof	Member
ICSID Secretariat:	
Ms. Leah W. Njoroge	Secretary of the Committee
Ms. Ekaterina Minina	Paralegal
Ms. Lamiss Al Tashi	Hearings Officer
Ms. Michelle Lemus	Hearings Assistant
Mr. Adam Kirn Hennessey	IT Technician
Mr. Emebet Alemu Demissie	IT Technician
For the Applicant:	
Mr. David Kőhegyi	DLA Piper
Mr. Ben Sanderson	DLA Piper
Ms. Zsófia Deli	DLA Piper
Ms. Kate Mala	DLA Piper
Ms. Zita Ambrus	Department for State Representation in Legal Proceedings, Government Office of the Prime Minister
Ms. Nikolett Pilling	Department for State Representation in Legal Proceedings, Government Office of the Prime Minister
For the Claimant:	
Mr. Philippe Cavalieros	Simmons & Simmons LLP
Ms. Christina Mangani	Simmons & Simmons LLP
Mr. Wendyam Conombo	Simmons & Simmons LLP
Mr. Emmanuel Favier	General Counsel, Sodexo Pass International SAS
Court Reporter:	
Ms. Claire Hill	

37. On November 24, 2020, the Committee issued Procedural Order No. 3 directing that the Applicant produce a copy of the decisions on annulment issued in *Edenred S.A. v. Hungary* and *Orascom TMT Investments S.àr.l. v. People's Democratic Republic of Algeria* as discussed at the Hearing. The Committee further invited the Parties to submit comments on those decisions.

38. In accordance with the Committee's invitation, on November 30, 2020, the Applicant produced the annulment decisions and, on December 4, 2020, both Parties submitted their respective comments on those decisions.

39. On December 8, 2020, the EC submitted a Request to Intervene as a Non-Disputing Party in the annulment proceeding. On January 22, 2021, the Committee after due consultation with the Parties in accordance with Arbitration Rule 37(2), rejected the application and notified the EC accordingly. The Committee communicated its reasoned decision to the Parties on the same day.

40. Hungary filed its statement of costs on December 23, 2020, and Sodexo filed its statement of costs on December 29, 2020.

41. The proceeding was closed on April 30, 2021.

III. THE PARTIES' REQUESTS FOR RELIEF

A. HUNGARY'S REQUEST FOR RELIEF

42. In its Memorial, Hungary requested that the Committee annul the Award in its entirety and order Sodexo to bear all costs of the proceeding.[3] In its Reply, Hungary reiterated the request for relief that it made in its Memorial.[4]

B. THE CLAIMANT'S REQUEST FOR RELIEF

43. In its Counter-Memorial, the Claimant requested the Committee to reject the Application and order Hungary to reimburse all legal fees and costs in relation to the present annulment proceeding.[5] In its Rejoinder, the Claimant requested the same request for relief.[6]

[3] Memorial, para. 313.
[4] Reply, para. 324.
[5] Counter-Memorial, para. 1.
[6] Rejoinder, para. 268.

IV. THE PARTIES' POSITIONS AND COMMITTEE'S ANALYSIS

44. In its Application, Hungary presented the following three grounds for annulment:

(a) The Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention);

(b) The Tribunal seriously departed from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention); and

(c) The Award failed to state the reasons on which it is based (Article 52(1)(e) of the ICSID Convention).

45. The Committee addresses each of these grounds separately below.

A. MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(B))

(1) The Parties' Positions

a. Applicant's Position

46. Hungary asserts that the Tribunal manifestly exceeded its powers. It makes the following three arguments in support of that assertion: (a) the Tribunal wrongly asserted its jurisdiction on the basis of Article 9(2) of the BIT; (b) the Tribunal failed to assess its jurisdiction in the light of the Declarations issued by France and Hungary on the effect of the *Achmea* Decision dated January 15 and 16, 2019 ("**Declarations**") despite compelling reasons to do so; and (c) the Tribunal's wrongful exercise of jurisdiction and failure to take account of the Declarations constitute a "manifest excess of powers" within the meaning of Article 52(1)(b) of the ICSID Convention. In its Reply, Hungary addressed a procedural defense raised by the Claimant, and argued that (d) Hungary's jurisdictional challenge is not belated. A summary of these arguments is set out below.

(a) The Tribunal Wrongly Asserted Jurisdiction on the Basis of Article 9(2) of the BIT

47. First, Hungary asserts that the *Achmea* Decision established that the EU Treaties, the TFEU and the Treaty on the European Union ("**TEU**"), preclude investor-State

arbitration provisions in intra-EU BITs.[7] Hungary contends that the CJEU's decision in *Achmea* ruled that Articles 267 and 344 of the TFEU preclude investor-State arbitration provisions in international agreements concluded between EU Member States.[8]

48. In Hungary's view, the CJEU's interpretation of EU Treaties in the *Achmea* Decision is authoritative and "commands the proper interpretation of Hungary and France's international law obligations under the TFEU."[9] According to Hungary, this authoritative nature flows from "the *erga omnes* effect of preliminary rulings of the CJEU within the EU legal order," as well as the "general principles of international law as to the deference that must be accorded to decisions of permanent jurisdictional bodies."[10] Hungary argues that, from the text of the *Achmea* Decision, the CJEU's ruling extends beyond the scope of the Netherlands-Slovakia BIT.[11] In this context, Hungary argues that the purpose of the CJEU ruling was the uniform interpretation of EU law and that it was drafted broadly to apply to intra-EU BITs.[12] Hungary's position is that the *Achmea* Decision is moreover authoritative, with respect to the interpretation of EU law, pursuant to the provisions of Article 288 of the TFEU, which provides that any decision of an EU institution, such as the CJEU, shall be binding.[13] Thus, Hungary argues that the *Achmea* Decision is binding on France and Hungary as EU Member States.[14]

49. As regards international law, Hungary's view is that the *Achmea* Decision establishes the correct interpretation and scope of the international law obligations undertaken by EU Member States under the EU Treaties, which preclude, and are incompatible with, investor-State arbitration provisions in international agreements concluded between EU Member States.[15] With respect to the Claimant's contention that international law

[7] Memorial, para. 74.
[8] Memorial, paras. 76-92, providing a background and summary of the CJEU's findings.
[9] Memorial, para. 93.
[10] Memorial, para. 93.
[11] Memorial, para. 94.
[12] Memorial, paras. 95 and 97.
[13] Memorial, paras. 99-100.
[14] Memorial, para. 102.
[15] Memorial, para. 107.

beyond the BIT and the ICSID Convention should play no role for purposes of determining the Tribunal's jurisdiction, Hungary asserts that this argument is "ill-founded" and criticizes the Claimant's reliance on *Theodoros Adamakopoulos v. Cyprus*, which Hungary says actually contradicts the Claimant's position.[16] Relying on *Electrabel v. Hungary*, Hungary submits that the BIT is placed in an international law context and thus the tribunal must consider whether another law supersedes the BIT.[17] Further, Hungary contends that tribunals must look in particular to the international law that applies between the State parties to the treaty at issue, as illustrated by the tribunal in *Jürgen Wirtgen v. Czech Republic*.[18] In this regard, Hungary's position is that irrespective of the choice of law provided for in Article 9(3) of the BIT, the determination of jurisdiction is governed by the rules of international law applying between France and Hungary.[19]

50. Second, Hungary asserts that Article 9(2) of the France-Hungary BIT, which constitutes an investor-State arbitration provision in an intra-EU BIT, is incompatible with France and Hungary's obligations under the EU Treaties. According to Hungary, since Article 9(2) of the BIT provides an analogous mechanism to Article 8 of the Netherlands-Slovakia BIT, the terms of the *Achmea* Decision apply *mutatis mutandis* to Article 9(2) of the BIT.[20] As a result, Hungary's position is that "Article 9(2) of the BIT falls foul of the EU Treaties (namely, Articles 267 and 344 of the TFEU and Article 19(1) of the TEU) for the same three reasons determined in the *Achmea* Decision."[21]

51. Hungary contends that a tribunal constituted under Article 9(2) of the BIT has to rule on possible infringements of the BIT taking into account the law in force of the

[16] Reply, para. 21, referring to Counter-Memorial, para. 129 and citing to *Theodoros Adamakopoulos, Ilektra Adamantidou, Vasileios Adamopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction (February 7, 2020), para. 156 (**CLA-013**).

[17] Reply, paras. 24-25, citing to *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (November 30, 2012), para. 4.193 ("***Electrabel v. Hungary***") (**RLA-017**).

[18] Reply, para. 26, citing to *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award (October 11, 2017), para. 156 ("***Jürgen Wirtgen v. Czech Republic***") (**RLA-020**).

[19] Reply, para. 27.

[20] Memorial, para. 108.

[21] Memorial, para. 109.

concerned contracting party.[22] According to Hungary, because EU law forms part of the municipal law in force in Hungary as well as part of the body of international law, it follows therefore that a tribunal constituted under Article 9(2) of the BIT may be called upon to determine disputes that relate to the interpretation or application of EU law.[23] Hungary argues that, while in this particular case the Tribunal was not required to take into account any EU law provisions to resolve the dispute, under the *Achmea* Decision, "it suffices that Article 9(2) may lead a tribunal in any dispute under the BIT to potentially take account of provisions of EU law for Article 9(2) to be determined to be incompatible with EU law."[24]

52. Hungary further asserts that the Tribunal was not a court or tribunal of an EU Member State pursuant to Article 267 of the TFEU and, in this particular case, there exists no mechanism pursuant to which the Tribunal could submit requests for a preliminary ruling to the CJEU, contrary to the case in the *Achmea* Decision.[25]

53. Third, Hungary submits that both France and Hungary agree that the EU Treaties preclude investor-State arbitration provisions in intra-EU BITs, and that the Declarations issued on January 15 and 16, 2019, provided a binding interpretation of the BIT by the Contracting States thus confirming the *Achmea* Decision.[26]

54. Fourth, according to Hungary, Article 9(2) of the BIT became inapplicable upon Hungary's accession to the EU in 2004 and could not therefore form the basis for the Tribunal's jurisdiction.[27] Hungary's position is that the existence of an incompatibility between conflicting treaty obligations of France and Hungary must be resolved in accordance with international law, particularly in this case as the alleged incompatibility is an issue of jurisdiction, which is governed by international law.[28] In Hungary's

[22] Memorial, para. 110.
[23] Memorial, para. 111.
[24] Memorial, para. 112.
[25] Memorial, paras. 113-116.
[26] Memorial, paras. 117-120.
[27] Memorial, paras. 74-75; Reply, para. 13.
[28] Memorial, paras. 124-125. *See* full discussion at paras. 126-132.

submission, by applying any of the following two international law rules (i) Article 351 of the TFEU (formerly Article 307 of the TEC – a special orientation rule) and (ii) Article 30(3) of the VCLT (reflecting customary international law), Article 9(2) of the BIT became inapplicable on May 1, 2004, when the TFEU entered into force as between France and Hungary.[29]

55. In response to the Claimant's argument that none of Hungary's written or oral submissions in the arbitration had argued that Article 9(2) of the BIT became inapplicable upon Hungary's accession to the EU (*see* paragraph 76 below), Hungary submits that the Claimant is mistaken.[30] According to Hungary, it had argued this issue in the original arbitration in its letter to the Tribunal dated March 27, 2018 and its comments on the EC's *amicus curiae* brief dated September 28, 2018.[31]

56. Further, Hungary submits that the Claimant's argument that neither the TFEU's nor the VCLT's provisions on conflict of laws apply in this arbitration is flawed (*see* paragraph 79 below).[32] Hungary reiterates its position that the TFEU governs inconsistencies between the TFEU and other intra-EU treaties and that by application of Article 351 of the TFEU, Article 9(2) became inapplicable on May 1, 2004.[33]

57. With respect to the Claimant's argument that Hungary's accession to the EU did not have "the effect of terminating its intra-EU BITs (or invalidating an article thereof),"[34] Hungary criticizes the Claimant's reliance on the *UP* case.[35] In Hungary's view, the tribunal's analysis in *UP* was erroneous as it failed to assess whether it had jurisdiction under the BIT, and therefore did not apply the proper law.[36] Moreover, Hungary

[29] Memorial, paras. 122-123. *See* full discussion at paras. 133-150.

[30] Reply, para. 58, referring to Counter-Memorial, paras. 114-115.

[31] Reply, paras. 58-59, referring to Hungary's letter to the Tribunal (March 27, 2018), p. 6 (**R-006**); Hungary's comments of the EC's *amicus curiae* brief (September 28, 2018), p. 9 (**R-007**).

[32] Reply, para. 62.

[33] Reply, para. 64.

[34] Reply, para. 69, referring to Counter-Memorial, para. 139, quoting *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award (October 9, 2018), para. 259 ("***UP v. Hungary***") (**CLA-003**).

[35] Reply, para. 69.

[36] Reply, para. 70.

criticizes the Claimant's reliance on the Separate and Dissenting Opinion of Mr. Thomas to argue that if France and Hungary wished that investor rights under the BIT would cease when Hungary became a member of the EU, they would have explicitly provided for the withdrawal of their consents. In Hungary's submission, while the Separate and Dissenting Opinion sought to explore the applicability of Article 9(2) of the BIT, it did not take into account the Declarations and therefore, it reached a wrong conclusion.[37]

(b) The Tribunal Failed to Assess its Jurisdiction in the Light of the Declarations Despite Compelling Reasons to Do So

58. Turning to the second limb of the argument that the Tribunal wrongly asserted jurisdiction, Hungary contends that the Tribunal failed to consider and give effect to the Declarations issued by France and Hungary, which provided a new basis for Hungary's objection to the Tribunal's jurisdiction.[38] In Hungary's view, the Tribunal was obligated to assess the basis for its jurisdiction, even if that required reopening proceedings to consider new, material evidence, and, as such, its failure to consider the Declarations also constitutes a serious departure from a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention, which will be addressed in greater detail at section B below.[39]

(c) The Tribunal's Wrongful Exercise of Jurisdiction and Failure to Address the Declarations Constitute a "Manifest Excess of Powers"

59. The third limb of Hungary's assertion that the Tribunal wrongly asserted jurisdiction deals with "manifest excess of powers." Hungary's position regarding the relevant legal standard is that an annulment pursuant to Article 52(1)(b) of the ICSID Convention requires a demonstration of a "manifest excess of powers" and that jurisprudence on the legal implications of the term "manifest" has been divergent.[40] Hungary submits that

[37] Reply, para. 75.
[38] Memorial, para. 153.
[39] Memorial, paras. 154-155.
[40] Memorial, paras. 156-157.

annulment committees have generally understood this term either in terms of the "obviousness" or "seriousness" of the error made by the tribunal.[41]

60. It is Hungary's submission that, in relation to the specific nature of issues of jurisdiction, it has been widely held that "the 'manifest' requirement is always satisfied when a decision is wrong on jurisdiction," a view supported by several authors.[42] According to Hungary, this approach has been taken by the *ad hoc* committees in *Vivendi v. Argentina* and *Venezuela Holdings v. Venezuela*.[43] Further, it is Hungary's submission that the requirement of "manifestness" is always satisfied in case of a jurisdictional excess of powers and that any deviance from the mandatory jurisdictional requirements will satisfy "manifest excess of powers" for the purposes of annulment under Article 52(1)(b) of the ICSID Convention.[44]

61. Hungary submits that for these reasons, the Tribunal's error in asserting jurisdiction that it did not have, in light of the implications of the *Achmea* Decision and the Declarations, which the Tribunal failed to assess, "is accordingly necessarily manifest and warrants the annulment of the Award under Article 52(1)(b) of the ICSID Convention."[45] Hungary submits that, even if the *ad hoc* Committee were to consider that a wrongful decision on jurisdiction is not in itself sufficient to constitute a "manifest excess of powers" and that it must be established that the Tribunal's jurisdictional error is both "evident" and "serious" to warrant the annulment of the Award, that test would be met in the present case.[46]

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[41] Memorial, para. 157.

[42] Memorial, paras. 158-159. *See also* Reply, paras. 103, 109.

[43] Memorial, paras. 161-162, citing to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Decision on Annulment (July 3, 2002), para. 72 ("***Vivendi v. Argentina***") (**RLA-28**) and *Venezuela Holdings, B.V., et al* (case formerly known as M*obil Corporation, Venezuela Holdings, B.V., et al.*) *v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (March 9, 2017), para. 110 ("***Venezuela Holdings v. Venezuela***") (**RLA-34**).

[44] Memorial, paras. 163-164.

[45] Memorial, para. 165.

[46] Memorial, para. 166.

62. In response to the Claimant's submission that the ICSID Convention does not draw any distinction between jurisdictional errors (*see* paragraph 69 below), Hungary submits that "exclusive reliance of these decisions on the text of the Convention does not conform with the accepted principles of treaty interpretation, which require that the terms of a treaty be interpreted 'in their context and in the light of its object and purpose' – and in the event of ambiguity, having recourse to the treaty's preparatory work."[47] To this end, Hungary refers to the drafting history of the ICSID Convention and argues that it confirms why the Convention does not make a distinction between errors on jurisdiction and other excesses of powers.[48]

63. Moreover, with regard to the Claimant's competence-competence argument (*see* paragraph 69 below), Hungary asserts that there exists no presumption in favor of the validity of the tribunal's jurisdiction.[49]

64. As regards the Claimant's argument that the Parties may not obtain a *de novo* consideration of, or an appeal against a decision of a tribunal under Article 41(1) (*see* paragraph 75 below), Hungary submits that even though Article 53 of the ICSID Convention places a limitation concerning an appeal of an award, it does not limit an *ad hoc* committee's power to review an arbitral tribunal's decision on jurisdiction under Article 52(1)(b) of the ICSID Convention.[50] Hungary further submits that past *ad hoc* committees have found that Article 53 of the ICSID Convention relates to a review of the award on merits.[51] Hungary submits that when it comes to issues of jurisdiction it is

[47] Reply, para. 107, quoting United Nations, Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, 331, Articles 31 and 32 (23 May 1969) (**RLA-012**), referring to Counter-Memorial, paras. 98 and 100.

[48] Reply, para. 108, referring to Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, The ICSID Convention: A Commentary, Article 52, para. 155 (2d ed. 2009) ("**Schreuer, Commentary**") (**RLA-040**).

[49] Reply, para. 114.

[50] Reply, para. 117, referring to Schreuer, Commentary, Article 52, para. 131 (**RLA-040**); History of ICSID Convention, Vol. II-1, p. 517 (**RLA-074**).

[51] Reply, paras. 118 and 119 citing to *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988 (December 14, 1989), para. 4.04 ("***MINE v. Guinea***") (**RLA-057**).

unavoidable that an annulment committee appraise arguments that have "bold similarity" to those raised in the original proceeding.[52]

65. Hungary criticizes what it characterizes as the Claimant's attempt at raising the standard for annulment inappropriately by arguing that annulment is possible "only where the Tribunal's decision on jurisdiction is untenable or unreasonable."[53] In Hungary's view, the correct test is "was the Tribunal correct in its decision on jurisdiction, or did the Tribunal exercise a jurisdiction it did not have?"[54]

66. Hungary dismisses the Claimant's challenge to the timeliness of Hungary's jurisdictional objection, as raised in the Claimant's Counter-Memorial.[55] Hungary's response is that unlike in the *Edenred* case where Hungary did not raise an intra-EU objection in the original proceedings, it did so in the present proceedings and the Tribunal found that objection to be admissible and dealt with it allegedly in an incorrect manner in the Award.[56] Hungary submits that it is not for this Committee to examine the Tribunal's decision on the admissibility of Hungary's jurisdictional objection "unless Claimant alleged (and it does not) that the Tribunal's determination of this procedural matter amounted to one of the annulment grounds listed under Article 52 of the ICSID Convention."[57] Hungary also submits that all the other arguments made by the Claimant regarding the timeliness of arguments raised by Hungary under Article 52(1)(b) of the ICSID Convention should be rejected.[58]

b. Claimant's Position

67. In its Counter-Memorial, the Claimant challenges Hungary's arguments that the Tribunal manifestly exceeded its powers under the first ground presented for annulment. This section sets out the following arguments presented by the Claimant: (a) the relevant

[52] Reply, para. 123.
[53] Reply, para. 124, referring to Counter-Memorial, para. 102.
[54] Reply, para. 131.
[55] Reply, para. 152, referring to Counter-Memorial, paras. 30 and 32.
[56] Reply, para. 153.
[57] Reply, para. 154.
[58] Reply, para. 155.

legal standard; (b) the Tribunal's alleged wrongful exercise of jurisdiction does not constitute a "manifest excess of powers;" and (c) the Tribunal's alleged failure to consider the Declarations does not constitute a manifest excess of powers.

(a) The Relevant Legal Standard

68. The Claimant agrees with Hungary's assertion that annulment pursuant to Article 52(1)(b) of the ICSID Convention requires a demonstration of a "manifest excess of powers."[59] However, the Claimant differs with Hungary as to the meaning of the term "manifest."[60] According to the Claimant, while Hungary argues that *ad hoc* committees have understood the term "manifest" to mean "obvious" or "serious," it has then attempted to lower this standard by arguing that the "manifest" requirement is always satisfied when a decision is wrong on jurisdiction.[61]

69. Relying on *Alapli Elektrik B.V. v. Turkey,* the Claimant's position is that it is widely accepted that when it comes to a tribunal's decision on jurisdiction, "the standards are identical […] meaning evident, obvious and clear on its face."[62] The Claimant submits that Hungary's conclusion cannot stand as it would require the review of tribunals' decisions on jurisdiction in detail to determine whether or not an error was made.[63] To support its position, the Claimant cites to the findings of the *ad hoc* committees in *Total v. Argentina* and *Azurix v. Argentina*, which explained that arbitral tribunals are judges of their own competence, following the principle of competence-competence.[64]

70. The Claimant therefore submits that, contrary to Hungary's position, a tribunal's error in asserting jurisdiction does not necessarily amount to a "manifest excess of powers,"

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[59] Rejoinder, para. 16.

[60] Rejoinder, para. 17.

[61] Counter-Memorial, para. 96, referring to Memorial, para. 158. *See also* Rejoinder, para. 17.

[62] Counter-Memorial, para. 98, citing to *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, July 10, 2014, para. 238 ("***Alapli Elektrik v. Turkey***") (**CLA-001**).

[63] Counter-Memorial, para. 99.

[64] Counter-Memorial, paras. 100-101, citing to *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, February 1, 2016, paras. 241-242 ("***Total v. Argentina***") (**CLA-004**); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, paras. 67-69 ("***Azurix v. Argentina***") (**CLA-005**). *See also OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on the Application for Annulment, December 6, 2018, para. 183 (**CLA-007**).

"if the tribunal's decision to uphold its jurisdiction was not unreasonable nor untenable."[65]

(b) The Tribunal's Alleged Failure to Consider the Declarations Does Not Constitute a "Manifest Excess of Powers"

71. The Claimant challenges Hungary's position that the Tribunal's failure to consider the Declarations amounts to a manifest excess of powers. According to the Claimant, the Tribunal's refusal to consider the Declarations in the analysis of its jurisdiction was justified because, by the time the Declarations had been brought to the Tribunal's attention, the Award had not only been finalized but had also been signed by one of the arbitrators.[66]

72. The Claimant submits that the Tribunal's decision on jurisdiction would not have been any different had the Tribunal considered the Declarations, as evidenced by the "unanimous" awards which gave no legal effect to them.[67] Citing to *Magyar Farming v. Hungary*, the Claimant asserts that, "consent was already perfected when the investor accepted Hungary's permanent offer to arbitrate."[68] The Claimant also refers to Mr. Thomas' finding that, "[t]herefore, I do not think that a consent given by an EU Member State to an investor of another Member State which was valid in ICSID terms at the time of the submission of the dispute to arbitration can be varied or nullified by a subsequent development in EU law which declares intra-EU BITs' arbitration clauses to be inconsistent with the EU regime."[69] In view of the above, the Claimant submits that the Tribunal's refusal to take into account the Declarations when assessing its jurisdiction does not constitute a manifest excess of powers and the Declarations would not have altered the conclusion the Tribunal reached concerning its jurisdiction.[70]

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[65] Counter-Memorial, para. 103.

[66] Counter-Memorial, para. 143.

[67] Counter-Memorial, paras. 145-146, citing to *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, November 13, 2019, para. 216 ("***Magyar Farming v. Hungary***") (**CLA-008**).

[68] Counter-Memorial, para. 147, citing to *Magyar Farming v. Hungary*, para. 214 (**CLA-008**).

[69] Counter-Memorial, para. 148, citing Separate and Dissenting Opinion of J.C. Tomas QC (January 19, 2019), para. 68 (**RLA-004**).

[70] Counter-Memorial, para. 150.

(c) The Tribunal's Alleged Wrongful Exercise of Jurisdiction Does Not Constitute a "Manifest Excess of Powers"

73. The Claimant argues that (i) the Tribunal's alleged wrongful exercise of jurisdiction does not amount to a manifest excess of powers; (ii) Hungary is merely attempting to obtain a *de novo* ruling on jurisdiction; and (iii) the Tribunal correctly asserted jurisdiction on the basis of Article 9(2) of the BIT.

74. First, the Claimant submits that Hungary's arguments concerning the alleged wrongful conclusion on jurisdiction demonstrates that the Tribunal's alleged error was neither "obvious" nor self-evident "without the need for an elaborate analysis."[71] Further, the Claimant argues that, as past *ad hoc* committees have determined, "an *ad hoc* committee may only annul a tribunal's decision on jurisdiction when such decision is unreasonable or untenable."[72] In the present case, the Claimant's position is that the Tribunal's decision upholding jurisdiction does not meet either circumstance.[73] In the Claimant's submission, case law shows that in similar circumstances tribunals have "unanimously" upheld their jurisdiction when faced with disputes of an intra-EU nature despite the *Achmea* decision.[74] The Claimant refers to the *Edenred* case where Hungary's application for annulment was rejected by the *ad hoc* committee in that case, thus confirming the validity of the tribunal's decision based on the France-Hungary BIT.[75] Thus, the Claimant submits that the tribunal's decision on jurisdiction is not only tenable but is also consistent with that of all other investment tribunals, and, consequently, Hungary's position that the Tribunal wrongfully exercised jurisdiction does not meet the standard for annulment.[76]

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[71] Counter-Memorial, para. 106, referring to *Total Argentina*, para. 242 (**CLA-004**).

[72] Counter-Memorial, para. 107.

[73] Counter-Memorial, para. 108.

[74] Counter-Memorial, para. 108, referring to *UP v. Hungary* (**CLA-003**); *Magyar Farming v. Hungary* (**CLA-008**); *Edenred S.A. v. Hungary*, ICSID Case No. ARB/13/21, Award (redacted), December 13, 2016 (**CLA-002**).

[75] Counter-Memorial, para. 108, referring to IA Reporter Article entitled "Hungary fails to annul award in favour of French investor at ICSID", dated March 11, 2020 (**CLA-009**); Global Arbitration Review Article entitled "Hungary fails to reopen intra-EU BIT awards", dated March 18, 2020 (**CLA-010**). The Claimant reserved its right to seek the voluntary production by Hungary of the decision, or an order from this Committee to the same effect.

[76] Counter-Memorial, paras. 109-110.

75. Second, the Claimant contends that Hungary is merely attempting to obtain a *de novo* ruling on jurisdiction. In this regard, the Claimant submits that Hungary had, on separate instances in the original arbitration, raised similar arguments as it has in this annulment proceeding concerning the Tribunal's jurisdiction.[77] The Claimant alleges that Hungary is using the present annulment proceeding as an appeal, by reframing the issue of the Tribunal's jurisdiction, already pleaded in the original arbitration, hoping it may obtain a *de novo* ruling from the Committee.[78]

76. In addition, the Claimant submits that Hungary's contention that Article 9(2) of the BIT became inapplicable when Hungary acceded to the EU in 2004 should have been raised in the original proceeding.[79] According to the Claimant, this issue is independent from the *Achmea* Decision and the Declarations but none of Hungary's submissions ever raised such an objection on jurisdiction.[80] Therefore, the Claimant states that Hungary cannot use the annulment proceeding as a second chance to plead arguments that it failed to raise in a timely fashion in the original proceedings.[81] However, the Claimant does not argue that any of Hungary's jurisdictional arguments are inadmissible in raising any jurisdictional objections before the Tribunal.[82]

77. Third, the Claimant asserts that, in any event, Hungary's arguments should not succeed given that the Tribunal correctly asserted jurisdiction under international law and the ICSID Convention on the basis of Article 9(2) of the BIT.[83] According to the Claimant, and contrary to Hungary's assertions concerning the applicability of the *Achmea* Decision in the EU legal order, "the Tribunal derives its jurisdiction solely from the ICSID Convention and Article 9(2) of the BIT."[84]

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[77] Counter-Memorial, para. 112.

[78] Counter-Memorial, para 113.

[79] Counter-Memorial, para. 114.

[80] Counter-Memorial, para. 115.

[81] Counter-Memorial, paras. 115 and 116, the Claimant relies on *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 (May 3, 1985), para. 83 ("***Klöckner v. Cameroon***") (**RLA-62**).

[82] Rejoinder, para. 72.

[83] Counter-Memorial, para. 117.

[84] Counter-Memorial, para. 119.

78. The Claimant argues that Hungary's submission is contradictory with respect to the arguments concerning the application of international law.[85] Specifically, the Claimant contends that it has been established that EU law is a *sui generis* legal order embodied by its regional character, "[h]owever, EU law does not go further than that and constitutes, in the Tribunal's view, international law as a *lex specialis*, the application of which is restricted to those cases which fall into its particular scope."[86] In the Claimant's view, questions of jurisdiction are not subject to the law applicable to the merits and, thus, it is irrelevant whether or not EU law forms part of the international law to be applied by the Tribunal in considering its jurisdiction.[87] The Claimant further notes that the Tribunal was never asked to apply or interpret EU law by either party in the original arbitration until the *Achmea* Decision was issued and Hungary chose to reverse its previous stance on the applicability of EU law.[88]

79. With respect to Hungary's position that Article 9(2) of the BIT became applicable upon Hungary's accession to the EU in 2004 (*see* paragraph 54 above), the Claimant submits that Hungary never once raised such an objection prior to the *Achmea* Decision and has not done so in other publicly-known intra-EU BIT cases prior to the *Achmea* Decision.[89] Therefore, the Claimant dismisses all the arguments Hungary makes in support of the applicability of Article 351 of the TFEU and Article 30(3) of the VCLT. Specifically, the Claimant contends that the special orientation rule set out under Article 351 of the TFEU does not apply in this case because there exists no conflict between the BIT and the TFEU, as decided by the Tribunal in the Award.[90] With regard to the applicability of Article 30(3) of the VCLT, the Claimant asserts that "tribunals (including the Tribunal in the present case) have unanimously found that no incompatibility exists between the TFEU and the France-Hungary BIT, given that the former and the latter do

[85] Counter-Memorial, paras. 120 and 122.

[86] Counter-Memorial, para. 123, citing to *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on Intra-EU Jurisdictional Objection, June 29, 2019, para. 174 (**CLA-011**).

[87] Counter-Memorial, paras. 124-125.

[88] Counter-Memorial, para. 126.

[89] Counter-Memorial, para. 136 and 137.

[90] Counter-Memorial, para. 138.

not share the same subject matter."[91] The Claimant relies on *Magyar Farming v. Hungary* to support its assertion that, in a more general sense, "investment jurisprudence is consistent in holding that investment treaties do not share the [same] subject matter with the EU treaties."[92]

80. In any case, the Claimant contends that arbitral tribunals and *ad hoc* committees have consistently rejected the contention that a State's accession to the EU terminated or invalidated its intra-EU BITs, absent such express termination of the BIT.[93] To support this contention, the Claimant cites the finding of the tribunal in the *UP* award and the finding of Mr. Thomas, in his Separate and Dissenting Opinion.[94]

(2) The Committee's Analysis

81. The history of the ICSID Convention attests that the annulment procedure was intended to be a limited and exceptional recourse.[95] The grounds for annulment are tailored to safeguard procedural integrity, not to ensure substantive correctness as in an appeal.[96] Previous *ad hoc* committees have consistently confirmed their role within the ICSID system as circumscribed by the grounds for annulment exhaustively listed in Article 52 of the Convention, and affirmed their duty to exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of ICSID awards.[97]

82. Though limited and exceptional, the annulment procedure is essential to ensure that fundamental principles of law are respected and that both parties enjoy procedural justice and fairness. As annulment is the only remedy available to set aside an award,

[91] Counter-Memorial, para. 138.

[92] Counter-Memorial, para. 138, citing to *Magyar Farming v. Hungary*, para. 235 (**CLA-008**).

[93] Counter-Memorial, para. 139.

[94] Counter-Memorial, para. 140, citing to *UP v. Hungary*, para. 259 (**CLA-003**); Separate and Dissenting Opinion of J.C. Tomas QC (January 19, 2019), para. 67 (**RLA-4**).

[95] ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID (May 5, 2016), para. 71.

[96] ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID (May 5, 2016), para. 72.

[97] ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID (May 5, 2016), para. 74.

wholly or in part, *ad hoc* committees carry a special responsibility to protect the integrity of the ICSID arbitration system and respect both parties' right to be heard and present their case in full. The Committee is conscious of and respects its mandate commensurate with this special responsibility.

83. With respect to the Applicant's claim under Article 52(1)(b) that the Tribunal incurred a "manifest excess of power," the Committee must ultimately answer the following questions: (a) what is the legal standard when the alleged "manifest excess of power" relates to a tribunal's decision on jurisdiction; (b) did the Tribunal manifestly exceed its power when, despite the *Achmea* Decision, it assumed jurisdiction on the basis of Article 9(2) of the France-Hungary BIT; and (c) did the Tribunal manifestly exceed its power when it failed to consider the Declarations issued by France and Hungary in its decision on jurisdiction?

(a) The Relevant Legal Standard and the Meaning of "Manifest" in Relation to Decisions on Jurisdiction

84. The Parties disagree on the scope of the ground for annulment for "manifest excess of power" as established under Article 52(1)(b), when the alleged "excess of power" concerns a tribunal's decision on jurisdiction. Whereas the Applicant argues that an excess of jurisdiction is always "manifest" because a tribunal either has or does not have jurisdiction, the Claimant counters that the principle of competence-competence established under Article 41(1) of the Convention implies that a tribunal's decision on jurisdiction should only be annulled when it is "unreasonable" or "untenable," and that *ad hoc* committees have no authority to engage in a *de novo* review of the tribunal's decision on jurisdiction.

85. During the Hearing, the Committee specifically requested the Parties to further develop their views on how the Committee should conduct its review of the Tribunal's decision on jurisdiction in applying Article 52(1)(b) of the ICSID Convention.[98]

[98] Hearing Transcript Day 1, pp. 118-119.

86. The Applicant insisted that there is "no in between" in matters of jurisdiction and that the requirement of "manifest" is always satisfied in case of a jurisdiction excess of powers. It also contended that, in this case, the Tribunal's overreach is evident because it is clear that the Tribunal exceeded its power by disregarding the *Achmea* Decision and the Declarations; as well as serious, because consent forms the cornerstone of international arbitration.[99]

87. The Claimant on the other hand expressed the view that the notion that a Tribunal either has or does not have jurisdiction is slightly simplistic, and that a *de novo* review of jurisdictional matters is not what the drafters of the ICSID Convention had in mind.[100] It outlined two different methodological approaches adopted by previous *ad hoc* committees: the so-called two-step approach under which a committee must first determine whether there has been an excess of power, and if so, whether the excess of power was manifest; and the *prima facie* approach under which the committee verifies whether there is anything manifestly or obviously wrong in the decision on jurisdiction, without engaging in its own full analysis. The Claimant suggests that a *prima facie* approach is more in line with the overall spirit of the ICSID Convention and the word "manifest" as used in the ICSID Convention.[101]

88. The Committee agrees with the position put forward by Claimant.

89. The history of the ICSID Convention and numerous decisions by *ad hoc* committees make clear that a tribunal may incur an excess of power when it exceeds the mandate given to it by the parties, in particular, by going beyond the scope of the arbitration agreement and deciding on issues that were not submitted to it, and by failing to apply the proper law agreed on by the parties.[102] Thus, a manifest excess of power may occur both at the jurisdiction and at the merits stage.

[99] Hearing Transcript Day 2, pp. 9-10.
[100] Hearing Transcript Day 2, p. 37.
[101] Hearing Transcript Day 2, pp. 39-40.
[102] ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID (May 5, 2016), paras. 19-21.

90. Of all the grounds for annulment, "manifest excess of power" is most prone to invite a *de novo* review of the facts and the law, to determine whether the tribunal did or did not have jurisdiction, or whether its decision is congruent with the applicable law. It is for this reason that the drafters of the Convention insisted that the excess of powers be "manifest." Not just any excess of power should result in annulment, only those excesses that are obvious, clear and easily identifiable, and do not require complex interpretations of the award to be discerned.[103]

91. The Applicant refers to the history of the ICSID Convention, in particular the drafters' understanding that a decision on the merits by a tribunal that lacks jurisdiction is an obvious example of an excess of powers. However, that does not mean that such excess of power need not be "manifest," as expressly required under Article 52(1)(b) of the ICSID Convention. As pointed out by the Claimant, the wording of Article 52(1)(b) of the ICSID Convention makes no distinction between a tribunal's decision on jurisdiction or on the merits in this respect.

92. The Committee finds that this oversimplifies the legitimate disagreement that may exist on complex factual and normative considerations that affect a tribunal's jurisdiction. The decision on such matters falls to the tribunal, as established under Article 41(1) of the ICSID Convention.

93. Indeed, considering that the tribunal is the judge of its own competence, the "manifest" requirement gains particular relevance in the context of jurisdiction. An *ad hoc* committee must be mindful of and, therefore, respect the tribunal's margin of appreciation, rather than undertake a *de novo* evaluation of the facts and law supporting the tribunal's jurisdiction. It need only be satisfied that the decision on jurisdiction is

[103] *See* ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID (May 5, 2016), para. 83, footnotes 153 and 154 for references to cases.

clearly neither unreasonable nor untenable.[104] A debatable solution is not subject to annulment since the excess of powers would not then be "manifest."[105]

94. The Committee agrees with the Claimant that the *prima facie* approach to Article 52(1)(b) of the ICSID Convention is preferable, precisely to resist the temptation to first engage in a full review of the facts and the law, as is inherent in the two-step approach. The Committee will therefore take one step back and determine whether the decision reached by the Tribunal is *prima facie* so unreasonable or untenable that it constitutes a "manifest excess of power" in accordance with Article 52(1)(b) of the ICSID Convention.

(b) The Tribunal's Decision on Jurisdiction Does Not Constitute a Manifest Excess of Power

95. The Applicant claims that the Tribunal wrongly asserted jurisdiction on the basis of Article 9(2) of the France-Hungary BIT following the CJEU's decision in the *Achmea* case, and that its wrongful exercise of jurisdiction is, by that same token, "manifest." As explained above, the Committee rejects the latter since the "manifest" requirement must be satisfied independently, albeit on the basis of a *prima facie* review.

96. According to the legal standard set out in the previous section, the Committee must determine whether the Tribunal's decision that the *Achmea* Decision does not deprive it of jurisdiction under Article 9(2) of the France-Hungary BIT is so unreasonable or untenable that it amounts to a "manifest excess of power."

97. The Committee takes note that not a single ICSID tribunal thus far has held that the *Achmea* Decision renders null and void the arbitration clause contained in intra-EU BITs, whether retroactively (upon accession of both States to the EU) or proactively (upon the issuance of the *Achmea* Decision). As the Claimant pointed out during the

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[104] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. (also known as Industria Nacional de Alimentos, A.S. and Indalsa Perú S.A.) v. Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (September 5, 2007), para. 112; *Alapli Elektrik v. Turkey*, para. 82 (**CLA-1**).

[105] *Duke Energy International Peru Investments No. 1, Ltd. v. Peru*, ICSID Case No. ARB/03/28, Decision on Annulment (March 1, 2011), para. 99 ("***Duke v. Peru***") (**CLA-29**).

Hearing, this renders the Applicant's case "an uphill battle."[106] But to declare it a run race for that reason only would not do justice to the Applicant's understandable sense of frustration of history simply repeating itself.[107]

98. The Committee will therefore engage in its own review of whether the *Achmea* Decision renders the Tribunal's decision on its jurisdiction under the France-Hungary BIT so untenable that it must be annulled. To that end, the following uncontroversial facts are relevant:

- The *Achmea* Decision was issued by the CJEU upon request of the German Federal Court, in the context of a procedure in German courts to set aside an UNCITRAL arbitration award decided under the Netherlands-Slovakia BIT.

- The Netherlands-Slovakia BIT arbitration clause specifically required the arbitral tribunal to decide, among others, on the basis of "the law in force of the Contracting Party concerned" (Article 8(6) of the Netherlands-Slovakia BIT).

- The CJEU determined that the arbitral tribunal referred to in Article 8 of the Netherlands-Slovakia BIT "may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital," and that "by concluding the BIT, the Member States parties to it established a mechanism for settling disputes between an investor and a Member State which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law."

- The CJEU ruled that "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of

[106] Hearing Transcript Day 2, pp. 40-41.
[107] Hearing Transcript Day 2, p. 4.

investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic […]."

- Article 267 of the TFEU establishes the CJEU's jurisdiction to give preliminary rulings of the interpretation of EU Treaties and on the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union. Article 344 of the TFEU provides that "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

99. The question before the Tribunal was whether the CJEU's ruling on Article 8 of the Netherlands-Slovakia BIT deprives the Tribunal of its jurisdiction, based on Article 9 of a different intra-EU BIT and the ICSID Convention.

100. This question raises complex substantive and procedural issues, as it involves the interaction between two different legal systems: the EU legal system that is binding upon EU Member States, and the ICSID arbitration system that is created by a multilateral treaty (the ICSID Convention). Jurisdiction within the ICSID arbitration system has a dual basis in the ICSID Convention in conjunction with a variety of legal instruments, including intra-European BITs. Additional complexity is added by the fact that the ICSID arbitration system creates rights for third parties not States, who may have relied on their access to ICSID arbitration when making their foreign investment.

101. Both systems have their own means of resolving disputes concerning the interpretation and application of the legal instruments on which they are based. The ICSID arbitration system is specifically designed as a self-contained and autonomous arbitration system for disputes between foreign investors and States. It is not evident that a decision by the CJEU on the interpretation of an intra-EU BIT is binding on an ICSID tribunal whose jurisdiction is based on that same BIT. In the words of the Separate and Dissenting Opinion, "nothing in the Convention recognizes that a judgment of a court having jurisdiction within an ICSID Contracting State that has already given its consent to

ICSID arbitration can undo such an arbitration agreement, even if that court plays a supranational role within a regional legal system."[108]

102. Hungary also claims that Article 9 of the BIT became inapplicable long before the *Achmea* Decision, upon Hungary's accession to the EU on May 1, 2004, by virtue of Article 351 of the TFEU. The Committee takes note that the Claimant questions the timeliness of the Applicant's objection to jurisdiction based on this argument, which was not raised before the Tribunal, but ultimately does not oppose its admissibility in the annulment procedure.

103. Article 351 of the TFEU provides that Member States shall take all appropriate steps to eliminate incompatibilities between agreements concluded before January 1, 1958 or, for acceding States, before the date of their accession, and the EU Treaties. In the view of the Committee, this provision does not have the claimed automatic effect of making Article 9 of the France-Hungary BIT inapplicable. At most, it called for EU Member States to actively withdraw their consent to investment arbitration in intra-EU BITs, which they did not do, and certainly not before the *Achmea* Decision.

104. The Claimant relied on Hungary's consent to ICSID arbitration as expressed in Article 9 of the France-Hungary BIT, long before the *Achmea* Decision was issued. Depriving the Claimant retroactively of its right to arbitration based on the ICSID Convention, as a consequence of a decision by the CJEU, is not the evidently correct decision, in the view of the Committee.

105. Given the complexity of the issues raised by the *Achmea* Decision, on which sophisticated jurists may have different opinions, it is clear to the Committee that the Tribunal's decision to assume jurisdiction by virtue of Article 9 of the France-Hungary BIT, despite the *Achmea* Decision, is not *prima facie* so unreasonable or untenable that it constitutes a manifest excess of power under Article 52(1)(b) of the ICSID Convention.

[108] Separate and Dissenting Opinion of J.C. Thomas QC (January 19, 2019), para. 66 (**RLA-4**).

(c) The Tribunal's Failure to Consider the Declarations Does Not Constitute a Manifest Excess of Power

106. The Applicant also claims that the Tribunal manifestly exceeded its power because it did not take into consideration the Declarations issued by France and Hungary which, according to the Applicant, provide a binding interpretation of the France-Hungary BIT confirming the *Achmea* Decision and constitute a new ground for objection to jurisdiction.

107. The Declarations affirm, after citing the CJEU ruling in the *Achmea* Decision, that: "Union law takes precedence over bilateral investment treaties concluded between Member States. As a consequence, all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. […] An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer to arbitrate by the member State party to the underlying bilateral investment Treaty."[109]

108. The Claimant argues that the Declarations would not have changed the Tribunal's decision and relies on the Separate and Dissenting Opinion, which states that the consent to arbitrate given by an EU State to a foreign investor that was valid at the time of the submission of the dispute to arbitration cannot be varied or nullified by subsequent developments in European law.

109. The Committee agrees with the Claimant that the Declarations do not add new elements to the discussion on jurisdiction raised by the *Achmea* Decision. State declarations are no more binding on ICSID tribunals than decisions by the CJEU, nor is it evident that a State can unilaterally withdraw its consent to ICSID arbitration when that consent has previously been relied on by a foreign investor who submitted a dispute to arbitration.[110] Furthermore, and in addition to the tension between these Declarations and subsequent

[109] Declaration of the Member States of January 15, 2019 on the Legal Consequences of the *Achmea* Judgment and on Investment Protection, January 15, 2019 (**AL-02**) and Declaration of the Representative of the Government of Hungary of January 16, 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, January 16, 2019 (**AL-03**).

[110] ICSID Convention, Article 25(1), 2nd sentence.

attempts by EU Member States to regulate the impact of the *Achmea* Decision, the precise status of these Declarations is unclear. Different versions exist, the mandate of the signatories is not apparent, and the Declarations do not bear the signatures of (or representatives of) all EU Member States. As these are highly debatable issues, the Committee cannot find that the Tribunal's decision to assert jurisdiction despite the Declarations is *prima facie* so unreasonable or untenable that it qualifies as a manifest excess of power under Article 52(1)(b).

110. The Applicant's claim that the Tribunal manifestly exceeded its power by assuming jurisdiction under Article 9 of the France-Hungary BIT, despite the CJEU's *Achmea* Decision and the Declarations of Hungary and other EU States, is therefore rejected.

111. The Applicant raises the separate question whether the Tribunal seriously departed from a fundamental rule of procedure, in particular the Applicant's right to be heard, by not reopening the procedure to consider the Declarations. This will be discussed in the next section.

B. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE (ARTICLE 52(1)(D))

(1) The Parties' Positions

a. Applicant's Position

112. The second ground for annulment Hungary raises is that the Tribunal seriously departed from a fundamental rule of procedure. Hungary contends that the Tribunal (a) departed from the requirement to assess its jurisdiction and breached Hungary's right to be heard by failing to take account of the Declarations issued by France and Hungary; (b) departed from the formal and substantive requirements that any award must conform to by failing to mention and provide reasons in the Award for its prior decision refusing to take account of the Declarations; (c) departed from the principle of equal treatment of the Parties by deciding to introduce the *Edenred* and *UP* Awards in the proceedings and relying on their reasoning for certain of the Tribunal's findings; and that (d) the above departures from a rule of procedure were serious. The section below sets out a summary of Hungary's arguments in this regard.

(a) The Tribunal Departed from the Principle to Scrutinize its Jurisdiction and Hungary's Right to Be Heard

113. The first argument that Hungary makes is that the obligation to scrutinize the Tribunal's jurisdiction and the right to be heard are fundamental rules of procedure. It argues that the phrase "a fundamental rule of procedure" within the meaning of Article 52(1)(d) of the ICSID Convention "encompasses any procedural rule concerned with the integrity and fairness of the proceeding."[111]

114. In Hungary's submission, past *ad hoc* committees have identified four principles as constituting fundamental rules of procedure: (i) equal treatment of the parties; (ii) the right to be heard; (iii) an independent and impartial tribunal; and (iv) the proper handling of evidence and allocation of the burden of proof.[112] Moreover, Hungary submits that the principle of consent, on which the jurisdictional requirements for ICSID arbitration are based, is recognized as a fundamental rule of procedure.[113] Following on from this assertion, Hungary's position is that a tribunal's failure to scrutinize its jurisdiction and consider any jurisdictional objection under Article 41(2) of the ICSID Convention justifies the annulment of the award under Article 52(1)(d) of the ICSID Convention.[114] Hungary further submits that the right to be heard is also accepted as a fundamental rule

[111] Memorial, para. 174, referring to Updated Background Paper on Annulment for the Administrative Council of ICSID (May 5, 2016), para. 98 (**RLA-35**) and *Tulip Real Estate Investment and Development Netherlands B.V.* v. *Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (December 30, 2015), para. 71 ("***Tulip v. Turkey***") (**RLA-36**); *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (April 5, 2016), para. 85 ("***TECO v. Guatemala***") (**RLA-37**).

[112] Memorial, para. 175, referring to *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award (July 8, 2013), para. 263 (**RLA-38**); *Impregilo S.P.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment (January 24, 2014), para. 165 ("***Impregilo v. Argentina***") (**RLA-39**).

[113] Memorial, para. 176, referring to *Impregilo v. Argentina*, paras. 169-171 (**RLA-39**).

[114] Memorial, para. 176.

of procedure,[115] and that, if a tribunal adopts a position or proceeds in a manner that prevents one of the parties to present fully its case, then this principle is breached.[116]

115. Second, Hungary submits that the Tribunal's failure to assess the Declarations issued by France and Hungary infringed upon the Tribunal's obligation to scrutinize its jurisdiction and Hungary's right to be heard. According to Hungary, the Tribunal had an obligation to scrutinize the basis for its jurisdiction, including an obligation to reopen the proceedings with respect to the Declarations.[117]

116. Hungary states that on January 17, 2019 it notified the Tribunal of the Declarations and sought the reopening of the proceedings in accordance with Rule 38(2) of the Arbitration Rules, "for the limited purpose of considering the significance of the Declarations regarding the Tribunal's jurisdiction."[118] Hungary submits that it complied with the Arbitration Rule 38(2) requirements since the Declarations were a subsequent agreement between France and Hungary regarding the interpretation of the BIT, and hence a "decisive factor" for the Tribunal's assessment of its jurisdiction and given that they were issued after the closure of the proceedings they also qualified as "new."[119] It is Hungary's submission that by the time the Declarations were issued, the Award had only been signed by one of the arbitrators, Mr. Carlevaris, on January 10, 2019.[120] Therefore, Hungary contends that when it requested the consideration of the Declarations for the Tribunal's jurisdiction on January 17, 2019, the Tribunal was still in control of the Award and had the opportunity to make changes to it.[121] In Hungary's

[115] Memorial, para. 177, referring to *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (December 23, 2010), para. 198 ("***Fraport v. Philippines***") (**RLA-41**); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment (February 5, 2002), para. 58 ("***Wena v. Egypt***") (**RLA-42**); *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment (December 27, 2016), para. 149 (**RLA-43**).

[116] Memorial, para. 178.

[117] Memorial, para. 179.

[118] Memorial, para. 181.

[119] Memorial, para. 183, referring to Hungary's Request to the Tribunal for the Reopening of the Proceedings (January 17, 2019) (**R-11**).

[120] Memorial, para. 184.

[121] Memorial, para. 184.

view, an award has not been "rendered" until it is signed by all the members of the tribunal and transmitted to the Secretary-General for authentication and dispatch to the parties.[122]

117. Hungary claims that on January 22, 2019, the Tribunal denied the request to reopen the proceedings and consider the Declarations for assessing jurisdiction. The Tribunal offered no analysis of Arbitration Rule 38(2) but proceeded to issue the Award on January 28, 2019.[123] The point Hungary advances here is that Rule 38(2) is permissive in nature because of the inclusion of the word "may."[124] Relying on the tribunal's findings in *Micula v. Romania*, Hungary asserts that a tribunal not only has the power but the obligation to assess its jurisdiction throughout the proceedings even *sua sponte*, upon the existence of compelling reasons to do so.[125]

118. Further, Hungary submits that the duty to assess jurisdiction is even more compelling when a party has raised an objection.[126] To support the assertion that Article 42(2) of the ICSID Convention confers an obligation on tribunals to entertain every jurisdictional objection submitted to it, despite the party's failure to raise it in a timely fashion, Hungary cites to the findings of the tribunals in *AIG v. Kazakhstan*, *Meerapfel v. Central African Republic* and *Azurix v. Argentina.*[127]

119. Therefore, Hungary contends that given the nature of the Declarations and their impact on the question of jurisdiction, the Tribunal departed from a fundamental rule of

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[122] Memorial, para. 184, referring to Schreuer, Commentary, Article 51, para. 21 (**RLA-40**).

[123] Memorial, paras. 185-186.

[124] Memorial, para. 187.

[125] Memorial, para. 189, citing to *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 (September 24, 2008), para. 65 (**RLA-44**). *See also* Memorial, paras. 190-191 citing to *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (October 4, 2013), para. 123 (**RLA-45**) and *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award (March 15, 2002), para. 56 ("***Mihaly v. Sri Lanka***") (**RLA-46**).

[126] Memorial, para. 193, referring to *Mihaly v. Sri Lanka*, para. 56 (**RLA-46**).

[127] Memorial, paras. 195-197, citing to *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (October 7, 2003), para. 9.2 ("***AIG v. Kazakhstan***") (**RLA-47**); *M. Meerapfel Söhne AG v. Central African Republic*, ICSID Case No. ARB/07/10, Award (May 12, 2011), para. 121 (**RLA-48**); *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision of Jurisdiction (December 8, 2003), para. 68 (**RLA-49**).

procedure by failing to scrutinize its jurisdiction despite compelling reasons to do so.[128] According to Hungary, the Tribunal deprived it of the opportunity to plead fully its case with respect to a core issue going to the jurisdiction of the Tribunal, in violation of the right to be heard.[129]

(b) The Tribunal Departed from the Formal and Substantive Requirements that Any Award Must Conform to

120. The first argument Hungary raises is that the principle that an award must conform to the requirements of form and substance of the ICSID Convention is a fundamental rule of procedure.[130] According to Hungary, these requirements are primarily set forth in Article 48 of the ICSID Convention and in Rule 47 of the Arbitration Rules. Article 48 of the ICSID Convention provides that "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."[131] Rule 47 of the Arbitration Rules specifies the information to be included in an award, which includes, among others (i) "a summary of the proceeding" (ii) "a statement of the facts as found by the Tribunal" (iii) "the submissions of the parties" and (iv) "the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based."[132] Thus, in Hungary's submission, an award that fails to conform to Article 48 of the ICSID Convention and Rule 47 of the Arbitration Rules warrants an annulment.[133]

121. Second, Hungary submits that the Tribunal's failure to mention and provide reasons in the Award for the decision rejecting the Declarations infringed upon the formal and substantive requirements of an award. Hungary argues that the Tribunal's decision, conveyed by email from the Secretary of the Tribunal, only stated that the Tribunal had decided to deny Hungary's request "as coming too late in the process, given [the]

[128] Memorial, para. 202.
[129] Memorial, para. 203.
[130] Memorial, para. 204, referring to Schreuer, Commentary, Article 48, para. 23 (**RLA-40**).
[131] Memorial, para. 205.
[132] Memorial, para. 206.
[133] Memorial, para. 207.

context of Rule 38" without giving any reasons.[134] Further, Hungary states that the Award did not even mention Hungary's request to reopen the proceedings nor provide reasons for denying the request.[135]

122. In Hungary's view, the Declarations were "new evidence" which satisfied the Rule 38 criteria of being a "decisive factor" for consideration of Hungary's objection to jurisdiction.[136] Thus, Hungary contends that even if the Tribunal rejected the request to reopen the proceedings, the "very fact of Hungary seeking the admission of the Declarations constituted (i) an important procedural step invoked in the arbitration, (ii) a significant fact of fundamental relevance to the assessment of the *Achmea* objection, and (iii) [justified] brief written submissions on the importance of the Declarations by Hungary."[137]

123. Hungary contends that the Tribunal's omission to refer to the request to reopen the proceeding and the Tribunal's decision as a procedural step in the Award is a departure from Article 48(3) the ICSID Convention and Rule 47 of the Arbitration Rules.[138] In particular, Hungary asserts that the Award is in breach of the requirements of Rule 47 of the Arbitration Rules, namely that an award must contain (i) "a summary of the proceeding" (ii) "the submissions of the parties" and (iii) "the decision of the Tribunal on every question submitted to it," as it failed to provide a faithful summary of the procedural history of the case and the submissions of the Parties.[139]

124. In relation to Article 48(3) of the ICSID Convention, Hungary submits that the Award did not conform to the requirements set out therein as, "it fails to deal with a crucial question submitted to the Tribunal and fails to provide the reasons upon which it is based concerning this particular question."[140] In Hungary's submission, Article 48(3) of the

[134] Memorial, para. 209, quoting from the Tribunal Secretary's email to the Parties, concerning Hungary's Request to Reopen the Proceedings (January 22, 2019) (**R-13**).
[135] Memorial, para. 210.
[136] Memorial, para. 211.
[137] Memorial, para. 211.
[138] Memorial, para. 212.
[139] Memorial, para. 213.
[140] Memorial, para. 215.

ICSID Convention has been interpreted to mean that an award shall be a final, comprehensive act of the tribunal incorporating every relevant pre-award decision of the tribunal that had been rendered until that point in the proceeding.[141] To support this assertion, Hungary relies on the findings of the tribunal in *Burlington v. Ecuador* and *TANESCO v. Tanzania*.[142] Further, Hungary contends that a tribunal's decision on a party's request to reopen the proceeding or revisit a prior decision based on Arbitration Rule 38 has been dealt with comprehensively in the final award in all publicly available awards.[143] Hungary cites the following examples of cases in which the tribunal considered a request to reopen the proceedings: *EDF v. Romania*, *Masdar v. Spain* and *Supervisión v. Costa Rica*.[144]

125. Hungary therefore submits that by failing to (i) mention the request to reopen the proceedings in the Award so that evidence central to the determination of the Tribunal's jurisdiction could be admitted; and (ii) provide comprehensive reasons for the decision to deny the request, the Tribunal failed to comply with its obligations under Article 48(3) of the ICSID Convention.[145] Moreover, Hungary submits that the Tribunal failed to carry out the analysis required under Rule 38(2) of the Arbitration Rules, specifically whether the Declarations constituted (i) "new" pieces of evidence, and (ii) a "decisive factor" or (iii) whether Hungary had shown any conduct that would have barred it from submitting the Declarations.[146] In addition, there was no analysis in the Award as to

[141] Memorial, para. 216.

[142] Memorial, paras. 217-218, citing to *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (February 7, 2017), para. 86 (**RLA-50**) and *Tanzania Electric Supply Company Ltd. v. Independent Power Tanzania Ltd*., ICSID Case No. ARB/98/7, Final Award (June 22, 2001), para. 32 (**RLA-51**).

[143] Memorial, paras. 220-226, citing to *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (October 8, 2009), paras. 229-237 (**RLA-52**); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award (May 16, 2018), paras. 669-683 (**RLA-53**); *Supervision y Control S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/12/4, Award (January 18, 2017), paras. 44-48 (**RLA-54**).

[144] Memorial, para. 219. *See* footnote 160, where Hungary lists the cases in which Arbitration Rule 38(2) has been invoked in the context of the reopening of the proceedings in the context of revisiting a prior decision.

[145] Memorial, para. 227.

[146] Memorial, para. 228.

what the Tribunal meant by saying that Hungary's request to reopen the proceedings came "too late."[147]

(c) The Tribunal Departed from the Principle of Equal Treatment

126. Turning to the third assertion Hungary makes, Hungary argues that the Tribunal's decision to introduce the *Edenred* and *UP* Awards and rely on their findings infringed upon the equal treatment of the Parties and Hungary's right to be heard.

127. First, Hungary submits that equal treatment of the parties or the principle of "equality of arms" is a fundamental rule of procedure, falling under the scope of Article 52(1)(d) of the ICSID Convention.[148] This principle implies that each party is afforded an opportunity to present its case, including evidence, in conditions that do not disadvantage one party over the other.[149] Thus, Hungary contends that the principle is breached if the tribunal "adopts a posture or proceeds in a manner that results in disadvantaging one party to the benefit of the other."[150]

128. Hungary asserts that, after the hearing on the merits held on May 2 to 4, 2017, the Tribunal decided to introduce the *Edenred* award to the record *sua sponte*, despite Hungary's objections.[151] It argues that the Tribunal failed to invite the Parties to comment on the reasons for and against introducing the *Edenred* award, which was not publicly available, before directing Hungary to submit the award in question by letter dated June 26, 2017.[152] According to Hungary, the Tribunal ignored the concerns expressed in Hungary's letter dated June 15, 2017, more specifically that the *Edenred* award could improperly influence the Tribunal.[153] Hungary submits that this is because

[147] Memorial, para. 231.

[148] Memorial, para. 233.

[149] Memorial, para. 234, referring to *Tulip v. Turkey*, para. 146 (**RLA-36**). Hungary also refers to W. Michael Reisman, James Richard Crawford, et al. (eds), Foreign Investment Disputes: Cases, Materials and Commentary, Kluwer Law International (2nd ed., 2014), p. 1086 (**RLA-55**) and Campbell McLachlan, Equality of Parties before International Investment Tribunals, Rapport of the Institut de Droit International, Eighteenth Commission (2018), para. 52 (**RLA-56**).

[150] Memorial, para. 236.

[151] Memorial, para. 237. *See also* footnote 176.

[152] Memorial, para. 238.

[153] Memorial, para. 239.

the *Edenred* award, as opposed to any other general investment arbitration case award, concerned identical claims based on the same law as that at issue in the present proceeding save for distinct investor, factual issues, evidentiary record and legal analyses.[154] Therefore, Hungary reminded the Tribunal that it had a right to have its case adjudicated by the Tribunal based only on the arguments raised in this proceeding without influence from any other proceedings.[155] Another concern Hungary expressed was that the equality and fairness of the proceedings would be undermined to its detriment, if the Tribunal placed any reliance on the determinations made by the *Edenred* tribunal.[156] Hungary similarly expressed concerns regarding the equality and fairness of the proceedings when the Tribunal directed the production of the *UP* Award on October 19, 2018, but, it contends, the Tribunal ignored them.[157]

129. Consequently, Hungary submits that the admission of these awards detrimentally affected its position, particularly because it had to challenge not only the Claimant's arguments in this proceeding but also those advanced by *Edenred* and *UP*.[158] With reference to witness testimony, Hungary argues that the awards also contained assessments of the same fact and expert witnesses who also testified on behalf of Hungary in this arbitration, thus, conclusions could be drawn based on a comparison of their witness testimony across the three cases.[159] Hungary notes that neither the Claimant nor its witnesses were subject to the same degree of scrutiny.[160]

130. According to Hungary, the Tribunal incorrectly relied on the *Edenred* and *UP* awards without having access to the record of the proceedings and without affording Hungary's witnesses in this proceeding the opportunity to respond to the issues raised in the awards.[161] Hungary identifies four findings in the Award in this proceeding which were

[154] Memorial, para. 239.
[155] Memorial, para. 240.
[156] Memorial, para. 243.
[157] Memorial, para. 246.
[158] Memorial, paras. 248-249.
[159] Memorial, para. 250.
[160] Memorial, para. 251.
[161] Memorial, para. 253.

outcome-determinative issues on liability that the Tribunal apparently borrowed extensively from the *Edenred* and *UP* Awards: (i) the finding that the existence of Claimant's shares in SPH absent any additional vested right is sufficient (ii) the finding that the 2012 reforms were discriminatory against foreign voucher issuers; (iii) the confirmation of the Tribunal's finding that the 2012 reforms were not made for a public purpose for an expropriation claim; and (iv) the Tribunal's finding that its overall conclusion on liability was in "full consistency" with the *Edenred* and *UP* tribunals' findings.[162]

131. Hungary submits that despite the Tribunal claiming that it did not rely on the *Edenred* and *UP* awards, it did in fact place significant emphasis on these awards in support of its findings.[163] As a result, Hungary submits that it suffered unequal treatment as against the Claimant and that the *Edenred* and *UP* awards were "effectively determinative of the outcome of the case on a number of issues."[164]

(d) The Tribunal's Departure Is Serious

132. Referring to previous *ad hoc* committee decisions, Hungary submits that the departure from a fundamental rule of procedure is "serious" for the purposes of Article 52(1)(d) of the ICSID Convention if the violation is substantial and deprives a party of the benefit or protection which the rule was intended to provide.[165] Therefore, Hungary argues that an applicant need not prove that the violation of the rule of procedure was decisive for the outcome or that it would have won the case had the rule been applied.[166] Hungary's position is that it is sufficient to show that observing the rule could potentially cause the

[162] Memorial, para. 255.

[163] Memorial, para. 256.

[164] Memorial, para. 257.

[165] Memorial, para. 258, referring to *MINE v. Guinea*, para. 5.05 (**RLA-57**); *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (December 18, 2012), para. 80 ("***Victor Pey Casado v. Chile***") (**RLA-58**).

[166] Memorial, para. 259.

tribunal to render an award that is substantially different from what it actually decided.[167]

133. Hungary submits that it has been confirmed by past *ad hoc* committees that the determination of whether there has been a "serious" departure from a fundamental rule of procedure is fact specific and should be decided on a case by case basis.[168] Hungary submits that in the present case, the Tribunal's departure from the fundamental principles of (i) the duty to scrutinize its jurisdiction; (ii) the right to be heard; (iii) the formal and substantive requirements of an award; and (iv) the equal treatment of the parties was decisive for the outcome of the proceedings.[169] Specifically, Hungary contends that (i) the Tribunal's failure to reopen the proceedings to assess the Declarations; (ii) the Tribunal's failure to even mention and provide reasons for denying Hungary's request for the reopening of the proceedings are serious departures from a fundamental rule of procedure; and (iii) the *Edenred* award improperly affected the Tribunal's own findings and conclusions on the merits.[170]

134. Following on from the above, Hungary contends that the Tribunal's departure from the above-mentioned fundamental principles of procedure "is necessarily serious" and requires annulment of the Award.[171]

b. Claimant's Position

135. The Claimant's arguments on the second ground for annulment address the following matters: (a) the relevant legal standard; (b) the Tribunal did not seriously breach Hungary's right to be heard by refusing to take into account the Declarations; (c) the Tribunal did not seriously depart from the formal and substantive requirements that any

[167] Memorial, para. 259, referring to *Victor Pey Casado v. Chile*, paras. 78-80 (**RLA-58**); *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (February 21, 2014), para. 99 ("***Caratube v. Kazakhstan***") (**RLA-59**); *Tulip v. Turkey,* para. 78 (**RLA-36**).

[168] Memorial, para. 260, referring to Updated Background Paper on Annulment for the Administrative Council of ICSID (May 5, 2016), para. 83 (**RLA-35**); *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited (July 3, 2013), para. 49 (**RLA-60**).

[169] Memorial, para. 261.

[170] Memorial, para. 261.

[171] Memorial, para. 262.

award must conform to; and (d) the Tribunal did not seriously depart from the principle of equal treatment by deciding to introduce the *Edenred* and *UP* awards and by relying on them.

(a) The Relevant Legal Standard

136. The Claimant submits that for an award to be annulled under Article 52(1)(d) of the ICSID Convention, there must have been a serious departure from a fundamental rule of procedure.[172] Relying on the finding of the *ad hoc* committee in *Venezuela Holdings v. Venezuela*, the Claimant argues that the rule of procedure must be a fundamental one and the Committee should first establish whether a fundamental rule of procedure is at stake, whether it has been breached and, if so, whether the Tribunal's departure was so serious that it could have affected the outcome of the case.[173]

137. With respect to the requirement that the rule of procedure be a fundamental one, the Claimant submits that it has been consistently found that "[t]he fundamental rules of procedure that might furnish a ground for annulment, if violated, would be restricted to the principles of natural justice. In other words, fundamental rules of procedure are principles that are essential to a fair hearing."[174]

138. In relation to the "seriousness" of the departure, the Claimant concurs with Hungary's position that the tribunal's departure from a fundamental rule of procedure will be deemed serious "if the violation is substantial and deprives a party of the benefit or protection which the rule was intended to provide" and if such violation "produced a material impact on the award."[175]

[172] Counter-Memorial, para. 152; Rejoinder, para. 134.
[173] Counter-Memorial, para. 153, citing to *Venezuela Holdings v. Venezuela*, para. 129 (**RLA-34**).
[174] Counter-Memorial, para. 154, citing to *Tulip v. Turkey*, para. 71 (**RLA-36**).
[175] Counter-Memorial, para. 155, referring to Memorial, para. 258 and citing to *Caratube v. Kazakhstan*, para. 99 (**RLA-59**).

(b) The Tribunal Did Not Seriously Breach Hungary's Right to be Heard by Refusing to Take into Account the Declarations

139. The Claimant's position is that there has been no breach of a fundamental rule of procedure in the present case as the Tribunal did not depart from the right to be heard by refusing to consider the Declarations pursuant to Rule 38(2) of the Arbitration Rules.[176] In the Claimant's submission, even if there was such a departure, Hungary has failed to establish its seriousness.[177]

140. First, the Claimant disagrees with Hungary's contention that by "preventing Hungary from presenting its case fully, and by failing to assess its jurisdiction in light of the Declarations, the Tribunal violated Hungary's right to be heard."[178] While Claimant agrees with Hungary's argument that each party should be afforded the opportunity "to present fully its case" it argues that such opportunity is not unlimited.[179] In its assessment, the Claimant submits that "Hungary's right to be heard – and any limitations thereto by the Tribunal – should be assessed in light of Rule 38(2) and of the considerations guiding the Tribunal's refusal to re-open the proceedings."[180]

141. With regard to the Tribunal's alleged failure to assess its jurisdiction, the Claimant agrees with Hungary that the Tribunal has an obligation to assess its jurisdiction and address any belated jurisdictional objections throughout the proceedings, however, the Claimant argues that this obligation does not necessarily survive the closure of the proceedings.[181] In this regard, the Claimant notes that in the present case, the Tribunal complied with its duty to assess its jurisdiction by considering Hungary's jurisdictional objections raised after the issuance of the *Achmea* Decision and by also allowing the EC to file an *amicus curiae* brief and by allowing comments from the Parties.[182] Thus, the Claimant submits that throughout the proceedings and up until their closure thereof, the

[176] Counter-Memorial, para. 157.
[177] Counter-Memorial, para. 157.
[178] Counter-Memorial, para. 158.
[179] Counter-Memorial, para. 159, citing to *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment (March 18, 2019), para. 178 (**CLA-019**).
[180] Counter-Memorial, para. 160.
[181] Counter-Memorial, paras. 162-163, citing to *AIG v. Kazakhstan*, para. 9.2 (**RLA-47**).
[182] Counter-Memorial, paras. 164-165.

Tribunal never failed to hear Hungary's objections or limit Hungary's rights to be heard.[183]

142. In terms of the provisions of Rule 38(2) of the Arbitration Rules, the Claimant argues that the use of the words "exceptionally, the Tribunal may" suggests that the Tribunal has discretion in deciding to reopen or not to reopen the proceeding.[184] Therefore, the Claimant submits that the Tribunal's decision of January 22, 2019 not to reopen the proceedings was derived from the Tribunal's discretionary powers and thus does not constitute a departure from a fundamental rule of procedure.[185]

143. Second, the Claimant submits that if the Committee were to consider that the Tribunal's exercise of its discretionary power under Rule 38(2) of the Arbitration Rules did constitute a departure from Hungary's right to be heard, such departure was not serious enough to justify annulment of the Award.[186] According to the Claimant, Hungary has not demonstrated how the Declarations would have affected the outcome of the case whereas the Claimant has established that the few cases that have considered the Declarations found them to have no impact on the tribunals' jurisdiction.[187]

(c) The Tribunal Did Not Seriously Depart from the Formal and Substantive Requirements that Any Award Must Conform to

144. The Claimant disagrees with Hungary's position that the Tribunal's failure to even mention Hungary's request to reopen the proceedings, as well as the alleged failure to provide reasons in the Award, are both serious departures from a fundamental rule of procedure.[188] According to the Claimant, "unlike the right to be heard, the principle that an award must conform to the requirements of form and substance of Article 48 of the ICSID Convention is not 'essential to a fair hearing' and is therefore not a 'fundamental rule of procedure.'"[189] The Claimant's position is that only rules of natural justice,

[183] Counter-Memorial, para. 166.
[184] Counter-Memorial, para. 168
[185] Counter-Memorial, para. 169.
[186] Counter-Memorial, para. 170; Rejoinder, para. 164.
[187] Counter-Memorial, para. 172; Rejoinder, para. 166.
[188] Counter-Memorial, para. 175.
[189] Counter-Memorial, para. 177.

essential to a fair hearing, and not just any rule, are considered fundamental rules of procedure in the context of annulment proceedings.[190] To support this assertion, the Claimant argues that past *ad hoc* committees have found that a simple violation of rules, such as Rule 47 of the Arbitration Rules would not by itself amount to a ground for annulment.[191]

145. With regard to Hungary's argument that the Tribunal's failure to mention the decision not to re-open the proceedings in the Award constitutes a "serious" departure from the formal and substantive requirements that any award must conform to, the Claimant submits that should the Committee regard Article 48 of the ICSID Convention and Arbitration Rule 47 as "fundamental rules of procedure," Hungary has not established that there was a serious departure from these rules.[192]

146. In reference to Article 48(3) of the ICSID Convention, the Claimant opposes Hungary's submission that the Award should have dealt with the request to re-open the proceedings. According to the Claimant, the request to reopen the proceedings does not fall within the meaning of "every question submitted to the Tribunal."[193] The Claimant submits that, when interpreted strictly, the word "question" means "heads of claim" or "requests for relief."[194] Therefore, the Claimant asserts that Article 48(3) of the ICSID Convention does not apply to requests such as the one submitted by Hungary.[195]

147. As regards Arbitration Rule 47(1)(f), the Claimant submits that this rule does not require a detailed or exhaustive summary of the proceedings, which is consistent with the practice adopted by many tribunals.[196] In this context, the Claimant submits that the

[190] Counter-Memorial, para. 179, referring to *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Application for Annulment (September 22, 2014), para. 269 (**CLA-021**).
[191] Counter-Memorial, para. 180.
[192] Counter-Memorial, para. 182; Rejoinder, para. 178.
[193] Counter-Memorial, para. 184.
[194] Counter-Memorial, para. 184, referring to J. Fouret, R. Gerbay, G. M. Alvarez, The ICSID Convention, Regulations and Rules: A Practical Commentary, Edward Elgar Publishing Limited (2019), para. 4.693 (**CLA-022**).
[195] Counter-Memorial, para. 184.
[196] Counter-Memorial, para. 185.

Committee should conclude that the Award's failure to mention such a procedural step does not impact the fairness of the proceedings.[197]

148. The Claimant further submits that the Tribunal had no obligation to provide reasons in the Award for its refusal to reopen the proceedings.[198] According to the Claimant, the Tribunal provided an explanation that the request to reopen came too late in the process and dismissed Hungary's allegations that the Tribunal's explanation is "perfunctory, insufficient and unintelligible."[199]

149. In relation to Hungary's submission that the tribunal's decision on a party's request to reopen the proceedings is dealt with extensively and fully reasoned in the final award of ICSID tribunals in all publicly-known awards, the Claimant submits that not all awards deal extensively with a request to reopen the proceedings and identifies the award in *9Ren Holding v. Spain* to illustrate this point.[200]

(d) The Tribunal Did Not Seriously Depart from the Principle of Equal Treatment by Deciding to Introduce the Edenred and UP Awards and by Relying on them

150. The final limb the Claimant submits under the second ground for annulment, is that the Tribunal did not seriously depart from the principle of equal treatment by deciding to introduce the *Edenred* and *UP* Awards on the record and by relying on them.

151. First, according to the Claimant, the Tribunal legitimately exercised its right to introduce new evidence *sua sponte* pursuant to Article 43 of the ICSID Convention and Arbitration Rule 34(1). The Claimant submits that it is widely accepted that tribunals enjoy discretionary power to order the production of documents on their own motion and at any stage of the proceedings, and relies on the findings of the *ad hoc* committees

[197] Counter-Memorial, para. 188.

[198] Counter-Memorial, para. 189.

[199] Counter-Memorial, para. 190, referring to Memorial, para. 229.

[200] Counter-Memorial, para. 191-192, citing to *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award (May 31, 2019), para. 60 (**CLA-024**).

in *Azurix v. Argentina* and *Daimler v. Argentina* to support this assertion.[201] With regard to Hungary's assertion that the Parties were not invited to comment on the introduction of the awards, the Claimant submits that the Tribunal "explicitly" sought the Parties' views on this issue during the Hearing in the original arbitration.[202]

152. Second, contrary to Hungary's assertion, the Claimant submits that Hungary was not treated unequally in these proceedings. According to the Claimant, it was actually Hungary that benefited from this position because it used the same legal team for the three arbitrations, despite arguing that it had to defend not only its position but the arguments advanced by *Edenred* and *UP*.[203]

153. Finally, the Claimant submits that in any event, the Tribunal was not improperly influenced by the *Edenred* and *UP* awards. According to the Claimant, the majority of the Parties' submissions were made before the introduction of the two awards and therefore the Tribunal had the opportunity to hear from the Parties on issues of liability beforehand.[204] Moreover, the Claimant contends that from a simple reading of the Award, the Tribunal relied exclusively on the Parties' submissions.[205] In particular, the Claimant identifies that the Tribunal's analysis of Hungary's liability solely addresses the Parties' arguments and has not been improperly influenced by either the *Edenred* or the *UP* awards.[206] In the Claimant's view, mere references to the awards cannot amount to a serious departure from the principle of equal treatment, "as this would otherwise lead to the absurd conclusion that any referral to past decisions involving identical claims and legal bases could lead to annulment of an award."[207] Relying on *AES v. Argentina*, the Claimant submits that referral to past decisions may be both relevant and

[201] Counter-Memorial, paras. 198-200, citing to *Azurix v. Argentina*, para. 208 (**CLA-005**); *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment (January 7, 2015), para. 295 (**CLA-025**).

[202] Counter-Memorial, paras. 201-203, referring to Hearing Transcript in Arbitration Proceeding, Day 3 (May 4, 2017) (**R-2**); Rejoinder, para. 198.

[203] Counter-Memorial, para. 206; Rejoinder, para. 206.

[204] Counter-Memorial, para. 212.

[205] Counter-Memorial, para. 213.

[206] Counter-Memorial, para. 215.

[207] Counter-Memorial, para. 216.

useful, and is consistent with the practice of ICSID tribunals to refer *sua sponte* to other cases involving the same BITs or similar circumstances.[208]

(2) The Committee's Analysis

154. In relation to the Applicant's request for annulment under Article 52(1)(d) of the ICSID Convention, the Committee must respond to the following questions: (a) what is the legal standard, in particular, what counts as a "fundamental rule of procedure;" (b) did the Tribunal violate the Applicant's right to be heard when it refused to reopen the procedure under Arbitration Rule 38(2) to take account of the Declarations; (c) did the Tribunal depart from a fundamental rule of procedure by breaching the formal and substantive requirements for any award; and (d) did the Tribunal depart from the principle of equal treatment by introducing and relying on the *Edenred* and *UP* awards?

(a) The Relevant Legal Standard and the Scope of "Fundamental Rule of Procedure"

155. Both Parties agree that Article 52(1)(d) of the ICSID Convention imposes a twofold requirement for annulment: the Tribunal must have departed from a fundamental, not just any, rule of procedure, which must have been sufficiently serious to be capable of having affected the outcome of the case. However, throughout their discussion, the Parties disagree on what should be considered a "fundamental rule of procedure."

156. It is uncontroversial that a fundamental rule of procedure includes the equal treatment of the parties, the right to be heard and the right to an independent and impartial tribunal. The proper handling of evidence and allocation of the burden of proof has also been accepted as a fundamental rule of procedure.[209]

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[208] Counter-Memorial, paras. 217-219, citing to *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (April 26, 2005), paras. 27-28 and 31-32 (**CLA-026**); *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (June 17, 2005), para. 39 (**CLA-027**); *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (February 22, 2006), para. 85 and Footnote 19 (**CLA-028**).

[209] ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID (May 5, 2016), para. 99.

157. In addition, the Applicant claims that the principle of consent is a fundamental rule of procedure and that any jurisdictional objection regardless of the time of submission must therefore be scrutinized. To this, the Claimant objects that the closure of the proceeding sets a time limit on the tribunal's duties in this respect.

158. The principle of consent is no doubt the cornerstone of arbitration. The jurisdictional phase of arbitration is designed to ensure that the conditions of consent have been met.

159. The Committee does not find it helpful to frame the principle of consent as a fundamental rule of procedure, the only purpose of which seems to be to bring it under the scope of Article 52(1)(d) of the ICSID Convention. Indeed, the decision of the *ad hoc* committee in *Impregilo*, relied on by the Applicant in this context, supports the Committee's view. The *ad hoc* committee in *Impregilo* found that Argentina's claim under Article 52(1)(d) of the ICSID Convention was, in fact, a disagreement with certain aspects of the tribunal's decision on jurisdiction and could not therefore constitute a serious departure of a fundamental rule of procedure.[210]

160. Nor does the Committee find it necessary to transform the principle of consent into a fundamental rule of procedure. The Applicant's concerns with respect to the Tribunal's decision not to reopen the procedure following the Declarations can be adequately and should be analyzed under the principle of the right to be heard.

161. The Applicant also claims that the requirements set forth in Article 48(3) of the ICSID Convention and Arbitration Rule 47(1) constitute fundamental rules of procedure. Article 48(3) of the ICSID Convention provides that "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based," whereas Arbitration Rule 47(1) specifies, among others, that an award must contain a summary of the proceeding, the submissions of the parties and the decision of the Tribunal on every question submitted to it. To this, the Claimant objects that Arbitration Rule 47(1) is not a fundamental rule of procedure, essential to a fair hearing.

[210] *Impregilo v. Argentina*, paras. 170-171 (**RLA-39**).

162. The Committee starts its analysis by recognizing that Article 48 of the ICSID Convention establishes the duty of the tribunal to state the reasons upon which its decisions are based. Failure to comply with this duty is cause for annulment of the award under Article 52(1)(e) of the ICSID Convention. Article 48 of the ICSID Convention also establishes that the award shall deal with every question submitted to the tribunal. There is no equivalent ground for annulment that is specifically related to this requirement.

163. The failure to address every question submitted to the tribunal has on different occasions been invoked as cause for annulment on the grounds of manifest excess of power, serious departure from a fundamental rule of procedure, and failure to state reasons.[211] The Committee has no principled objection to the Applicant's decision to frame the Tribunal's failure to address in the award the Applicant's request to reopen the proceedings as a serious departure from a fundamental rule of procedure.

164. Different is the situation with respect to the specific requirements set out under Arbitration Rule 47(1). These include the identification of the parties and their counsel, the names of the members of the tribunal, the dates and places of the sittings of the tribunal, a summary of the proceeding, a statement of the facts and submissions of the parties, the "decision of the tribunal on every question submitted to it, together with the reasons upon which the decision is based" in direct allusion to Article 48(3) of the ICSID Convention, and any decision of the tribunal regarding the cost of the proceeding. The majority of these requirements are of a practical and even didactic nature, meant to guide the drafting process and ensure the identification, intelligibility, and completeness of the award. With the exception of the requirement that the tribunal must decide, and on a reasoned basis, on every question submitted to it, these are not procedural rules "concerned with the fairness and integrity of the proceedings."[212]

165. As the Applicant has pointed out, the summary of the proceedings and the parties' submissions may provide useful evidence of whether the parties were treated equally

[211] Schreuer, Commentary, Article 52, para. 426 (**RLA-40**).
[212] Memorial, para. 174.

and fairly during the proceedings, for instance, if no reference at all is made in the award to the arguments of one of the parties.[213] Thus, the Committee is open to the possibility that the Tribunal's failure to comply with Arbitration Rule 47(1) is indicative of a departure of a fundamental rule of procedure such as the right to be heard. But that does not mean that the requirements established under Arbitration Rule 47(1) themselves constitute fundamental rules of procedure.

166. With these considerations in mind, the Committee turns to the specific arguments raised by the Applicant under Article 52(1)(d) of the ICSID Convention.

(b) The Tribunal Did Not Seriously Depart from the Right to be Heard by Refusing to Take into Account the Declarations after the Closure of the Proceeding

167. Both Parties acknowledge that the Tribunal has discretionary power to reopen the procedure under Arbitration Rule 38(2).[214] Both Parties also agree that the Tribunal's discretion is not unlimited and may result in a serious departure from a fundamental rule of procedure.[215] However, they disagree on whether the Tribunal's decision not to reopen the proceeding violated the Applicant's right to be heard. They also disagree on whether the Tribunal's given reason for refusing the Applicant's request ("as coming too late in the process, given [the] context of Rule 38") is valid in this respect.

168. Arbitration Rule 38(2) provides as follows: "Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points."

169. On a *prima facie* reading, the decision to reopen the proceeding is exceptional and requires specific and challenging grounds: namely that new evidence is forthcoming of such a nature so as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points. The words "decisive" and "vital need" strongly

[213] Reply, para. 201.

[214] *See* Hearing Transcript Day 2, p. 13 for the Applicant's acknowledgment of this point.

[215] *See* Hearing Transcript Day 2, p. 43 for the Claimant's acknowledgment of this point.

reinforce the exceptional nature of the measure. The party requesting the reopening of the proceeding has the burden of proving that these requirements have been met.

170. The Committee has already reached the conclusion that the Declarations do not contribute new elements to the discussion on jurisdiction raised by the *Achmea* Decision that are potentially decisive for the Tribunal's decision on jurisdiction. The Applicant does not claim that its right to be heard with respect to the issue of jurisdiction, in particular the impact of the *Achmea* Decision, has otherwise been breached. Hence, the Committee cannot find that the Tribunal's exercise of discretion under Arbitration Rule 38(2) amounts to a violation of the Applicant's right to be heard on this matter.

171. With respect to the Tribunal's response that the request to reopen the proceeding came "too late," the Applicant argues that it is never too late to reopen the proceeding while the award is still under the control of the tribunal and has not yet been dispatched to the parties.[216] The Claimant does not necessarily disagree but emphasizes that the timeliness of the request ultimately depends on case-specific circumstances.[217]

172. The Committee agrees that the assessment of the timeliness of a request to reopen the procedure requires an evaluation of the facts and circumstances of the specific case and lies within the ample discretion of the Tribunal under Arbitration Rule 38(2). The circumstance that the Award had already been signed by one of the members of the Tribunal and was therefore for all practical purposes a final and closed text is a relevant consideration, again, considering the exceptional nature of the right to reopen the proceeding under Arbitration Rule 38(2). The Tribunal's response to the Applicant, albeit brief – as indeed were the communications from the Parties on the issue – does not violate a fundamental rule of procedure and in particular did not violate the Applicant's right to be heard.

[216] Hearing Transcript Day 2, p. 11-12.
[217] Hearing Transcript Day 2, pp. 45-46.

(c) The Tribunal Did Not Seriously Depart from a Fundamental Rule of Procedure by Failing to Mention and State Reasons for its Decision to Reject the Applicant's Request to Reopen the Procedure

173. The Applicant claims that the Tribunal's decision not to reopen the procedure should have been included and justified in the Award. By failing to do so, the Tribunal failed to comply with Article 48(3) of the ICSID Convention that establishes that the Award shall deal with every question submitted to the Tribunal. The Claimant argues that a request to reopen the proceeding does not fall within the meaning of Article 48(3) of the ICSID Convention.

174. The questions referred to under Article 48(3) of the ICSID Convention refer to the factual and legal heads of claim presented by the parties. *Ad hoc* committees agree that tribunals need not respond to each and every argument presented during the proceedings. The questions that a tribunal is obliged to answer are those that are crucial or decisive because their "acceptance would have altered the tribunal's conclusions."[218]

175. The failure to address the rejection to reopen the proceedings in the actual award cannot be said to amount to a "question submitted to the tribunal" within the meaning of Article 48(3) of the ICSID Convention. The Committee notes that the issue here is not and should not be confused or equated with the substantive issue of the reopening of the proceedings, but the procedural decision to address this issue in a separate communication rather than in the Award itself. This procedural decision is clearly not itself "a question submitted to the Tribunal," let alone a question that can be said to be crucial or decisive. Had the reference to the request to reopen been included in the Award, it would have been part of the summary of the proceedings, not of the Parties' submissions and as a mere procedural matter, and it would not have been crucial or decisive to the Tribunal's decision.

176. There is of course also the eminently practical matter that the Award had already been signed by one of the members of the Tribunal. Nothing would have been gained, in the eyes of the Committee, by incorporating a reference to the Applicant's request in the

[218] Schreuer, Commentary, Article 52, para. 426 (**RLA-40**).

summary of the proceeding that could not equally be dealt with by a communication to the Parties, as the Tribunal chose to do. Requiring the Tribunal to reopen the Award every time a request to reopen the proceedings is denied, would result in a vicious circle.

177. The Committee therefore finds that the Tribunal did not fail to comply with Article 48(3) of the ICSID Convention by not incorporating its decision on the Applicant's request under Rule 38(2) of the Arbitration Rules in the Award.

(d) The Tribunal Did Not Seriously Depart from the Principle of Equal Treatment by Introducing the Edenred and UP Awards

178. The Applicant claims it suffered unequal treatment by the Tribunal's decision to introduce the *Edenred* and *UP* awards. First, because the Tribunal did not heed the Applicant's objections to introducing the awards. Second, since the awards were based on the same set of facts and involved declarations from the same witnesses and experts on behalf of Hungary, the Applicant was under heightened scrutiny from the Tribunal and was forced to defend itself not only against Sodexo's but also against Edenred and UP's arguments. Third, the Applicant finds that the Tribunal incorrectly relied on the decisions in the Awards on several outcome-determinative issues.

179. The Committee cannot detect any basis for the allegation of unequal treatment in the Tribunal's decisions relating to the *Edenred* and *UP* awards.

180. First, in the absence of any agreement between the parties otherwise, the Tribunal had ample discretion to call upon the Parties to produce documents or other evidence, based on Article 43 of the ICSID Convention. Even so, the President of the Tribunal gave the Parties an opportunity to present their views on "what to do with the *Edenred* Award" during the hearing, as is clear from the record: "What is the Tribunal to do with the reference to *Edenred* which is in the Claimant's Prehearing skeleton? And I'll ask Claimant first and then Respondent, and we're not saying that we're going to accept what you think we should do, but since it's a case that has obviously got parallels to our own, and since it was decided just a few months ago and has not been made public, but

was cited by one side, we thought we had to raise this with the Parties as a matter of due process."[219] The Applicant's claim has therefore no legal nor factual ground.

181. Second, there is no evidence in the Award that the Tribunal held the Applicant to a higher standard than the Claimant in the appreciation of its factual statements or legal arguments. There is no indication that the Tribunal questioned or double-checked the evidence presented by the Applicant against the evidence presented in the *Edenred* and *UP* cases. There is also no suggestion in the Award that the Tribunal compared Hungary's legal strategies employed in the different cases, let alone that such treatment would have amounted to a breach of the duty to treat parties equally. The Applicant expressed these concerns to the Tribunal when it opposed the production of the Awards, but there is no sign that its fears materialized, nor has the Applicant tried to demonstrate that these alleged disadvantages effectively occurred.

182. Third, the Committee is not convinced that the Tribunal relied on the decisions in the *Edenred* and *UP* awards to any significant degree. The Tribunal referred to the *Edenred* and *UP* awards only in a few instances, namely: to note in passing that, besides the *Edenred* and *UP* tribunals, no other arbitral tribunal has had the occasion to examine the exact legal issues in the instant arbitration;[220] to express its wariness to draw any conclusions from Edenred's decision to stay in the Hungarian market;[221] to share a concern with the *Edenred* tribunal that considering reforms acceptable merely because they benefitted a charitable foundation would open the door for unlawful expropriation by other states;[222] and to note its slightly different approach towards the relevance of the CJEU decision on discrimination in *Commission v. Hungary*.[223] Significantly, the Tribunal explicitly stated that it did not rely on the *Edenred* and *UP* cases to reach its decisions.[224]

[219] Hearing Transcript in Arbitration Proceeding, Day 3 (May 4, 2017), p. 816 (**R-2**).
[220] Award, para. 210.
[221] Award, para. 254.
[222] Award, para. 361.
[223] Award, paras. 312 and 371-372.
[224] Award, para. 381.

183. None of these references go beyond the usual way in which tribunals refer to decisions in other cases, either to call attention to similarities of criteria, or of relevant legal considerations of even comparable factual circumstances, and if anything, show that the Tribunal reached its conclusions independently. None of this could give rise to a violation of the principle of equal treatment. Therefore, the Applicant's request for annulment on this account must fail.

C. THE AWARD FAILED TO STATE THE REASONS ON WHICH IT IS BASED (ARTICLE 52(1)(E))

(1) The Parties' Positions

a. Applicant's Position

184. The final ground for annulment set out in Hungary's Application for Annulment is that the Award failed to state the reasons on which it is based. Hungary asserts that the Award should be annulled because it does not satisfy the reasoning requirements of Article 52(1)(e) of the ICSID Convention.[225] In particular, Hungary makes two main arguments. First, it argues that the Tribunal failed to address Hungary's essential arguments on the inapplicability of Article 9(2) of the BIT. Second, Hungary contends that the Tribunal failed to state reasons for rejecting Hungary's request to reopen the proceedings. A summary of these arguments is set out in parts (b) and (c) below. Hungary's position regarding the legal test for annulment is first addressed in part (a).

(a) The Legal Test for Annulment under Article 52(1)(e)

185. Hungary asserts that the Tribunal has a duty to provide reasons for its decision, which is a "necessary prerequisite for the orderly administration of justice" pursuant to Article 52(1)(e) of the ICSID Convention.[226] According to Hungary, the Tribunal's duty in this context is two-fold.

186. First, Hungary submits that Article 52(1)(e) of the ICSID Convention stipulates that the Tribunal must deal with every question submitted to it, however this does not mean that it should address all the arguments raised by the Parties but it should address "crucial or

[225] Memorial, para. 263.

[226] Memorial, para. 265, referring to Schreuer, Commentary, Article 52, para. 338 (**RLA-40**).

decisive arguments that could change the outcome, if accepted."[227] To support this assertion, Hungary relies on the findings of the *ad hoc* Committees in *M.C.I. v. Ecuador* and *MINE v. Guinea*.[228]

187. Second, Hungary contends that under Article 48(3) of the ICSID Convention, the obligation that the award must state all reasons upon which it is based means that the award should allow the reader to understand the tribunal's motives and "follow the reasoning of the Tribunal on points of fact and law."[229] According to Hungary, an award must at least highlight the rationale behind those points that are essential to the tribunal's reasoning. In this regard, Hungary submits that an *ad hoc* committee need not inquire into the correctness or persuasiveness of the reasons offered by a tribunal but is required to assess whether the tribunal's reasons are "frivolous, perfunctory or absurd" and whether they are sufficient to allow the parties to understand the decision.[230] Hungary asserts that the Committee's purview extends to verifying the existence of contradictions in the stated reasons that would make the Tribunal's reasoning unintelligible, and submits that a "genuine contradiction" has been accepted to amount to a failure to state reasons.[231]

(b) The Tribunal Failed to Address Essential Arguments of Hungary on the Inapplicability of Article 9(2) of the BIT

188. The first assertion under this ground is that the Tribunal failed to analyze the question of whether EU law forms part of international law.

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[227] Memorial, para. 267, referring to Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2d ed. 2012), p. 308 (**RLA-61**); *Klöckner v. Cameroon*, para. 15 (**RLA-62**).

[228] Memorial, paras. 268-269, citing to *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment (October 19, 2009), para. 67 ("***M.C.I. v. Ecuador***") (**RLA-16**); *MINE v. Guinea*, para. 5.13 (**RLA-57**).

[229] Memorial, para. 270, referring to *MINE v. Guinea*, para. 5.08 (**RLA-57**); *TECO v. Guatemala*, para. 87 (**RLA-37**).

[230] Memorial, para. 271, referring to Schreuer, Commentary, Article 52, para. 344 (**RLA-40**).

[231] Memorial, para. 272, referring to *Vivendi v. Argentina*, para. 65 (**RLA-28**); *Mr. Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (November 1, 2006), para. 21 (**RLA-64**); *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki (June 5, 2007), para. 126 (**RLA-27**); *Fraport v. Philippines*, para. 272 (**RLA-41**).

189. First, Hungary notes that the Tribunal determined that the dispute did "not involve the application of the law of any EU state, or EU law as such."[232] The Tribunal then proceeded to distinguish the applicable law clause contained in Article 8(6) of the Netherlands-Slovakia BIT at issue in the *Achmea* case from Article 9(3) of the BIT in the present proceedings, in so far as the latter made no reference to the domestic law of the Contracting Parties.[233]

190. In Hungary's view, by concluding that EU law would not apply in the present case under Article 9(3) of the BIT, unlike in the case of *Achmea*, the Tribunal failed to address Hungary's argument that EU law forms part of international law, pursuant to the provisions of Article 9(3) of the BIT.[234] Hungary had argued that EU law has to be classified as international law consistent with the practice of investment treaty tribunals in its letter to the Tribunal dated March 27, 2018. In its subsequent comments on the EC's *amicus curiae* brief it had made additional arguments on the applicability of EU law.[235]

191. Second, Hungary submits that the Tribunal's reasoning set out at paragraphs 188-189 of the Award regarding the application of EU law is contradictory and renders the Award unintelligible.[236] The relevant paragraphs of the Award are reproduced below:

> *188. In the present case, the Tribunal must decide on Hungary's alleged liability on the basis of the BIT itself and international law, not EU law or the law of an EU state. No allegation has been made that EU law has been violated or that the controverted measures in question run contrary to EU law. Indeed, neither side in the present*

[232] Memorial, para. 275, citing Award, para. 181 (**RLA-4**).

[233] Memorial, para. 276, referring to Award, para. 182 (**RLA-4**).

[234] Memorial, para. 278. *See also* Hungary's Letter to the Tribunal regarding the *Achmea* Decision (March 27, 2018), p. 4 (**R-6**).

[235] Memorial, paras. 279-280, referring to Hungary's Letter to the Tribunal regarding the *Achmea* Decision (March 27, 2018), p. 4, footnote 7 (referring, among others, to *Electrabel v. Hungary* (**RLA-017**), *AES v. Hungary* (**CLA-30**), and *Jürgen Wirtgen v. Czech Republic* (**RLA-20**); Claimant's Letter to the Tribunal regarding the *Achmea* Decision (April 16, 2018), Section 1: "The Tribunal is Not Bound by EU Law, Neither on Jurisdiction Nor on the Merits" at pp. 2-4 (**R-14**); EC's Amicus Curiae Submission (September 14, 2018), paras. 10-12 (**R-15**); Hungary's Comments on the EC's Amicus Curiae Submission (September 28, 2018), p. 2 (**R-7**).

[236] Memorial, para. 283.

> *case has argued for the application of either Hungarian or EU law to the underlying dispute.*
>
> *189. In this connection, the Tribunal sees no reason to find an impairment of its jurisdiction by reason of the Achmea decision. The CJEU in Achmea ruled with respect to a treaty that required application of Slovakian law, as to which the tribunal in that case might need to interpret EU legal principles. In that context, Article 8 of the Netherlands-Slovakia BIT was precluded by Articles 267 and 344 of the TFEU which establish a preliminary ruling procedure[] by which parties undertake not to submit disputes about the interpretation and application of EU law to methods of dispute settlements outside of the EU Treaties.*[237]

192. Hungary submits that the Tribunal's finding, as quoted above, that neither Party had argued for the application of EU law and that hence there was no impairment of its jurisdiction by reason of the *Achmea* decision, failed to address Hungary's submission that the risk that the Tribunal "may" be called on to interpret or apply EU law rather than actually applying it, created a conflict between the BIT and EU Treaties as per the *Achmea* Decision.[238]

193. Hungary alleges that the Tribunal proceeded to acknowledge in paragraph 189 of the Award that in *Achmea*, the dispute resolution clause of the Netherlands-Slovakia BIT was precluded by the EU Treaties since the tribunal in that case "might need to interpret EU legal principles."[239]

194. Thus, for Hungary, the contradictory aspect of the Tribunal's findings is that in paragraph 188 of the Award, the Tribunal found it to be a relevant distinguishing factor that, in the present dispute, it was not actually called upon by the Parties to apply EU law, unlike in the *Achmea* arbitration, whereas in paragraph 189 of the Award, the Tribunal found that a different test applied to the *Achmea* Decision i.e., whether a tribunal "might" need to interpret or apply EU law.[240] Hungary therefore submits that

[237] Award, paras. 188-189 (**RLA-4**).
[238] Memorial, para. 285, referring to Hungary's Letter to the Tribunal regarding the *Achmea* Decision (March 27, 2018), p. 4 (**R-6**).
[239] Memorial, para. 287, referring to Award, para. 199 (**RLA-4**).
[240] Memorial, para. 288.

the Tribunal's failure to address every relevant question submitted to it as well as the contradictory findings on a point that is crucial to the outcome of the case justify annulment of the Award.[241]

195. Finally, Hungary submits that the Tribunal provided insufficient reasoning concerning the conflict of laws clauses under the VCLT and the TFEU. In the original proceedings, Hungary had argued that the "incompatibility between the conflicting treaty obligations of France and Hungary in Article 9(2) of the BIT on the one hand, and the EU Treaties on the other hand, must be resolved in accordance with international law."[242] According to Hungary, such incompatibility was to be resolved based on two provisions of international law applicable between France and Hungary – Article 351 of the TFEU and Article 30(3) of the VCLT.[243] Hungary submits that the Tribunal determined that the conflict resolution tool under Articles 59 and 30(3) of the VCLT and the conflict resolution tool in the TFEU did not apply since the TFEU and the BIT did not share the same subject matter.[244] As regards the inapplicability of Article 30(3) of the VCLT, Hungary's contention is that the Tribunal failed to provide any reasons concerning the degree of overlap between successive treaties applying Article 30(3) of the VCLT and why the TFEU and the BIT did not satisfy that standard.[245]

196. Hungary alleges that the Tribunal did not address the argument that where there is a conflict between two treaties, it has to be assumed that they share the same subject matter, and also that the Tribunal failed to state reasons why Hungary's arguments regarding the effect of Article 351 of the TFEU were incorrect.[246] In particular, Hungary does not agree with the Tribunal's ruling regarding the inapplicability of Article 30(3) of the VCLT because of divergent subject matter and hence the inapplicability of the conflict resolution tool in the TFEU. Hungary argues that the application of Article 351

[241] Memorial, paras. 289-290.

[242] Memorial, para. 291.

[243] Memorial, para. 292.

[244] Memorial, para. 293, referring to Award, para. 192 (**RLA-4**).

[245] Memorial, para. 295.

[246] Memorial, paras. 296-297, referring to Hungary's Comments on the European Commission's *Amicus Curiae* Submission (September 28, 2018), p. 8 (**R-7**).

of the TFEU is not dependent on the application of Articles 30(3) and 59 of the VCLT nor does it require that the treaties in conflict share the same subject matter.[247] Hungary contends that Article 351 of the TFEU provides that "in the event of an inconsistency between EU Treaties and provisions of prior treaties concluded by two EU Member States, the provisions of the EU law must prevail."[248] Therefore, Hungary submits that the Tribunal's reasons do not follow logically and it is difficult for the reader to understand the Tribunal's motives.[249]

(c) The Tribunal Failed to State Reasons for Rejecting Hungary's Request to Reopen the Proceedings

197. Hungary's second assertion under this ground is that the Tribunal failed to state reasons for rejecting Hungary's request to reopen the proceedings. As outlined in Section B above, Hungary contends that the Tribunal's failure to state reasons for rejecting Hungary's request to reopen the proceedings constitutes a serious departure from a fundamental rule of procedure i.e., Article 48(3) of the ICSID Convention pursuant to Article 52(1)(d) of the ICSID Convention.[250] However, Hungary argues that the Tribunal's omission may also qualify as an independent ground of a "failure to state reasons."[251] Reiterating the arguments made previously, Hungary asserts that the Tribunal's short notice by email of January 22, 2019, rejecting its request to reopen the proceedings "does not qualify as an award and is therefore – in principle – not subject to review by this Committee on the ground of 'failure to state reasons.'"[252] Further, Hungary asserts that the Tribunal's decision to reject the request to reopen the proceedings should have been included in the Award according to Article 48(3) of the ICSID Convention and should be subject to review by this Committee under Article 52(1)(e) of the ICSID Convention.[253] In conclusion, Hungary submits that the Tribunal's short message rejecting the request to reopen the proceedings does not enable

[247] Memorial, paras. 300-301.
[248] Memorial, para. 301.
[249] Memorial, para. 302.
[250] Memorial, para. 305.
[251] Memorial, para. 306.
[252] Memorial, para. 307.
[253] Memorial, para. 308.

a reader to understand the Tribunal's analysis and there is no explanation as to what the Tribunal meant in the Award.[254]

b. Claimant's Position

198. Under the final ground for annulment pursuant to Article 52(1)(e) of the ICSID Convention, the Claimant sets forth five arguments: (a) the relevant applicable standard; (b) the Tribunal's alleged failure to address the question of EU law as part of international law does not warrant annulment of the Award; (c) the alleged contradictory reasoning at paragraphs 188 and 189 of the Award does not warrant annulment of the Award; (d) the alleged insufficient or incoherent reasoning regarding conflict rules does not warrant annulment of the Award; and (e) the alleged failure to state reasons for rejecting Hungary's request for the reopening of the proceedings annulment of the Award does not warrant annulment of the Award on the basis of Article 52(1)(e) of the ICSID Convention.

(a) The Relevant Legal Standard

199. The Claimant agrees with Hungary as to the relevant legal standard, pursuant to Article 52(1)(e), i.e., "an award may be annulled (i) if the tribunal has failed to deal with every question that was submitted to it, or (ii) if the award fails to state the reasons on which it is based."[255]

200. First, with respect to the tribunal's failure to deal with every question that was submitted to it, the Claimant agrees with Hungary's position, as set out in *M.C.I. v. Ecuador*, pursuant to which "it would be unreasonable to require a tribunal to answer each and every argument which was made in connection with the issues that the tribunal has to decide […]."[256] In addition, the Parties agree that "only a failure to address a question that would 'render the award unintelligible' would lead to annulment of the award" as confirmed by the *ad hoc* committee in *Duke v. Peru*.[257]

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[254] Memorial, paras. 310-311.
[255] Counter-Memorial, para. 224.
[256] Counter-Memorial, para. 225, citing to *M.C.I. v. Ecuador*, para. 67 (**RLA-16**); Rejoinder, para. 224.
[257] Counter-Memorial, para. 226, citing to *Duke v. Peru*, para. 228 (**CLA-029**).

201. Second, with respect to Hungary's contention that the award fails to state the reasons on which it is based, the Claimant agrees with Hungary that this has been interpreted to mean that "an award must highlight the rationale behind those points that are essential to the tribunal's reasoning."[258] However, the Claimant asserts that a tribunal is not required to substantiate every single legal principle relied upon in its award.[259] Further, the Claimant argues that *ad hoc* committees will not be "'required to inquire into the correctness or persuasiveness of the reasons offered by a tribunal,' unless such reasons are manifestly 'frivolous, perfunctory or absurd.'"[260]

(b) The Tribunal's Alleged Failure to Analyse the Question of EU Law as Part of International Law Does Not Warrant Annulment of the Award

202. The Claimant rejects Hungary's assertion that by failing to address the argument that EU law forms part of international law, the Award has failed to deal with every question that was submitted to the Tribunal. According to the Claimant, while the argument concerning EU law was not addressed in the Award, this does not render the Award "unintelligible."[261]

203. Further, the Claimant argues that there exists a distinction between "questions" and "arguments." In this context, the Claimant argues that *ad hoc* committees have determined that, whereas "a tribunal has a duty to deal with each of the questions" it is not obligated, however, to "comment on all arguments of the parties."[262] The Claimant's position is that if this distinction were applied to the present case and given Hungary's presentation of the EU law issue as an "argument," then the argument did not require a response from the Tribunal, whether explicitly or implicitly.[263] In any event, the Claimant asserts that the Tribunal addresses Hungary's argument at paragraph 182 of the Award, specifically finding that it shall rule in accordance with the provisions of the

[258] Counter-Memorial, para. 228, referring to Memorial, para. 270.

[259] Counter-Memorial, para. 228.

[260] Counter-Memorial, para. 229, citing to Memorial, para. 271.

[261] Counter-Memorial, para. 233.

[262] Counter-Memorial, para. 235, citing to *Enron Creditors Recovery Corporation (formerly 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 (July 30, 2010), para. 222 ("***Enron v. Argentina***") (**CLA-006**); Rejoinder, para. 234.

[263] Counter-Memorial, para. 236.

BIT and principles of international law and that it was not bound to apply either Hungarian or EU law.[264] The Claimant notes that "Hungary's argument that EU law forms part of international law has never been relied upon by any tribunal as a basis for declining jurisdiction." Thus, the Claimant concludes that whether or not the EU law argument was addressed in the Award is irrelevant because it was not outcome determinative.[265]

(c) The Tribunal's Alleged Contradictory Reasoning at Paragraphs 188 and 189 of the Award Does Not Warrant Annulment of the Award

204. The Claimant objects to Hungary's assertion that paragraphs 188 and 189 of the Award are contradictory. According to the Claimant, these paragraphs do make sense considering the rest of the Award.[266] Specifically, in paragraphs 187 through 190, the Tribunal notes and explains the applicability of EU law in the indicated contexts.[267] Therefore, in the present case, the Tribunal found that EU law did not apply but also found that "the risk that it 'might' need to interpret EU law did not exist, in light of the wording of Article 9(3) of the BIT."[268]

(d) The Tribunal's Alleged Insufficient or Incoherent Reasoning Regarding Conflict Rules Does Not Warrant Annulment of the Award

205. With respect to Hungary's argument that the Tribunal's alleged insufficient and incoherent reasoning regarding the conflict of law clauses at Article 351 of the TFEU and Article 30(3) of the VCLT justify annulment, the Claimant asserts that the Tribunal's reasoning regarding the conflict rules was neither insufficient nor incoherent.[269] To illustrate this assertion, the Claimant submits that the Tribunal found that in relation to (i) Article 351 of the TFEU, no conflict exists between the TFEU and the BIT; and (ii) Article 30(3) of the VCLT, that "the TFEU and the France-Hungary BIT do not share the same subject matter, as required for the application of the VCLT

[264] Counter-Memorial, para. 238.
[265] Counter-Memorial, para. 239.
[266] Counter-Memorial, para. 245.
[267] Counter-Memorial, para. 245.
[268] Counter-Memorial, para. 246.
[269] Counter-Memorial, para. 251.

provisions."[270] In both situations ruling that Article 351 of the TFEU and Article 30(3) of the VCLT did not apply to this arbitration.

(e) The Tribunal's Alleged Failure to State Reasons for Rejecting Hungary's Request to Reopen the Proceedings Does Not Warrant Annulment of the Award

206. The Claimant submits that the aim of Article 52(1)(e) of the ICSID Convention is to ensure that an award "highlight[s] the rationale behind those points that are essential to the tribunal's reasoning" as opposed to making sure all procedural steps are accounted for exhaustively.[271] Further, the Claimant asserts that there was no need for the Award to provide reasons for the Tribunal's decision not to reopen the proceedings, which had been explained in writing, even if Hungary terms the explanation as "cursory."[272] Thus, while Hungary may consider the justification to be cursory, this does not justify annulment of the Award.[273] To support this assertion, the Claimant relies on *Venezuela Holdings v. Venezuela*, in which the tribunal ruled on Venezuela's document production request in two sentences in the original arbitration and, in the annulment proceeding, Venezuela argued that "this decision represented a sanctionable failure to state reasons, in addition to amounting to a serious departure from a fundamental rule of procedure."[274] The *ad hoc* committee in that case found that it could not pronounce a decision without a full investigation into the circumstances surrounding the tribunal's decision, and that such an investigation went beyond the functions of an *ad hoc* committee.[275]

(2) The Committee's Analysis

207. In relation to the Applicant's request for annulment under Article 52(1)(e) of the ICSID Convention, the Committee must respond to the following questions: (a) what is the legal standard to determine that the Tribunal failed to state the reasons on which the

[270] Counter-Memorial, para. 251, referring to Award, para. 192 (**RLA-4**).
[271] Counter-Memorial, para. 255.
[272] Counter-Memorial, para. 256.
[273] Counter-Memorial, para. 256.
[274] Counter-Memorial, paras. 257-258, citing to *Venezuela Holdings v. Venezuela*, para. 126 (**RLA-34**).
[275] Counter-Memorial, para. 258, citing to *Venezuela Holdings v. Venezuela*, para. 127 (**RLA-34**).

award is based; (b) did the Tribunal fail to state reasons when it decided that the *Achmea* Decision has no preclusive effect on its jurisdiction over the dispute based on Article 9(2) of the BIT, in particular: first, did the Tribunal fail to analyze whether EU law forms part of international law; second, is the reasoning of the Tribunal in paragraphs 188 and 189 of the Award regarding the application of EU law contradictory to such extent that it renders the Award unintelligible; third, is the reasoning of the Tribunal regarding conflict of law rules in the TFEU and the VCLT insufficient or incoherent; and (c) did the Tribunal fail to state reasons for its decision to reject Hungary's request to reopen the proceedings.

(a) The Relevant Legal Standard

208. Article 48(3) of the ICSID Convention provides that the award "shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." Failure to state the reasons on which the award is based, is a ground for annulment under Article (52(1)(e) of the ICSID Convention.

209. Even though a failure to deal with questions submitted to a tribunal is not a separate ground for annulment under Article 52 of the ICSID Convention, various *ad hoc* committees have considered that such failure may amount to a failure to state reasons.[276] As those committees stated, this does not mean that the tribunal should address every argument raised by the parties with respect to each question submitted to it.[277]

210. Considering that Article 49(2) of the ICSID Convention provides for a separate remedy to request a supplemental decision in cases where the tribunal failed to deal with a question submitted to it, *ad hoc* committees have analyzed the relationship between the

[276] *See M.C.I. v. Ecuador,* para. 66 (**RLA-16**); *MINE v. Guinea*, para. 5.13 (**RLA-057**); *Wena v. Egypt,* para. 101 (**RLA-42**); *Klöckner v. Cameroon*, para. 131 (**RLA-62**). Other *ad hoc* committees have considered that a failure to decide a question submitted to the tribunal may amount to an excess of power under Article 52(1)(b) of ICSID Convention, *see Duke v. Peru*, para. 229 (**CLA-029**), *Vivendi v. Argentina*, para. 64 (**RLA-28**), and *Klöckner v. Cameroon*, para. 133 (**RLA-62**).

[277] *M.C.I. v. Ecuador*, para. 67 (**RLA-16**); *Klöckner v. Cameroon*, para. 131 (**RLA-62**); *Enron v. Argentina*, para. 72 (**CLA-006**).

annulment proceedings and the proceedings for completion of an award.[278] In that regard, the *ad hoc* committee in *Wena v. Egypt* declared that the ground for annulment under Article 52(1)(e) of the ICSID Convention includes the case where the tribunal omitted to decide upon a question submitted to it to the extent such supplemental decision may affect the reasoning of the award.[279] Further, due to the existence of the remedy in Article 49(2) of the ICSID Convention, the *ad hoc* committee in *Duke v. Peru* stated that a failure to address every question will not *ipso facto* constitute a ground for annulment, but it is necessary for the applicant to demonstrate that such a failure amounts to a failure in the intelligibility of the reasoning of the award itself.[280]

211. Hungary and the Claimant are largely in agreement with respect to the requirements for annulment under Article 52(1)(e) of the ICSID Convention.[281]

212. The tribunal's failure to state reasons must result in some kind of inability for the reader to understand the tribunal's reasoning. Specifically, following the often-cited formula for the requirements of failure to state reasons set forth by the *MINE v. Guinea ad hoc* committee, the reader must be able "to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law."[282]

213. A total absence of reasons, or frivolous or contradictory reasons are clearly a cause for annulment.[283] It is more controversial where insufficient or inadequate reasons may be cause for annulment as well. An annulment procedure is not an appeal and it is not the task of an *ad hoc* committee to evaluate the correctness of an award on the basis of the

[278] *See M.C.I. v. Ecuador*, paras. 68-69 (**RLA-16**). *See also Enron v. Argentina*, para 73 (**CLA-06**): "Furthermore, even in cases where a tribunal has failed to deal with a question submitted to it, the appropriate remedy may not be an application for annulment, but rather, an application to the tribunal for a supplementary decision, pursuant to Article 49(2) of the ICSID Convention."

[279] *See Wena v. Egypt*, para. 101 (**RLA-42**).

[280] *Duke v. Peru*, para. 228 (**CLA-029**).

[281] *See* paras. 185-187 and 199-201 above.

[282] *MINE v. Guinea*, para. 5.09 (**RLA-057**).

[283] *Soufraki*, para. 126 (**RLA-28**); *M.C.I. v. Ecuador*, para. 84 (**RLA-16**).

strength of its reasoning.[284] There is a fine line between finding reasons insufficient or inadequate on the one hand and finding them unpersuasive on the other.

214. In this context, the Committee finds it helpful to point out that the objective of the requirement to state reasons is fundamentally to keep arbitrariness at bay. By having to provide reasons, a tribunal is more likely to consider the arguments presented by either party, and to establish reasonable connections between the facts and the law before reaching its decision. At a minimum, the requirement to state reasons allows the parties to be satisfied that their arguments have been considered, even if not accepted, and that the decision is the outcome of a deliberative process. At a maximum, the requirement for the award to state reasons allows the parties to be persuaded that the decision is reasonable or even correct.

215. For the purposes of Article 52(1)(e) of the ICSID Convention, the minimum is sufficient for a decision to withstand a request for annulment. In the view of the Committee, this means that the decisions reached must consider the parties' positions, even if they are neither limited nor bound by them. It also means that the reader must be able to follow the Tribunal's reasoning process on points of fact and law in order to understand how and why the Tribunal arrived at its decision.[285]

216. The reasoning need not be exhaustive. It may be implicit or be reasonably inferred from the terms used in the decision, read as a whole.[286]

217. The Parties agree that, with respect to the alleged contradiction of the reasoning of the Tribunal, two genuinely contradictory reasons cancel each other out. Therefore, it is, in principle, appropriate to qualify contradictory reasons as failure to state reasons under Article 52(1)(e) of the ICSID Convention.[287] However, contradictory reasons should be

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[284] *Vivendi v. Argentina*, para. 64 (**RLA-28**). *See also Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/35 (September 17, 2020), para. 165 ("***Orascom v. Algeria***"): "The correctness of the reasoning is not relevant for the purpose of annulment and the *ad hoc* committees are not expected to review this aspect of the reasoning. Otherwise they would act as an appellate body."

[285] *Orascom v. Algeria*, para. 170.

[286] *Wena v. Egypt*, para. 81 (**RLA-42**); *See also Azurix v. Argentina*, para. 54.

[287] *Klöckner v. Cameroon,* para. 116 (**RLA-62**).

distinguished from reasons which are claimed to be legally or factually wrong, which escape review by *ad hoc* committees.[288]

218. Finally, the Committee agrees with the *ad hoc* committee in *Vivendi I* that annulment under Article 52(1)(e) of the ICSID Convention should only occur when the particular point lacking in reasons is itself necessary to the tribunal's decision.[289]

(b) The Tribunal Stated Reasons for its Decision on Jurisdiction under Article 9 of the France-Hungary BIT and its Reasoning is not Contradictory

219. In order to appreciate whether the Tribunal stated the reasons for its decision that it had jurisdiction under Article 9(2) of the BIT, despite the *Achmea* Decision, the Committee will briefly summarize the Award on this point.

220. The Tribunal commenced its reasoning by referring to Article 9(2) and 9(3) of the BIT.[290] It stated that, in order to decide on jurisdiction, it must consider the impact of the CJEU's *Achmea* Decision.[291] The Tribunal devoted subsequent sections to a discussion of the *Achmea* Decision,[292] the Parties' positions on the *Achmea* Decision,[293] and the EC's *amicus curiae* brief and intervention in the Arbitration.[294] The Tribunal made reference to, among others: (i) the argument raised by the Applicant and the EC that Article 9(2) of the BIT is incompatible with Articles 267 and 344 of the TFEU; (ii) the conflict rules contained in the VCLT; and (iii) the allegation that the Tribunal's exercise of jurisdiction would lead to the fragmentation of international law.

221. The Tribunal also reflected on the Claimant's arguments to the effect that EU law was irrelevant to the Tribunal's determination of jurisdiction; the inapplicability of the *Achmea* Decision to the case due to the fact that the Tribunal was not required to interpret or apply EU or Hungarian law, and that neither the EU nor the VCLT's conflict

[288] *M.C.I. v. Ecuador*, para. 85 (**RLA-16**).
[289] *Vivendi v. Argentina*, para. 65 (**RLA-28**).
[290] Award, paras. 138 and 139.
[291] Award, para. 140.
[292] Award, paras. 145-151.
[293] Award, paras. 152-160.
[294] Award, paras. 161-177.

rules apply because the two treaties in question, the TFEU and the France-Hungary BIT, do not share the same subject matter.

222. In order to conduct its analysis, the Tribunal, as an initial matter, after transcribing the relevant provisions of the TFEU involved in the *Achmea* Decision, noted that the dispute does not involve the application of the law of any EU state, or the law of the EU as such, a finding central to its reasoning affirming its jurisdiction over the dispute.[295]

223. The Tribunal then proceeded to differentiate between the arbitration clauses under the two BITs, pointing out that Article 9 of the France-Hungary BIT does not contain an explicit reference to the law in force of the Contracting Party concerned, which would have included European law, and that it is, therefore, not called to interpret the law of any European state or European law. The Tribunal added that such provision remains highly significant in light of other treaties with contrasting applicable law provisions.[296]

224. The Tribunal then mentioned that in addressing "international law," it considered the ordinary meaning of the treaty provisions and other applicable sources as established under Articles 31 and 32 of the VCLT, stating in the following paragraph that "[t]hus, the Tribunal would not apply either Hungarian or EU law."[297]

225. Next, the Tribunal determined that the CJEU ruling is binding on the EU state court in Germany that requested the preliminary ruling, and possibly on other EU Member State courts, but not on ICSID tribunals whose authority rests on the ICSID Convention.[298] It noted that the awards of ICSID tribunals do not risk annulment in any of the EU Member States,[299] and that by contrast, the *Achmea* Decision concerned the award of an *ad hoc* arbitration tribunal, subject to the law of Germany, an EU Member State.[300]

[295] Award, para. 181.
[296] Award, para. 182.
[297] Award, paras. 183-184.
[298] Award, para. 185.
[299] Award, para. 186.
[300] Award, para. 187.

226. Continuing with its reasoning and based on its previous findings, the Tribunal stated that it must decide the case based on the BIT and international law, not EU law or the law of an EU state. It concluded that in the case before it, neither Party argued for the application of either Hungarian or EU law. [301]

227. The Tribunal found that the *Achmea* Decision concerned the Netherlands-Slovakia BIT, instructing the tribunal to apply Slovakian law, which might require the interpretation of EU legal principles. The Tribunal continued its reasoning by stating that under these circumstances, Article 8 of the Netherlands-Slovakia BIT was precluded by Articles 267 and 344 of the TFEU. [302] The Tribunal concluded its analysis by noting that in the case submitted to it, such reasoning did not bar its jurisdiction, and consequently no risk exists of substantive legal fragmentation. [303]

228. As a final step, the Tribunal established that neither the TFEU's nor the VCLT's provisions on conflict apply in this arbitration, because there exists no conflict between the TFEU and the France-Hungary BIT that would negate the jurisdiction of the Tribunal and also because the TFEU and the France-Hungary BIT do not share the same subject matter. [304]

229. As stated in paragraph 193 of the Award, based on the reasons set forth above and after having considered the *Achmea* Decision and the submissions before it, the Tribunal concluded that *Achmea* has no preclusive effect such as to remove its jurisdiction to hear the dispute. [305]

230. The Committee has no difficulty following the reasoning of the Tribunal discussing Hungary's, and the EC's allegations, concerning the inapplicability of Article 9(2) of the BIT to the present dispute due to the *Achmea* Decision. The Tribunal's reasoning is based on two central elements.

[301] Award, para. 188.
[302] Award, para. 189.
[303] Award, para. 190.
[304] Award, para. 192.
[305] Award, para. 194.

231. First, the Tribunal noted that, different from the *Achmea* Decision, the dispute before it did not involve the application of the law of any EU state, or EU law as such. This is reinforced, in view of the Tribunal, by the fact that no allegation was made that EU law had been violated or that the controverted measures in question ran contrary to EU law. As the Tribunal further noted, neither side in the case argued for the application of either Hungarian nor EU law to the underlying dispute, and the Tribunal was not asked to decide whether Hungary's conduct breached EU law.

232. In this respect, the Committee notes that the Separate and Dissenting Opinion agreed with the majority that the *Achmea* Decision did not deprive the Tribunal of jurisdiction over the dispute.[306] Mr. Thomas' conclusion coincides with the Tribunal's findings, stating that: "[o]n a separate point, I note that the stated policy concern in *Achmea* was that an arbitral tribunal with no power to refer questions of EU law to the CJEU might err in its application of EU law. That concern does not arise on the facts of the present case."[307]

233. The second element of the Tribunal's reasoning is the difference between the language of the applicable law clauses contained in Article 8(6) of the Netherlands-Slovakia BIT, at issue in *Achmea*, and Article 9(3) of the BIT in the Hungary-France BIT, applicable to the Tribunal's jurisdiction. For the Tribunal, it determined that, Article 8(6) of the Netherlands-Slovakia BIT provides that the tribunal shall take into account *inter alia* the law in force of the Contracting Party concerned "which of course would be the law of an EU member state."[308] Whereas Article 9(3) of the Hungary-France BIT establishes that that the arbitral tribunal "shall rule in accordance with the provisions of this Agreement and principles of international law."[309] In the words of the Tribunal, Article 9(3) "[…] remains highly significant, particularly in light of other treaties with contrasting applicable law provisions."[310]

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[306] Separate and Dissenting Opinion, para. 64.

[307] Separate and Dissenting Opinion, para. 69.

[308] Award, para 182.

[309] Article 9(3) of the BIT (**RLA-13**).

[310] Award, para 182.

234. These two elements led the Tribunal to conclude that *Achmea* had no preclusive effect on its jurisdiction. Moreover, in the Committee's view, the necessary conclusion that derives from the Tribunal's reasoning contained in paragraphs 189 and 192 of the Award, is that because of Article 9(3) of the BIT, there is no incompatibility between the TFEU and the BIT and therefore the conflict provisions of the TFEU do not apply in this arbitration.

235. In this context, the Committee does not agree that the Tribunal failed in the specific allegations made by Hungary under Article 52(1)(e) of the ICSID Convention, with respect to the Tribunal's decision to assert jurisdiction over the dispute based on Article 9(2) of the BIT.

236. First, the Committee does not agree with Hungary that the Tribunal failed to address a question or argument submitted to it, in particular, whether EU law forms part of international law.[311]

237. In the view of the Committee, the Tribunal addressed and rejected that possibility in its Award. The Committee agrees with the Claimant that this is the necessary result of the reasoning contained in paragraphs 182, 183 and 184 of the Award. Moreover, that reasoning is confirmed by the Tribunal's statement that it "must decide on Hungary's alleged liability on the basis of the BIT itself and international law, not EU law or the law of an EU state,"[312] making clear that the Tribunal does not consider EU law as part of "international law" under the applicable law clause of the BIT.

238. Accordingly, the Committee does not find that the Tribunal failed to consider the question of whether EU law forms part of international law, pursuant to the provisions of Article 9(2) of the BIT. The Committee understands that Hungary disagrees with the Tribunal's conclusion and that it would have preferred a more detailed analysis of its

[311] The Parties have debated whether the issue raised by Hungary is a question or an argument. The Committee does not consider that distinction useful for its decision in the present case. The Committee acknowledges that the issue before the Tribunal was whether the *Achmea* Decision precluded its jurisdiction to hear the dispute and that one the arguments raised by Hungary was that EU law shall be considered "international law" for the purposes of Article 9(2) of the BIT. In that regard, whether the issue was either a question or an argument, the Tribunal needed to address it in its decision.

[312] Award, para. 188.

argument, but this obviously is not a reason for annulment under the legal test described by the Committee above.[313]

239. As stated before, the reasons on which the Award is based need not be exhaustive, and they may be implicit or be reasonably inferred from the terms used in the decision, read as a whole. In addition, the Committee fails to see, in the words of the *ad hoc* committee in *Enron v. Argentina* that we are in the presence of "a clear case when there has been a failure by the tribunal to state any reasons for its decision on a particular question […]"[314] And certainly the Applicant has not demonstrated that the alleged failure renders the reasoning of the Award unintelligible.[315]

240. Second, the Committee also disagrees with Hungary that the Tribunal's reasoning set out at paragraphs 188 and 189 of the Award, regarding the application of EU law, is contradictory and renders the award unintelligible.

241. According to Hungary, in paragraph 188 of the Award, the Tribunal differentiated the present dispute from the *Achmea* Decision, in that the Tribunal was not actually called upon to apply EU law; whereas in paragraph 189, the Tribunal found that the test which applied in the *Achmea* Decision is whether a tribunal might need to interpret or apply EU law.[316]

242. The Committee does not follow the contradiction alleged by the Applicant. As previously mentioned, the reasoning of the Tribunal is based on two central elements. First, that the dispute before it did not actually involve the application of the law of any EU state or the law of the EU as such. In this context, the Tribunal did not mention the *Achmea* Decision. And second, the differences between the language of the applicable law clauses of Article 9(3) of the BIT and Article 8(6) of the Netherlands-Slovakia BIT, in which the Tribunal considered that there was no risk that it might have to apply EU

[313] *See* para. 208 above *et seq*.
[314] *Enron v. Argentina*, para 74.
[315] *Duke v. Peru*, para. 228 (**CLA-029**).
[316] Memorial, para. 284.

law nor was there a risk of substantive legal fragmentation.[317] In the view of the Committee, paragraphs 188 and 189 are consistent with these two different strains in the reasoning of the Tribunal that, together, support its decision on jurisdiction.

243. Third, the Committee also disagrees with Hungary that the reasoning of the Tribunal regarding the conflict of law clauses under the TFEU and the VCLT are insufficient or incoherent.

244. In paragraph 192 of the Award, the Tribunal determined that the provisions on conflicts of law of the TFEU and the VCLT do not apply in the arbitration. With respect to the former, because there is no incompatibility between the TFEU and the BIT, no conflict can exist between the two. With respect to the latter, because the TFEU and the BIT do not share the same subject matter, the Tribunal decided that the VCLT did not apply in this arbitration.

245. As previously confirmed in paragraph 234 above, the Committee's conclusion necessarily derives from the Tribunal's reasoning contained in paragraphs 189 and 192 of the Award. Indeed, since the Tribunal did not consider EU law as part of international law under Article 9(3) of the BIT, there could be no incompatibility between the TFEU and the BIT, and, as a result, the conflict provisions of the TFEU or the VCLT do not apply in the arbitration.

246. The Committee understands, and to some extent shares, Hungary's desire for a more detailed response from the Tribunal to Hungary's arguments, including a specific reference to Article 351 of the TFEU. However, this is not a basis for annulment of the Award under failure to state reasons, nor does it render the reasoning insufficient or incoherent. To the extent that a reader can understand how and why the Tribunal arrived at its decision, the standard for providing reasons is satisfied, a test that, as already expressed, the Committee considers satisfied by the Award.

[317] *See* Award, para. 190.

(c) The Tribunal Did Not Fail to State Reasons when it Rejected Hungary's Request to Reopen the Procedure

247. Hungary's second assertion under Article 52(1)(e) of the ICSID Convention is that the Tribunal failed to state reasons for its decision to reject Hungary's request to reopen the proceedings. The arguments in support of this claim are in essence the same as those in support of its allegation that the Tribunal departed from a fundamental rule of procedure by failing to mention and state reasons for its decision to not reopen the proceedings.

248. In that regard, the Committee recalls that it has already determined that the Tribunal did not fail to comply with Article 48(3) of the ICSID Convention by not incorporating its decision on the Applicant's request under Arbitration Rule 38(2) in the Award.[318]

249. Accordingly, the Committee does not follow Hungary's submission with respect to this ground and considers that it cannot be accepted. As the Applicant recognizes, the Tribunal's decision not to reopen the proceedings under Rule 38(2) does not qualify as an award and therefore is not subject to review by this Committee on the ground of failure to state reasons.[319]

250. For the above reasons, the Committee rejects Hungary's request for annulment based on the Tribunal's alleged failure to state reasons for rejecting Hungary's request to reopen the proceedings.

V. COSTS

A. THE PARTIES' SUBMISSIONS ON COSTS

251. On December 23 and December 29, 2020, the Parties filed their respective Statement of Costs pursuant to Arbitration Rules 28(2) and 53, paragraph 20 of Procedural Order No. 1, and the Committee's letter dated December 8, 2020.

[318] *See* paragraph 177 above.
[319] Memorial, para. 307.

252. Hungary and the Claimant each submit that this Committee should order the other Party to pay all costs associated with this annulment proceeding. Hungary sets forth the amount it claims as follows:

CATEGORY	AMOUNT
Attorney fees (DLA Piper)	HUF 207,777,000
ICSID Costs (Advances and registration fee)	USD 425,000

253. The Claimant quantifies the amount it claims as follows:

CATEGORY	AMOUNT
Simmons & Simmons legal fees	EUR 1,182,769.00
Simmons & Simmons expenses	EUR 16,256.39
Szecskay Attorneys at Law legal fees	EUR 25,892.00
Szecskay Attorneys at Law expenses	EUR 4,009.38
Total	EUR 1,228,926.77

B. THE COMMITTEE'S DECISION ON COSTS

254. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

255. This provision, together with Arbitration Rule 47(1)(j) (applied by virtue of Arbitration Rule 53) gives the Committee discretion to allocate all costs of the proceeding, including attorney's fees and other costs, between the Parties as it deems appropriate.

256. The annulment procedure is the only remedy available within the ICSID arbitration system to set aside an award on the basis of the limited grounds specified in Article 52 of the ICSID Convention. There can be no doubt that Hungary had every right to pursue annulment of the Award.

257. The Committee has rejected Hungary's request for annulment in its entirety. However, that does not mean that Hungary's request for annulment was dilatory, unreasonable, or otherwise manifestly unfounded. Hungary's objections to some aspects of the Tribunal's decision, although they have not met the high standard for annulment set out under Article 52 of the ICSID Convention, were serious and legitimately brought by Hungary. In this regard, the Committee notes that the jurisdictional aspect of the underlying arbitration has placed Hungary as a Member State of the European Union in the position that it cannot fail to request annulment of the Award. It is also the case that Sodexo's legal fees are significantly higher than those incurred by the Applicant. Under these circumstances, applying the principle that "costs follow the event" in relation to both legal fees and the costs of the proceeding would impose an unreasonable burden upon Hungary.

258. Thus, the Committee finds that each Party shall bear its own legal fees and expenses incurred during the annulment proceedings.

259. The costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD):

Committee Members' fees and expenses	
Mr. Andrés Jana Linetzky	USD 104,250.00
Dr. Ucheora Onwuamaegbu	USD 75,000.00
Dr. Jacomijn van Haersolte-van Hof	USD 71,437.50
ICSID's administrative fees	USD 84,000.00

Direct expenses	USD 7,077.25
Total	**USD 341,764.75**

260. The above costs have been paid out of the advances made by Hungary pursuant to Administrative and Financial Regulation 14(3)(e).[320]

261. Given that Hungary's bid for annulment was ultimately unsuccessful, and while not applying the principle of "costs following the event" in an unmitigated fashion, the Committee decides that Hungary shall bear all administrative costs related to the annulment proceeding. Hungary has already paid all administrative costs, through advance payments, in accordance with Regulation 14(3)(e) of the Administrative and Financial Regulations. Hence, there will be no reimbursements between the Parties related to legal costs.

VI. DECISION

262. For the reasons set forth above, the Committee decides as follows:

(1) Hungary's Application for Annulment of the Award rendered on January 28, 2019, in the arbitration proceeding between Sodexo Pass International SAS and Hungary is rejected in its entirety;

(2) Each Party shall bear the costs of its own legal fees and expenses related to the annulment procedure; and

(3) Hungary shall bear all administrative costs incurred by the Centre related to the annulment procedure.

[320] The remaining balance will be reimbursed to the Applicant.

[redacted]

Ucheora Onwuamaegbu
Member of the *ad hoc* Committee

Date: 2 May 2021

Jacomijn van Haersolte-van Hof
Member of the *ad hoc* Committee

Date:

Andrés Jana Linetzky
President of the *ad hoc* Committee

Date:

[redacted]

Ucheora Onwuamaegbu
Member of the *ad hoc* Committee

Date:

Jacomijn van Haersolte-van Hof
Member of the *ad hoc* Committee

Date: 1 May 2021

Andrés Jana Linetzky
President of the *ad hoc* Committee

Date:

Ucheora Onwuamaegbu
Member of the *ad hoc* Committee

Date:

Jacomijn van Haersolte-van Hof
Member of the *ad hoc* Committee

Date:

[redacted]

Andrés Jana Linetzky
President of the *ad hoc* Committee

Date: 3 MAY 2021