Excerpts

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

MAGYAR FARMING COMPANY LIMITED, KINTYRE KFT AND INÍCIA ZRT

Claimants

and

HUNGARY

Applicant

ICSID Case No. ARB/17/27
Annulment Proceeding

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Prof. Geneviève Bastid Burdeau, President
Mr. Manuel Conthe
Mr. Michael Nolan

Secretary of the *ad hoc* Committee
Dr. Laura Bergamini

Date of dispatch to the Parties: November 16, 2021

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TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS

2019 Declaration	Declaration of the Representatives of the Governments of the Member States of the European Union dated January 15, 2019
Achmea Decision	CJEU Case C-284/16, *Slovak Republic v. Achmea B.V.*, March 6, 2018
Applicant or the Respondent	Hungary
Annulment Application	Application for Annulment filed on March 12, 2020
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	*Magyar Farming Company Limited, Kintyre Kft and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, November 13, 2019
BIT or Treaty	Agreement between the United Kingdom of Great Britain and Northern Ireland and the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments, dated March 9, 1987
C-[#]	Claimants' Exhibit
CL-[#]	Claimants' Legal Authority
CJEU	Court of Justice of the European Union
Claimants	Magyar Farming Company Limited, Kintyre Kft and Inícia Zrt
Committee	*Ad hoc* Committee composed of Prof. Geneviève Bastid Burdeau, President, Mr. Manuel Conthe and Mr. Michael Nolan
Counter-Memorial	Claimants' Counter-Memorial dated January 29, 2021
EC	European Commission

EC Application	EC's Application for leave to intervene as non-disputing party in the annulment proceedings dated February 17, 2021
EU Treaties	Treaty on the European Union and the Treaty on the Functioning of the European Union
EU	European Union
Hearing	Hearing on the Annulment Application held on June 21, 2021
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	Applicant's Memorial dated October 19, 2020
NLA	National Land Agency
R-[#] or AF-[#]	Applicant's Exhibit
RL-[#] or AL-[#]	Applicant's Legal Authority
Reply	Applicant's Reply dated March 12, 2021
Rejoinder	Claimants' Rejoinder dated April 23, 2021
Hearing Transcript, [page number]:[lines]	Transcript of the Hearing
TFEU	Treaty on the Functioning of the European Union
Tribunal	Arbitral tribunal composed by Professor Gabrielle Kauffman-Kohler, Dr. Stanimir A. Alexandrov and Dr. Inka Hanefeld
VCLT	Vienna Convention on the Law of Treaties dated May 23, 1969

I. INTRODUCTION AND PARTIES

1. This annulment concerns an application for annulment of the award rendered on November 13, 2019 between Magyar Farming Company Limited, Kintyre Kft and Inícia Zrt and Hungary (ICSID Case No. ARB/17/27) (the "Award") by a tribunal composed of Prof. Gabrielle Kaufmann-Kohler, as President, Dr. Stanimir A. Alexandrov and Dr. Inka Hanefeld (the "Tribunal").

2. The Application for annulment was filed by Hungary (the "Respondent" or the "Applicant") against Magyar Farming Company Limited, Kintyre Kft and Inícia Zrt (the "Claimants"). The Claimants and the Respondent are collectively referred to as the "Parties". The Parties' representatives and their addresses are listed above on page (i).

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 United Kingdom of Great Britain and Northern Ireland and the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments, dated March 9, 1987 (the "BIT" or "Treaty") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "ICSID Convention").

4. As described in the Award, the dispute in the original proceeding related to Hungary's measures regulating possession and disposal of State-owned agricultural land, which, according to the Claimants, resulted in the expropriation of their leasehold rights to 760 hectares of State-owned land located in Hungary's North-Western region of Ikrény (the "Land") and in a diminution of the value of their farming business in Hungary[1].

5. In the Award, the Tribunal found that (i) it had jurisdiction over the dispute; (ii) the Respondent breached Article 6(1) of the BIT by expropriating the Claimants' investment

[1] Award, **AF-3**, para 5.

without compensation; (iii) the Respondent should pay EUR 7,148,824 (plus interest) as compensation for expropriation and reimburse the Claimants for the costs of arbitration and their legal costs (plus interest)[2].

6. The Respondent applied for annulment of the Award on the basis of Article 52(1) of the ICSID Convention, identifying three grounds for annulment: (i) manifest excess of powers (Article 52(1)(b))[3]; (ii) serious departure from a fundamental rule of procedure (Article 52(1)(d))[4]; and (iii) the Award has failed to state the reasons on which it is based (Article 52(1)(e))[5].

II. PROCEDURAL HISTORY

7. On March 12, 2020, ICSID received an application for the annulment of the Award (dated March 11, 2020) from Hungary (the "Annulment Application"). The Annulment Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules") for the stay of the enforcement of the Award (the "Request for Stay").

8. On March 19, 2020, pursuant to Rule 50(2) of the ICSID Arbitration Rules, the Secretary-General of ICSID registered the Annulment Application. On the same date, the Secretary-General informed the Parties that the enforcement of the Award was provisionally stayed pursuant to Arbitration Rule 54(2).

9. On June 1, 2020, the *ad hoc* Committee (the "Committee") was constituted in accordance with Article 53 of the ICSID Convention. Its members are Prof. Geneviève Bastid Burdeau, a national of France, serving as President of the Committee, Mr. Manuel Conthe, a national of Spain, and Mr. Michael Nolan, a national of the United States of America. On the same

[2] Award, **AF-3**, para 441.
[3] Application, paras 47-94.
[4] Application, paras 95-105.
[5] Application, paras 106-124.

date, the Parties were notified that Dr. Laura Bergamini, Legal Counsel, ICSID, would serve as Secretary of the Committee.

10. On June 18, 2020, the Committee invited Hungary to confirm whether it maintained its request for stay of enforcement of the Award. Hungary confirmed that it did on June 25, 2020.

11. On June 26, 2020, the Committee invited the Parties to confer and agree upon a briefing schedule to address the Request for Stay and ruled that the provisional stay of enforcement was to continue until it could hear the Parties at the first session and reach a final determination on the Request.

12. On July 1, 2020, the Claimants informed the Committee that the Parties could not reach an agreement on the schedule to brief the Request for Stay and transmitted the relevant correspondence exchanged by the Parties.

13. On July 3, 2020, the Committee took note that the Parties agreed to exchange one round of written submissions on the Request for Stay and to have oral arguments at the first session but disagreed about the time limits for their respective written submissions. Having considered the Parties' proposals, the Committee established the schedule to address the Request for Stay. It also informed the Parties that they would be afforded the opportunity to make further observations on the Request for Stay during the first session.

14. On July 14, 2020, the Respondent filed a request for the continued stay of enforcement of the Award along with exhibits R-46 and R-47 and legal authorities RL-112 through RL-123.

15. On July 24, 2020, the Claimants submitted their observations on the Applicant's request for continuation of the stay of enforcement, along with exhibits C-256 through C-262 and legal authorities CL-76 through CL-87.

16. On July 28, 2020, in accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session and a hearing on the stay of enforcement with the Parties by telephone conference. During the session, the Committee and the Parties discussed draft Procedural Order No. 1, transmitted to them on June 18, 2020. The Parties also presented oral pleadings on the continuation of the stay of enforcement of the Award, which were recorded.

17. Following the first session, on August 1, 2020, the Committee issued Procedural Order No. 1, providing, *inter alia*, directions on the conduct of the annulment proceeding and setting forth the procedural calendar of the proceeding.

18. On September 11, 2020, the Committee issued a Decision on the Applicant's request for the continuation of the stay of enforcement of the Award, by which it decided that the stay of enforcement would unconditionally continue pending a decision on the Annulment Application. The Committee reserved its decision on costs for a later stage of the proceeding.

19. On October 19, 2020, Hungary filed its Memorial on Annulment, along with exhibits R-01 through R-05 and legal authorities RL-01 through RL-54.

20. On January 29, 2021, the Claimants filed their Counter-Memorial on Annulment, along with exhibits C-01 through C-16 and legal authorities CL-01 through CL-45.

21. On February 17, 2021, the European Commission ("EC") filed an Application for Leave to Intervene as a Non-Disputing Party along with Annex 1 (the "EC Application"). The EC argued that its intervention would assist the Committee by bringing a "*perspective, particular knowledge or insight that is different from that of the disputing parties concerning the EU Treaties*"[6].

[6] EC Application, para 17.

22. On February 18, 2021, the Committee invited the Parties to provide their comments on the EC Application.

23. The Claimants and the Respondent submitted their comments on the EC Application on February 22 and 25, 2021, respectively.

24. On March 12, 2021, Hungary submitted its Reply on Annulment, along with exhibit R-06, legal authorities RL-55 through RL-68 and legal authority RL-24 (resubmitted).

25. On March 22, 2021, the Committee issued its Decision on the EC Application, granting the European Commission leave to submit a written submission on the issues mentioned at paragraphs 23 and 25 of its Application.

26. On March 29, 2021, the European Commission submitted its *amicus curiae* brief.

27. On April 12, 2021, Hungary submitted its comments on the EC *amicus curiae* brief.

28. On April 13, 2021, the Claimants informed the Committee that they did not intend to file any comments on the EC *amicus curiae* brief.

29. On April 23, 2021, the Claimants filed their Rejoinder on Annulment, along with factual exhibit C-17 and legal authorities CL-46 and CL-47.

30. On May 11, 2021, the Committee held a pre-hearing organizational meeting with the Parties by telephone conference. During the pre-hearing organizational meeting, the Parties discussed a number of matters relating to the upcoming hearing, including whether the hearing should be held remotely or in-person.

31. On May 20, 2021, the Claimants requested leave to refer to certain documents filed in the arbitration proceeding in their opening PowerPoint presentation. The Claimants argued

inter alia that documents from the arbitration proceeding do not constitute "'*new documents or 'new evidence' for the purposes of Procedural Order No. 1*"[7].

32. On May 26, 2021, the Respondent provided its comments on the Claimants' request of May 20, 2021.

33. On May 28, 2021, the Claimants confirmed that they had no further comment on its request of May 20, 2021.

34. On June 3, 2021, the Committee advised the Parties that "*in light of all circumstances, including the constraints that an in-person hearing held on June 21, 2021 would have, the Committee considers that it would not be efficient or cost effective to hold the June 21, 2021 hearing in-person*"[8] and that it was minded to hold the hearing remotely. As an alternative, the Committee informed the Parties that it would be available to hold the hearing in-person at a later date, should the Parties prefer to postpone the hearing and hold it in-person.

35. On June 4, 2021, the Parties informed the Committee that they had conferred and agreed that the hearing should proceed remotely.

36. On June 5, 2021, the Committee issued Procedural Order No. 2 concerning the organization of the hearing and denying the Claimants' request of May 20, 2021.

37. A hearing on the Annulment Application was held by videoconference on June 21, 2021 (the "Hearing"). The following persons were present at the Hearing:

Members of the Committee:

Prof. Geneviève Bastid Burdeau	President
Mr. Manuel Conthe	Member of the Committee
Mr. Michael Nolan	Member of the Committee

[7] Email from the Claimants of May 20, 2021.
[8] Email from ICSID to the Parties of June 3, 2021.

ICSID Secretariat:	
Dr. Laura Bergamini	Secretary of the Committee
Ms. Céline Pommier	
For the Claimants:	
Mr. Zannis Mavrogordato	Twenty Essex
Mr. András Dániel László	LFB – László Fekete Bagaméry
[redacted]	[redacted]
For the Applicant:	
Mr. Michael Ostrove	DLA Piper France LLP
Mr. Théobald Naud	DLA Piper France LLP
Ms. Clémentine Emery	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
Ms. Kate Mala	DLA Piper Posztl, Nemescsói, Györfi-Tóth & Partners Law Firm
Mr. András Lovas	Sárhegyi and Partners Law Firm
Ms. Fanni Takács	Sárhegyi and Partners Law Firm
Court Reporter:	
Ms. Claire Hill	Claire Hill Real Time Reporting

38. At the Hearing, the Parties presented oral pleadings on the Annulment Application and agreed not to file post-hearing briefs. A verbatim transcript of the Hearing was made and circulated to the Parties.

39. The Committee met to deliberate by videoconference on June 23, 2021 and continued its deliberations thereafter by various means of communication.

40. On June 30, 2021, the Applicant, also on behalf of the Claimants, submitted joint corrections to the transcript of the Hearing.

41. On July 2, 2021, a finalized version of the transcript of the Hearing was transmitted to the Parties and the Committee.

42. On July 8, 2021, the Applicant and the Claimants filed their statements on costs.

43. On July 9 and 12, 2021, respectively, the Claimants and the Applicant filed their observations on the other party's statement on costs.

44. In accordance with ICSID Arbitration Rules 53 and 38(1), the annulment proceeding was declared closed on November 1, 2021.

III. SUMMARY OF THE AWARD

45. In the framework of the agricultural land regulation in Hungary, a group of British farming professionals led by [redacted] invested in 1997 in the agricultural sector purchasing a farm held by Inícia Zrt in the region of Ikrény, through Magyar Farming Company, a holding incorporated in the United Kingdom, and its Hungarian subsidiary, Kintyre Kft, which acquired 95,13% of the shares of Inícia. Among its assets, Inícia retained since the privatization in 1994 a leasehold right over 760 hectares, with both contractual and statutory pre-lease rights to the Land. In keeping with the agricultural land regulation in Hungary, lessees were entitled, at the expiration of the lease, to be informed by landlords about any offer from a third party that they intended to accept and to match and assume the offer of the third party and thereby create a lease contract between the landlord and the holder of the pre-lease right upon the terms offered by the third party.

46. After several successive versions of the land regulation following political changes in Hungary, an amendment to the 2010 Act adopted by the Parliament on July 9, 2011 precluded the exercise of the statutory pre-lease rights in cases where State-owned land had been leased through a tender ("2011 Amendment"). The Claimants, whose lease was due to expire on July 25, 2014, unsuccessfully tried to take advantage of a 2013 Amendment to the 2010 Act. The 2013 Amendment had relaxed the 2011 text in granting

the National Land Agency ("NLA") a discretionary power to extend the duration of existing leases for lessees who benefited from European or national subsidies until they discharged their subsidy obligations. Despite diplomatic interventions and domestic judicial proceedings initiated by Inícia, the takeover of the Land took place on October 16, 2014. After the eviction, Inícia continued farming activities on the land that it owned or leased from private owners.

47. The Claimants submitted the dispute to ICSID on the basis of the BIT. This followed unsuccessful attempts by the Parties to settle their dispute amicably, during which the Claimants had contended that the farm was unsaleable, and the Respondent had contended that the Claimants continued to derive profit from their Hungarian farm.

48. The Tribunal had to address two jurisdictional objections raised by the Respondent. The first (i) was grounded on the alleged absence of a valid consent to arbitrate as provided by Article 8 of the BIT due to it having been rendered inapplicable as a result of Hungary's accession to the European Union in 2004. The second jurisdictional objection (ii) was that the dispute did not arise from an "*investment*". The Award rejected both objections.

49. (i) On the intra-EU objection, the European Commission had filed an application to intervene as a non-disputing party and had been granted leave to submit an *amicus curiae* brief. The Tribunal, after having examined the scope of the decision rendered by the Court of Justice of the European Union ("CJEU") on March 6, 2018 in the case *Slovak Republic v. Achmea B.V.* ("*Achmea* Decision"), the European Union Member States' 2019 Declaration ("2019 Declaration") and the impact of the Treaty on the Functioning of the European Union ("TFEU") provisions on the application of Article 8 of the BIT[9], concluded "*that at the time of the initiation of these proceedings the BIT's offer to arbitrate was standing and that a valid arbitration agreement was formed when the Claimants accepted this offer, thus creating the consent to arbitrate required under Article 25 of the*

[9] Award, **AF-3**, paras 200-247.

ICSID Convention"[10]. The Tribunal's detailed analysis of the intra-EU objection begins at paragraph 200 of the Award, and – because this annulment proceeding fundamentally concerns it – the principal points of that analysis are summarized below.

a. The Tribunal, when assessing the question of whether the EU Treaties overrode the dispute resolution clause contained in Article 8 of the BIT, did so under international law, because, in its view, the BIT containing Hungary's consent to arbitration is an international treaty and, as such, interpretation was governed by the Vienna Convention on the Law of Treaties ("VCLT"), to which both Hungary and the United Kingdom are parties[11].

b. The Tribunal viewed itself to be "*the judge of its own competence*" pursuant to Article 41 of the ICSID Convention, and the Tribunal accordingly did not considered itself to be bound by the *Achmea* Decision. In the further judgement of the Tribunal, the interpretative authority of the CJEU extends to the interpretation and application of the EU Treaties, but not to the interpretation of the BIT or the VCLT, that the Tribunal understood to be applicable[12].

c. In the judgement of the Tribunal, the BIT remained in force notwithstanding the *Achmea* Decision, for the following reasons:

> […] the UK and Hungary have not terminated the BIT pursuant to the rules of Section 3 of the VCLT. Even if they had done so by virtue of the 2019 Declarations, however, the Claimants accepted the BIT's offer to arbitrate prior to its purported termination. Pursuant to Article 25 of the ICSID Convention, "[w]hen the parties [i.e. the investor and the State] have given their consent, no party may withdraw its consent unilaterally." Indeed, it is common ground between

[10] Award, **AF-3**, para 248.
[11] Award, **AF-3**, para 203. The Award at paragraph 237 sets forth Article 42(1) of the VCLT, which states that "*the validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention*".
[12] Award, **AF-3**, para 209.

> the Parties that the relevant time for determining jurisdiction is the date of the initiation of the arbitration[13].

d. The Tribunal also referenced the 20-year sunset provision of the BIT, stating as follows:

> If the protection of existing investments outlives an unambiguous termination of the Treaty, then the protection must continue *a fortiori* in respect of a decision of an adjudicatory body constituted under a different treaty or of declarations that purport to clarify the legal consequences of that decision[14].

e. In the Tribunal's view, "[f]*or these reasons, the 2019 Declarations cannot retroactively invalidate or render inapplicable the offer to arbitrate that the Claimants accepted through their request for arbitration*"[15].

50. The Tribunal then proceeded to consider Hungary's argument, in reliance on the conflict rules of Article 30 of the VCLT, that Articles 267[16] and 344[17] of the TFEU "*override Article 8 of the BIT*"[18]:

> Article 30 of the VCLT sets forth rules to resolve conflicts between successive treaties that govern the same subject matter. It is in relevant part as follows:
>
> Article 30
>
> Application of successive treaties relating to the same subject matter

[13] Award, **AF-3**, para 213.
[14] Award, **AF-3**, para 223.
[15] Award, **AF-3**, para 224.
[16] Article 267 of the TFEU reads as follows: "*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of the Treaties; b) the validity and interpretation of acts of institutions, bodies, offices or agencies of the Union*".
[17] Article 344 of the TFEU reads as follows: "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other that those provided for therein*".
[18] Award, **AF-3**, paras 225 *et seq*.

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations[19].

51. In the view of the Tribunal,

> investment jurisprudence is consistent in holding that investment treaties do not share the same subject matter with the EU Treaties. By contrast, the *Achmea* Decision is silent on whether intra-EU investment treaties and the TFEU govern the same subject matter for the purposes of Article 30 of the VCLT[20].

The Tribunal saw no reason to diverge from the consistent line of investment awards according to which the EU Treaties and investment treaties do not share the same subject

[19] Award, **AF-3**, para 225.
[20] Award, **AF-3**, para 231.

matter. Consequently, the Tribunal ruled that the conflict rules embodied in Article 30 of the VCLT did not apply to possible conflicts between the BIT and the EU Treaties[21].

52. The Tribunal summarized its analysis as follows:

> For these reasons, the conclusions that the BIT and the EU Treaties do not have the same subject matter and thus Article 30 of the VCLT does not apply dispose of the question whether the BIT's offer to arbitrate was valid and applicable at the commencement of this arbitration. The analysis could stop here[22].

53. The Tribunal could have stopped there but it considered that even if the BIT and the EU Treaties, as Hungary had argued, were regarded as having the same subject matter, there is no conflict between Article 8 of the BIT and Articles 267 and 344 of the TFEU[23]. The Tribunal considered that "*when States subscribe to successive treaties without terminating or amending any of them, it should be presumed that they did not intend to create a normative contradiction*"[24]. Since Article 344 does not limit or prohibit the submission of disputes to an investment treaty body, but limits the power of Member States to litigate disputes concerning the interpretation of the EU Treaties by means other than those provided in the EU Treaties, and as the present dispute does not call for the interpretation or application of the EU Treaties, at the time the Claimants commenced this proceeding the BIT's offer to arbitrate was valid in respect of the subject-matter scope of the present dispute. As for Article 267 TFEU, it does not create an obligation for the Member States that each and every adjudicatory body applying EU law may seek a preliminary ruling from the CJEU[25]. This analysis does not make express reference to Article 351 of the TFEU[26],

[21] Award, **AF-3**, para 236.
[22] Award, **AF-3**, para 238.
[23] Award, **AF-3**, para 239.
[24] Award, **AF-3**, para 240.
[25] Award, **AF-3**, paras 239-247.
[26] Article 351 of the TFEU reads as follows: "*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member States or States concerned shall take*

which the Award mentions only when summarizing the Parties' positions[27], and this, as will be explained, is a matter of significance to Hungary in this annulment proceeding.

54. (ii) On the subject-matter issue, the Tribunal emphasized that the Parties did not dispute that the Claimants' farm was an investment within the meaning of both the ICSID Convention and the BIT, that the dispute arose out of that investment envisaged holistically and that the legal dispute was limited, along with Article 8 of the BIT, to reviewing a breach of Article 6 of the BIT[28]. Therefore, "*the disagreement on whether the Claimants held rights capable of being expropriated and whether Hungary's measures were expropriatory constitutes 'a legal dispute rising of Article 6' of the BIT. It thus falls within the Tribunal's jurisdiction pursuant to Article 8 of the BIT*"[29].

55. The Tribunal's discussion of subject-matter jurisdiction began by noting the "common ground" between the Parties, as follows:

> It is common ground that the Claimants' farming business in Hungary constitutes an investment within the meaning of the BIT and the ICSID Convention. The Parties disagree, however, on whether the consent to arbitrate 'any legal dispute arising under Article 6 [the expropriation provision]' of the BIT extends to the present dispute and, in particular, whether Hungary's measures were capable of constituting an expropriation of the assets constituting an investment[30].

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all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraphs, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States".

[27] Award, **AF-3**, paras 178, 179, 180, 183, and 195.

[28] Award, **AF-3**, paras 271-280.

[29] Award, **AF-3**, para 281.

[30] Award, **AF-3**, para 249 (inserted material in original).

56. The Award's summary of the Parties' positions highlights the distinction that Hungary made between the Claimants' farming business and their purported lease rights, and the contended legal significance of that distinction. It states as follows:

> 250. The Respondent contends that the present dispute does not fall within the subject-matter scope of the BIT's dispute resolution provision, since none of the conduct alleged by the Claimants is capable of constituting an expropriation.
>
> 251. First, although the Claimants' farming business in Hungary indisputably constitutes an investment, the farm as a whole is not the subject of the expropriation claim, since the Claimants continue to derive profit from it.
>
> 252. Second, the Lease cannot be the subject of an expropriation either, because it expired on 25 July 2014 on its own terms […]
>
> 254. Third, the alleged pre-lease right and right to claim damages for the conduct of the Tenders do not constitute an investment under the BIT and are thus not capable of being expropriated[31].

57. In its analysis of subject-matter jurisdiction, the Tribunal proceeded on the basis that "*the existence of an investment must be assessed holistically*"[32]. It identified the following three jurisdictional requirements deriving from Article 25 of the ICSID Convention[33] and Article 8(1) of the BIT[34]:

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[31] Award, **AF-3**, paras 250-252 and 254 (footnotes omitted).
[32] Award, **AF-3**, para 274.
[33] Article 25(1) of the ICSID Convention reads as follows: "*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre*".
[34] Article 8(1) of the BIT reads as follows: "*Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes* […] *for the settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965 any legal dispute arising under Article 6* [expropriation provision] *of this Agreement*

- The dispute must arise directly out of an investment (Article 25 of the ICSID Convention);

- The dispute must "concern the investment" (Article 8(1) of the BIT); and

- The dispute must arise under Article 6, which is the expropriation provision of the BIT (Article 8(1) of the BIT)[35].

58. The Tribunal found the first two requirements to have been met on the basis that the Parties did not dispute that the Claimants' farm was an investment within the meaning of both the ICSID Convention and the BIT[36]. The Tribunal further found that the present dispute – which it said "*concerns the alleged expropriation of the Claimants' leasehold rights*" – "*does arise out of that overall investment of the Claimants*"[37]. The Award explains as follows:

> 277. As for the third requirement, Article 8 of the BIT requires that there be 'a legal dispute arising under Article 6'. According to the definition given by the PCIJ in *Mavrommatis*, under international law "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[38] The ICJ also defines a legal dispute broadly as "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations."[39]
>
> 278. Hence, for the Tribunal to have subject-matter jurisdiction under Article 8 of the BIT, it must be satisfied that the Parties are in "disagreement on a point of law or

between that Contracting Party and an investor of the other Contracting Party concerning an investment of the latter in the territory of the former […]".

[35] Award, **AF-3**, para 272.

[36] Award, **AF-3**, para 273.

[37] Award, **AF-3**, para 273.

[38] *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, Judgment of 30 August 1924, 1924 PCIJ Series A, No. 2, p. 11.

[39] *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, 30 March 1950 (first phase), ICJ Reports (1950) 65, at p. 74.

> fact" concerning Hungary's performance or non-performance under Article 6 of the BIT. When assessing this requirement, it is not necessary for the Tribunal to establish whether the Claimants' assets have actually been expropriated. It is in the nature of a dispute that it may eventually be decided against the Claimants[40].

The Tribunal finally concluded that:

> the disagreement on whether the Claimants held rights capable of being expropriated and whether Hungary's measures were expropriatory constitutes "a legal dispute arising under Article 6" of the BIT. It thus falls within the Tribunal's jurisdiction pursuant to Article 8 of the BIT[41].

59. On the merits, the Tribunal considered Hungary's measures in terms of expropriation of the statutory pre-lease rights and assessed whether the 2011 Amendment had that effect. It considered undisputed that the lease fulfilled a function like ownership in terms of the investor's expectations of legal certainty and stability and that the deprivation of vested pre-lease rights should have been accompanied by compensation even if the State acted with a legitimate public purpose[42]. Recognizing that the 2011 Amendment was inspired by Hungary's decision to change its agricultural land holding policy, the Tribunal considered that in doing so the State was required to respect vested rights[43]. Whether this expropriation had been unlawful was not regarded by the Tribunal as having been raised by the Claimants, because the Claimants requested compensation for the difference in the value of the farm with and without the leasehold rights, which is equal to the lost value of those rights and to the fair market value of the investment expropriated immediately before the expropriation. Accordingly, the Tribunal did not determine whether or not the expropriation had been unlawful.

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[40] Award, **AF-3**, paras 277 -278.
[41] Award, **AF-3**, para 281.
[42] Award, **AF-3**, para 360.
[43] Award, **AF-3**, para 367.

60. Coming to the quantum, the Tribunal having compared the expert evaluations opted for an evaluation presented by the Claimants' expert and addressed secondary points in discussion. The Tribunal reduced the evaluation presented by the Claimants' expert by certain amounts resulting from the level of the liquidity risk discount due to the actual value of the farm, the rate of the risk discount, and the cost of the energy required for packing potatoes. The Tribunal did not take into account, however, the value of potato production on the land that Inícia managed to sublease from the new lessees after the eviction[44].

61. The Award sets forth in detail, relying heavily upon testimony from [redacted], what the Claimants submitted had been their attempts to mitigate losses by trying to lease replacement land and to buy land by bidding at auction as a "*local farmer*." None of those efforts was successful. Ultimately, the Claimants obtained from the winners of the tenders[45] only temporary and unnotified sublets for about 107 hectares of the Land they had previously farmed. [redacted], the Claimants' expert, did not consider potato production on the sublet land as part of his damages analysis, because "*these quasi sub-lease* [did] *not offer security of tenure to Claimants*"[46]. For Hungary's expert, [redacted], [redacted]'s analysis was simply incorrect from an economic perspective and resulted in overcompensation[47].

62. The Tribunal addressed at paragraphs 415 to 418 of the Award the disagreement between the experts concerning potato production on the sublet land. In the Tribunal's assessment, both experts agreed that [redacted]'s valuation of the Claimants' loss was made on an *ex ante* basis, meaning as of the date when expropriation affected the Claimants (July 2015) and with the data available at that time. In the Tribunal's view, that Claimants produced potatoes on the sublet land subsequent to the expropriation did not affect the value of the expropriated asset at the time of the expropriation[48]. Further, the Tribunal stated that [redacted]

[44] Award, **AF-3**, paras 415-418.
[45] Award, **AF-3**, para 377.
[46] Award, **AF-3**, para 389.
[47] Award, **AF-3**, para 389.
[48] Award, **AF-3**, para 416.

[redacted] had rightly pointed out that the quasi-sublease arrangements did not provide legal security comparable to that of ownership or a lease, that it would thus be unreasonable to project that the Claimants would benefit from this arrangement for 20 years, and that no reasonable buyer would have made such a projection, given the uncertain nature of the sublease[49]. For these reasons, the Tribunal said, it "*does not share Mr. Sequeira's criticism of Mr. Gilbey's secondary valuation in respect of potato production*"[50].

63. The Tribunal also dismissed a claim presented by the Respondent during the hearing to reduce the amount of compensation on the basis of alleged lack of mitigation by the Claimants. The Tribunal considered that "[s]*ubject to the admissibility of the amendment by the Respondent of its request for relief, which can be left open in light of the considerations that follow, these new requests are in any event not well-founded. As set out above, events taking place after the date of valuation are irrelevant*"[51].

64. The Tribunal awarded the Claimants compensation for the expropriation of their investment in the amount of EUR 7,148,824.

IV. THE SCOPE OF ANNULMENT PROCEEDINGS IN GENERAL

65. The grounds for annulment of an ICSID award are set out in Article 52(1) of the ICSID Convention:

> Either Party may request annulment by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (a) that the Tribunal was not properly constituted;
>
> (b) that the Tribunal has manifestly exceeded its powers;

[49] Award, **AF-3**, para 417.
[50] Award, **AF-3**, para 418.
[51] Award, **AF-3**, para 425.

> (c) that there was corruption on the part of a member of the Tribunal;
>
> (d) that there has been a serious departure from a fundamental rule of procedure; or
>
> (e) that the award has failed to state the reasons on which it is based.

66. The principles concerning the role and powers of annulment committees in general are summarized in the ICSID Background Paper on Annulment of May 2016 as corresponding to the generally accepted interpretation of the ICSID Convention by *ad hoc* committees, including the present Committee.

> (1) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled;
>
> (2) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* Committee is limited;
>
> (3) *ad hoc* committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own;
>
> (4) *ad hoc* committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards;
>
> (5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly; and
>
> (6) an *ad hoc* committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* committee has

> discretion with respect to the extent of an annulment, i.e., either partial or full[52].

67. These principles have been recalled by the Claimants in their Counter-Memorial[53] and oral pleadings[54] without being generally challenged or commented upon by the Respondent, except concerning the limits to the discretionary power of a committee to annul partially or in whole an award, which is discussed in the Reply and will be addressed hereafter[55]. Rather, the Respondent preferred to concentrate on the interpretation to be given to the specific provisions of Article 52 on which its request for annulment is grounded.

68. It must be clarified that an *ad hoc* committee has to survey the overall integrity of the award at the date it was delivered and according to the legal arguments of the parties before the tribunal, notwithstanding any legal change that could have occurred after this date and which could in any manner affect some aspects of the dispute.

A. THE PARTIES' POSITIONS

(1) Hungary's Position

69. In its Reply, the Respondent contends first that while *ad hoc* committees enjoy some discretion whether or not to annul sections of the award, this power is not unfettered[56] and should not be exercised to the point of defeating the object and purpose of the remedy of annulment. Second, the Respondent affirms that if the tribunal's error materially affects the award as a whole or in part, the *ad hoc* committee has no choice but to annul the affected part of the award in question[57]: it is not for the Claimants to second guess whether an error on quantum has a "*minor*" or "*major*" material impact on the Award[58].

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[52] Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, **RL-4**, para 74.
[53] Counter-Memorial, paras 7-21.
[54] Hearing Transcript, 74:19-25, 75:01-25, 76:01-25, 77:01-25, 78:01-25, 79:01-25, 80:01-25.
[55] Reply, paras 112-137.
[56] Reply, para 120.
[57] Reply, para 123.
[58] Reply, para 129.

70. Concerning the discretion of the Tribunal in determining issues of quantum, Hungary affirms that there exists no legal standard requiring a "*gross illegitimate*" error and no basis that only an error that affects the merits of a case or the entirety of the damages analysis would warrant annulment[59]. According to Hungary, the Tribunal's discretion on quantum issues finds its limits in the Tribunal's duty to abide by basic principles of law, including that of mitigation and full compensation[60].

(2) The Claimants' Position

71. The Claimants in the Counter-Memorial submit that, even if the Tribunal were guilty of an "*error of law*", as claimed by Hungary, any such error was clearly not of such magnitude as to amount to a veritable non-application of the proper law as a whole. It further underlines that Hungary does not contest that the Tribunal applied the first and principal component and only invoked an alleged second component of the mitigation principle, relying on English law but without any reference to international law[61]. Finally, the Claimants submit that, if the Committee were to consider that the Tribunal's treatment of the "*second component of the mitigation principle*" was a manifest excess of powers, this would be a paradigm example of a case in which the Committee should exercise its undoubted discretion not to annul the Award[62].

72. In the Rejoinder, the Claimants contest the reading by Hungary of the decisions in *MINE v. Guinea* and *Tidewater v. Venezuela*, emphasizing that, to the contrary, a committee should annul the affected parts of an award only when the reasoning is contradictory or frivolous[63].

[59] Reply, para 134.
[60] Reply, para 135.
[61] Counter-Memorial, para 81.
[62] Counter-Memorial, para 86.
[63] Rejoinder, para 18.

B. THE COMMITTEE'S ANALYSIS

73. The Parties seem to disagree mainly about the margin of discretion of the Committee to decide on partial or total annulment of the Award. It is essential to recall, and both Parties apparently agree on this point, that an annulment proceeding is not an appeal.

74. It has permanently been recalled by ICSID, by the doctrine and by all *ad hoc* committees, that pursuant to Article 53 of the ICSID Convention the "*award shall be binding and shall not be subject to any appeal or to any other remedy except those provided for in this Convention*". The consequence of this fundamental character is that the annulment review is an exceptional and limited exercise and does not provide for an appeal of the award or any form of retrial.

75. Concerning the discretion to annul, Article 52(3) of the ICSID Convention provides that "[*t*]*he Committee shall have the authority to annul the award*". Along with the ordinary meaning of this sentence *ad hoc* committees have adamantly considered that they have some discretion and are not under the obligation to annul the award even if a ground for annulment listed in Article 52 of the ICSID Convention is found. As stated in *MINE v. Guinea*:

> The Convention does not require automatic exercise of that authority to annul an award whenever a timely application has been made and the applicant has established one of the grounds for annulment […][64].

76. Along with Article 52 of the ICSID Convention, and as it has constantly been recalled since the *MINE v. Guinea* decision, the role of an *ad hoc* committee is to verify the overall integrity and legitimacy of the arbitral process. An annulment proceeding is not concerned with the substantive correctness of the decision, and annulment is not a remedy to correct

[64] *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, **RL-49** ("*MINE v. Guinea*"), para 4.09.

a mere error. As recently recalled in *Orascom v. Algeria*, with reference to several previous annulment decisions:

> It is not the role of *ad hoc* committees to review tribunals' findings on facts or to control their interpretation of the applicable law[65].

77. Moreover, as recently underlined in *Orascom v. Algeria*, along with the ordinary terms of Article 52(3) of the ICSID Convention, the Committee has a discretionary authority to decide on the annulment and is not obliged to do so:

> Under the ordinary meaning of this provision, an *ad hoc* committee has some discretion and is not under an obligation to annul even if it finds that there is a ground for annulment listed in Article 52(1)[66].

78. As has been clearly summarized in *Soufraki v. UAE*:

> An *ad hoc* committee is responsible for controlling the overall integrity of the arbitral process and may not, therefore, simply determine which party has the better argument. This means that an annulment, as already stated, is to be distinguished from an ordinary appeal, and that, even when a ground for annulment is justifiably found, an

[65] *Orascom TMT Investments SàRL v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on annulment, September 17, 2020 ("*Orascom v. Algeria*"), para 124; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, May 3, 1985, **AL-33**, paras 61 and 128; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, *Ad hoc* Committee decision on the application for annulment, May 16, 1986, **RL-52** ("*Amco v. Indonesia*"), para 23; *CDC Group PLC v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the application for annulment of the Republic of Seychelles, June 29, 2005, **CL-7**, para 45; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the application for annulment of the Argentine Republic, September 25, 2007, **CL-11**, paras 85 and 136; *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, **RL-12**, para 44.

[66] *Orascom v. Algeria*, para 125.

> annulment need not be the necessary outcome in all circumstances[67].

79. The Committee adheres to this well-established position concerning the discretion to annul.

V. THE GROUNDS FOR ANNULMENT ASSERTED BY HUNGARY

80. In its Annulment Application, Hungary sought annulment of the Award on the basis of a) incorrect analysis of the consequences of the *Achmea* Decision; b) the Tribunal's failure to address one of Hungary's key arguments on the merits of the case; and c) an egregious error by the Tribunal in interpreting and applying the mitigation principle to its damages analysis[68]. The grounds invoked in the Annulment Application are subparagraphs (b) (manifest excess of power)[69], (d) (serious departure from a fundamental rule of procedure)[70], and (e) (failure to state the reasons on which the award is based) of Article 52 of the ICSID Convention[71].

81. In the Memorial as well as in the Rejoinder, however, Hungary invokes only subparagraphs (b) and (e) of Article 52 of the ICSID Convention and does not elaborate on the arguments invoked in the Annulment Application under subparagraph (d). Nor has Hungary raised subparagraph (d) in the oral pleadings so that only two grounds of annulment have been advanced. This was also the understanding of the Claimants who, in their written as well as oral pleadings, discussed only subparagraphs (b) and (e) of Article 52. The *ad hoc* Committee therefore considers that only two grounds for annulment of the Award have

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[67] *Hussein Nuaman Soufraki v. The 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, **RL-6** ("*Soufraki v. UAE*"), para 24; *CDC Group PLC v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the application for annulment of the Republic of Seychelles, June 29, 2005, **CL-7**, para 36: "*This mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID convention drafter's desire that Awards be final and binding* […]".
[68] Memorial, para 5.
[69] Annulment Application, para 47.
[70] Annulment Application, para 95.
[71] Annulment Application, para 106.

been advanced by the Applicant and discussed among the Parties, namely manifest excess of power and failure to state the reasons on which the Award is based.

82. The points of the Award that are challenged under these two grounds concern, first, the jurisdiction of the Tribunal in consequence of the *Achmea* Decision and, second, the alleged refusal by the Tribunal to apply the principle of mitigation of damages.

A. MANIFEST EXCESS OF POWER BY THE TRIBUNAL

(1) The Parties' Positions

a. Hungary's Position

i. Jurisdiction

83. Hungary's principal objection in this annulment proceeding is on the basis of the landmark 2018 ruling by the CJEU in *Slovak Republic v. Achmea B.V.* In its *Achmea* Decision, the CJEU ruled as follows:

> Articles 267 and 344 TFUE 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 investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept[72].

[72] Case C-284/16, *Slovak Republic v. Achmea BV*, March 6, 2018, **AL-14**, para 62.

84. In Hungary's submission, the CJEU's ruling in the *Achmea* Decision applies beyond the terms of the Netherlands-Slovakia BIT, including to Article 8 of the BIT at issue in this arbitration.

85. Hungary maintains in this annulment proceeding that the Tribunal manifestly exceeded its powers in wrongly asserting its jurisdiction based on Article 8 of the BIT without taking into account the impact of the *Achmea* Decision on the legal relationship between Hungary and the United Kingdom, allegedly reinforced by the 2019 Declaration of 22 Member States of the European Union. The analysis of the *Achmea* Decision and the alleged incompatibility of Article 8 of the BIT with the United Kingdom and Hungary's obligations under the EU Treaties were already presented and developed before the Tribunal both by Hungary and by the EU Commission in its *amicus curiae* brief. The Respondent takes over the demonstration already presented before the Tribunal about the analysis, the scope and authority of the *Achmea* Decision[73], which should prevail among EU Member States, notwithstanding Brexit[74], leading to the affirmation that the arbitration mechanism provided by Article 8 of the BIT is incompatible with the international obligations of Hungary under the EU Treaties[75].

86. The Applicant recognizes the principle of *Kompetenz Kompetenz*[76], but considers that the Tribunal should have abided by the CJEU's determination of the nature and scope of the Member States' international obligations under the EU Treaties. In Hungary's submission, the authoritative nature of the CJEU's interpretation of the international obligations

[73] Memorial, paras 58-89.
[74] Memorial, paras 90-93. Hungary points out that, at the time that the Claimants instituted the arbitration proceeding against Hungary on July 14, 2017, the United Kingdom was an EU Member State, and that the United Kingdom continued to be an EU Member State when the Tribunal rendered its Award on November 13, 2019. For these reasons, Hungary maintains that the BIT constituted an intra-EU BIT between the United Kingdom and Hungary, falling squarely under the scope of application of the *Achmea* Decision, and Brexit should have no bearing upon the contended incompatibility between Article 8 of the BIT and the EU law. *See* Memorial, paras 92-93; Hearing Transcript, 124:08-15: "*Actually, after Brexit, even the incompatibility between the sole provision of the BIT, Article 8, the dispute resolution clause, and the EU Treaties does not exist anymore, because the UK-Hungary BIT is no longer an intra-EU BIT. That incompatibility arose merely between 2004, when Hungary joined the European Union, and the period when the UK left the European Union, so Brexit marks the end date*".
[75] Memorial, para 89.
[76] Memorial, para 102.

undertaken by the EU Member States under the EU Treaties results from the application of general principles of international law as to the deference that must be accorded to decisions of permanent jurisdictional bodies[77].

87. Thus, for Hungary, the Tribunal should not have disregarded the CJEU's interpretation of the obligations arising under the EU Treaties and substituted its own analysis for the CJEU's, as concerns both Articles 344 and 267 of the TFEU[78]. In substituting its own analysis for that of the CJEU on the proper interpretation of the international law obligations undertaken by the United Kingdom and Hungary under the EU Treaties, Hungary submits that the Tribunal erred in its analysis of the jurisdictional issues put before it, which led to the Tribunal exceeding its powers[79].

88. The Respondent further contends that the 2019 Declaration by the EU Member States was an authoritative and binding interpretation of the BIT under Article 31(3) of the VCLT. For this reason, in the Respondent's view, the Tribunal exceeded its powers by not according effect to this authority[80].

89. For Hungary, there are two distinct rules of international law to resolve conflicts between the international law obligations of the United Kingdom and Hungary under the EU Treaties and under the BIT. These rules are primarily Article 351[81] of the TFEU – a special orientation rule – and the "residual" rule expressed in Article 30(3) of the VCLT, which

[77] Memorial, para 94.
[78] Memorial, para 100.
[79] Memorial, para 103.
[80] Memorial, paras 108-111.
[81] Article 351 TFEU: "*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States*".

reflects customary international law. In its oral pleadings, Hungary submitted that Article 351 of the TFEU would constitute a *lex specialis* between EU Member States which should have preference over Article 30 of the VCLT[82]. Considering the conflict between Article 8 of the BIT and the *Achmea* Decision, the Respondent reproaches the Tribunal for setting aside the special conflict rule provided in Article 351 of the TFEU and for applying the residual rule of Article 30(3) of the VCLT[83]. It further contests the way the Tribunal applied this last provision, considering the fact that the BIT is an earlier treaty and that the VCLT applies to successive treaties relating to the same subject-matter, which should have led to the conclusion that the later-in-time treaty should prevail[84]. In Hungary's view, in its analysis of Article 30(3) of the VCLT, the Tribunal disregarded that the test of "*relating to the same subject matter*" has been widely held to be met just by the mere existence of a conflict between the provisions of an earlier and a later treaty (as was the case, in Hungary's view, of the conflict between Article 8 of the BIT and Articles 267 and 344 of the TFEU)[85].

90. Finally Hungary avers that the Tribunal's jurisdictional error is both "*evident*" and "*serious*" to warrant the annulment of the Award. For the Applicant, the *Kompetenz Kompetenz* principle, which Hungary accepts, does not mean, however, that the Tribunal's decision is immune from review[86] and Hungary argues that the Tribunal's error in refusing to apply the relevant rules is both obvious and serious, justifying the annulment of the Award since there exists no basis to restrict the power of annulment to a failure to apply the applicable law *in toto*[87].

ii. Mitigation

91. The Applicant contends that the Tribunal also exceeded its powers by refusing to take account of the Claimants' mitigation efforts in the calculation of damages, thus committing

[82] Hearing Transcript, 17:08-09.
[83] Memorial, paras 113-138.
[84] Memorial, paras 129-132.
[85] Memorial, para 132.
[86] Reply, para 37.
[87] Reply, para 74.

an egregious error. In its Memorial, Hungary contends that misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially amount to failure to apply the proper law, warranting annulment of the award on the basis of an excess of power[88].

92. According to the Applicant's position, the duty to mitigate damages is a well-established principle in investment arbitration that imposes, first, that the injured party cannot recover damages in respect of a loss that it could have avoided through reasonable action and, second, that any action taken by the injured party after the breach that results in a reduction of its losses should be taken into account to diminish the breaching party's liability for damages. The Applicant adds that mitigation strictly accords with the principle of full compensation and that "[d]*amages* […] *will be overstated if mitigation events are ignored*"[89].

93. Hungary contends that the Tribunal made an egregious error in not applying the mitigation principle[90]. The Claimants' expert having recognized that the Claimants had mitigated losses by subletting State-owned land, any profits earned as a result of the subletting should have been taken into account in the calculation of the Claimants' losses[91]. Hungary acknowledges that the Tribunal seemed to understand the requirement to address mitigation as a separate and subsequent component to the initial value of the Claimants' loss[92]. The efforts of the Claimants to grow potatoes on sublet land should have, says Hungary, resulted in deducting the profits made on these activities from the calculation of the final amount of damage suffered by the Claimants, the profits being quantified between EUR 375,000 and EUR 390,000[93]. The Tribunal, having considered that "*a valuation cannot take into account facts that occurred after the valuation date, which a hypothetical buyer*

[88] Memorial, para 145.
[89] Memorial, para 151.
[90] Memorial, para 146.
[91] Memorial, para 158.
[92] Memorial, para 162.
[93] Memorial, paras 167 and 174.

could not have considered"[94] and consequently confusing, according to Hungary, the issue of the valuation of the asset with the issue of the actual loss suffered by the investor, committed an egregious misapplication of the mitigation principle constituting a manifest, obvious error[95] with the consequence that this part of the Award should be annulled[96]. For Hungary, the Committee has no discretion to refuse to annul this part of the Award, as the Tribunal failed to apply an established legal principle[97].

94. In its Reply, Hungary used the following heading for its discussion of what it contended to be the Tribunal's manifest excess of power respecting mitigation: "*B. The Tribunal Manifestly Exceeded its Powers Due to an Egregious Error of Law in the Context of its Damages Analysis*"[98]. Hungary stated as follows:

> As Hungary established in the Memorial, the Tribunal further manifestly exceeded its powers in its award of damages by proceeding on the basis of a flagrant and egregious error of the law of damages. This egregious error consisted in the Tribunal's mistaken and illogical confusion of two distinct and separate components of any damages analysis: the *ex ante* valuation of the expropriated asset and the subsequent adjustment of the amount of damages to reflect the Claimants' *ex post* mitigation of their losses[99].

In Hungary's further submission, the Tribunal "*failed to deduct at least 375,000 euros from the damages awarded to Claimants*"[100], and the Tribunal's "*egregious error of law led it to award damages in manifest excess of its power, justifying annulment pursuant to Article*

[94] Memorial, para 168, quoting Award, para 422.
[95] Memorial, para 174.
[96] Memorial, paras 176-179.
[97] Reply, para 135.
[98] Reply, p. 12.
[99] Reply, para 48 (footnotes omitted; emphasis in the original).
[100] Reply, para 49.

52(1)(b) of the ICSID Convention"[101]. The "*Tribunal's error*" – that it "*confused*" mitigation of damages and valuation of an asset – "*is plainly obvious*", Hungary submits[102].

b. The Claimants' Position

i. Jurisdiction

95. The Claimants first presented the annulment mechanism in the ICSID Convention in general as already mentioned above in paragraph 67, insisting on the principle that the Committee should exercise discretion even when a ground for annulment under Article 52(1) can be identified.

96. The Claimants then analyze Article 52(1)(b) and insist on the fact that it imposes a dual requirement of an "*excess of power*" that is "*manifest*". Concerning the existence of an excess of power, the Claimants recall that the drafters of the ICSID Convention anticipated an excess of power when a tribunal went beyond the scope of the parties' arbitration agreement, decided points which had not been submitted to it or failed to apply the law agreed by the parties. They further consider that the drafters intended to draw a distinction between failure to apply the proper law and an incorrect or erroneous application of that law, a distinction reflected in the case law[103]. The Claimants criticize Hungary's attempt to blur this distinction between failure to apply and error in the application of the law[104]. Coming then to the "*manifest*" excess of power, the Claimants contend that the excess of power must be obvious and substantially serious as well as immediately identifiable and not only consist of a "*wrong*" application of law as contended by Hungary[105]. The Claimants also contest Hungary's contention that the "*manifest*" requirement would be always satisfied when a decision about jurisdiction is wrong, considering that the case law indicates in their view that no distinction is to be made between jurisdiction and other

[101] Reply, para 50.
[102] Reply, para 51.
[103] Counter-Memorial, paras 26-30.
[104] Counter-Memorial, paras 31-33.
[105] Counter-Memorial, paras 35-37.

issues[106]. They insist on the fact that, as tribunals are judges of their own competence, *ad hoc* committees have been reluctant to annul awards on the basis of an alleged lack of jurisdiction[107].

97. In any event, the Claimants strive to demonstrate that the Tribunal did not exceed its powers by upholding jurisdiction. They insist that, because the arguments concerning the *Achmea* Decision have already been examined by the Tribunal, a new appraisal by the *ad hoc* Committee would "*cross the line that separates annulment from appeal*"[108]. Thus for the Claimants, the Tribunal's decision on jurisdiction *ratione volontatis*[109] was not an excess of power, and even, *quod non*, if it would exist it could not be qualified as "*manifest*" since the Tribunal diligently considered the jurisdictional objections raised by Hungary in relation to the *Achmea* Decision and concluded that, even if the United Kingdom and Hungary had terminated the BIT, a conclusion which Claimants reject, the Claimants had accepted the BIT's offer to arbitrate prior to its purported termination[110].

ii. Mitigation

98. In their initial statement of their position respecting the Tribunal's handling of mitigation, the Claimants begin with the observation that, unlike the primary argument that the Claimants had failed to mitigate their loss, Hungary's alternative argument that damages should be reduced to take account of the "*quasi-subletting*" was raised for the first time in the arbitration only briefly in the rejoinder, and then again during the hearing. According to the Claimants, the legal argumentation advanced in support of Hungary's case in this annulment proceeding was not included in Hungary's submissions during the arbitration[111].

[106] Counter-Memorial, paras 40-42; Hearing Transcript, 76:16-25, 77:01-13.
[107] Counter-Memorial, paras 42-44.
[108] Counter-Memorial, paras 46-51.
[109] And not "*voluntaris*"!
[110] Counter-Memorial, paras 55-57.
[111] Counter-Memorial, para 63.

99. The Claimants, having recalled that Article 52(1) of the ICSID Convention does not provide for annulment on the basis of an error of fact or law, observe that Hungary's complaint about mitigation does not relate to the Tribunal's interpretation of the duty to mitigate damages but to an alleged corollary of that duty. According to the Claimants, Hungary's complaint is just that the damages payable to the Claimants should be reduced by any amount saved through the mitigation steps[112]. Moreover, no valuation for the subletting with all components was presented to the Tribunal by the experts, and the claim relied only on Hungary's counsel's calculation[113]. The Claimants emphasize that the Tribunal recognized the investor's efforts to mitigate its damages by "*quasi-subletting*" but contend that mitigation efforts after the date of valuation are irrelevant. They argue that Hungary does not contend that the Tribunal failed to apply the proper law to its argument on mitigation[114] and they contest the existence of a second component of the mitigation principle, which would exist in English law but not in international law[115]. The Claimants recall that anyhow a misapplication of the applicable law is not an annullable error[116] and has to be distinguished from the non-application of law. They affirm that even if the Committee were to consider that the Tribunal's treatment of the "*second component of the mitigation principle*" was a manifest excess of power, it should exercise its discretion not to annul this part of the Award[117].

100. The Claimants comment on what they describe as a "*shift*" in Hungary's position, stating as follows:

> Realizing the absurdity of conflating the alleged misapplication of a subset ("*second component*") of a subset (mitigation) of a subset (law of damages) of the applicable law (international law) with a "*veritable non-application of the proper law as a whole*", Hungary shifts the emphasis in

[112] Counter-Memorial, paras 60-63.
[113] Counter-Memorial, paras 63-69.
[114] Counter-Memorial, para 73.
[115] Counter-Memorial, para 81.
[116] Counter-Memorial, paras 76-80.
[117] Counter-Memorial, paras 86-90.

> its Reply from mitigation to the law of damages in general and reconstructs its case as an egregious error in the application of principles of international law relating to damages, including the principle of full compensation and unjust enrichment […][118].

The Claimants tell the Committee that "[t]*he only real point of interest in Hungary's Reply is its decision to downgrade its Request for Relief in respect of the Tribunal's mitigation analysis from annulment of the entirety of the Award on quantum to a partial annulment of €375,000*"[119].

(2) The Committee's Analysis

a. Jurisdiction

101. Hungary contends that the Tribunal committed an excess of power because it exercised a jurisdiction it did not have in not properly addressing the issue of consent to arbitration. The Tribunal should have refused to consider Article 8 of the BIT as the basis of its jurisdiction, since the *Achmea* Decision and the 2019 Declaration by the EU Member States had confirmed that all bilateral investment treaties between EU Member States were contrary to their commitments as EU Member States. Hungary does not contest, however, that at the date of the initiation of this proceeding it had considered that Article 8 of the BIT could be relied on.

102. The notion of manifest excess of power has been generally analyzed as implying that a tribunal has manifestly stepped entirely outside the scope of its authority and manifestly disregarded the boundaries of it powers and the term "*manifest*" has been interpreted as

[118] Rejoinder, para 15.
[119] Rejoinder, para 16.

"*clear*", "*obvious*", "*self-evident*" and also substantively serious[120]. This would mean here that the Tribunal went beyond its jurisdiction *ratione voluntatis* or *ratione materiae*.

103. During the arbitration proceeding, the issues of whether the *Achmea* Decision was binding and of the value of the 2019 Declaration were discussed in detail, and the Tribunal concluded that the BIT's offer to arbitrate was standing and that a valid arbitration agreement was formed when the Claimants accepted this offer, thus creating the consent to arbitrate required under Article 25 of the ICSID Convention[121]. The Tribunal emphasized that, even if the State parties had actually decided to terminate the BIT, the investor would be protected pursuant to the 20-year sunset clause. And if the protection of existing investment outlives an unambiguous termination of the BIT, the protection must continue *a fortiori* in respect of a decision (i.e. the *Achmea* Decision) of an adjudicatory body constituted under a different treaty or of declarations (i.e. the 2019 Declaration) that purport to clarify the legal consequences of that Decision[122]. All arguments presented by the Respondent have been carefully examined and answered in the Award, which contains an interpretation of the scope of the *Achmea* Decision and of the 2019 Declaration that is consistent with that of all tribunals and committees seized on that issue. It follows that no excess of power on these different aspects of the jurisdiction issue has been demonstrated.

104. The Committee has identified no error, let alone any manifest error, in the Tribunal's decision as to why the offer to arbitrate contained in Article 8 of the BIT was valid and capable of acceptance by the Claimants when they commenced arbitration against Hungary. In particular, this Committee does not see any excess of power by the Tribunal in its determinations that (i) as an ICSID Tribunal, it could not abandon its mandate and blindly follow the determination of another adjudicatory body such as the CJEU but to the contrary was required to perform its own analysis; (ii) the CJEU has no exclusive or ultimate jurisdiction in respect of the interpretation of the BIT or the VCLT rules on treaty

[120] *Soufraki v. UAE*, paras 39-40.
[121] Award, **AF-3**, para 248.
[122] Award, **AF-3**, para 223.

conflicts; and (iii) in order to determine whether Article 8 of the BIT is precluded by the EU Treaties, it does not suffice to interpret only the EU Treaties. To the contrary, such a determination requires the interpretation of both the EU Treaties and the BIT, in order to answer questions such as whether the BIT and the EU Treaties govern the same subject matter as provided in Article 30 of the VCLT and, if so, whether there is a normative conflict between these treaties as understood under the VCLT[123]. The Tribunal considered that pursuant to Article 8 of the BIT and to the Convention and absent any manifestation of the contrary, there has been a valid consent of the Parties on its jurisdiction since the filing of the request. It cannot therefore be considered that the Tribunal manifestly disregarded the boundaries of its authority and it follows that as no excess of power on these different aspects of the jurisdiction *ratione voluntatis* issue has been demonstrated, the discussion whether it would be manifest has not to be opened.

b. Mitigation

105. Hungary contends that the Tribunal made an egregious error constitutive of an excess of power in not taking into account, for the determination of the quantum, the profits drawn by Inícia from the production of potatoes on sublet State-owned land after the expropriation. The obligation for the injured party to minimize or avoid losses is a well-established principle in international law[124] as well as the principle of mitigation, which has been recognized in investment arbitration and especially in the ICSID case law:

[123] Award, **AF-3**, paras 208-209.
[124] *Amco v. Indonesia*, paras 167-169; E. Gaillard, *La jurisprudence du CIRDI*, Pedone, 2004, p. 307; *General Electric Company, on Behalf of Its Aircraft Engine Business Group v. The Government of the Islamic Republic of Iran, Military Industries Organization, Iran Aircraft Industries and Bank Markazi Iran*, IUSCT Case No. 386, Award, March 15, 1991, para 43, according to which the claimant *"was not only permitted, but indeed obligated, to mitigate its damages*".

> […] that general principle of international law […] requires an innocent party to act reasonably in attempting to mitigate its losses[125].

106. As for the measures employed by the injured party, it appears in the ICSID case law that the tribunals have constantly considered that they had to appreciate *in concreto* whether such measures had been appropriate. In the present case the Tribunal deemed that the investor did comply with this obligation and this is not contested as such by the Respondent[126].

107. However, there is no evidence that an obligation to take into account the profits drawn from any activities undertaken by the Claimants which reduce the quantum of their losses is recognized in international law, particularly when those activities were based, as in the Claimants' case, on a quasi-sublease arrangement that, in the Tribunal's words, did "*not provide legal security comparable to that of ownership or a lease*"[127] and whose legal basis was tenuous at best, as it emerged during the arbitration and subsequently during the Hearing of this annulment procedure. Therefore, it is difficult to consider that the Tribunal made an egregious error and thus exceeded its powers. Even if an excess of power could result from the absence of application of a rule by a tribunal, this would require that the existence of an applicable rule and its importance as for the issue would be established, which is not the case here. Therefore, the Committee considers that the Tribunal did not exceed its powers in not taking into account the value of the potatoes sale.

108. Hungary also contends, as explained above, that the Tribunal committed an egregious error in its alleged confusion of two distinct and separate components of damage analysis: the *ex ante* valuation of the expropriated asset and the subsequent adjustment of the amount of damages to reflect the Claimants' *ex post* mitigation of their losses. In the Committee's

[125] *Hrvatska Elektroprivreda D.D. v. Slovenia*, ICSID Case No. ARB/05/24, Award, December 17, 2015, **RL-63**, para 215.
[126] Counter-Memorial, para 62; Award, **AF-3**, para 427.
[127] Award, **AF-3**, para 417.

view, it may be argued that the cross reference by the Tribunal in paragraphs 422 and 425 of the Award, when discussing mitigation, to the principle that "*a valuation cannot take into account facts that occurred after the valuation date*" may lead to an incorrect understanding that the Tribunal stated - as Hungary seems to suggest - that mitigation efforts should always be irrelevant, under all circumstances, in the determination of the net loss sustained by the injured party. In the Committee's view, such an inference would be a stretch, given what the Tribunal actually wrote, which referred exclusively to *ex ante* valuations.

109. Hungary contended that, in this particular case, the Tribunal's misinterpretation or misapplication of the proper law was so gross and egregious as to be tantamount to a failure to apply the proper law[128]. Although the distinction between an annulment proceeding and an appeal is invariably noted in annulment decisions, there is broad agreement that an excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention may occur if a tribunal fails to apply the proper law[129].

110. Although failure to apply the proper law may be a valid reason for annulment, it is fundamental that a mere error in the application of the proper law is not. The *ad hoc* committee in *Soufraki v. UAE* usefully explained as follows:

> ICSID *ad hoc* committees have commonly been quite clear in their statements – if not always in the effective implementation of these statements – that a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment[130].

[128] Reply, paras 44 to 75; Hearings transcript, 54:08-25, 55:01-25, 56:01-08.
[129] See C. Schreuer, L. Malintoppi, A. Reinish, A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, **AL-10**, paras 191-270. See, e.g., *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, May 3, 1985, **AL-33**, paras 58 to 60; *MINE v. Guinea*, para 5.03; *Industria Nacional de Alimentos, S.A. and Indalsa Perú S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on annulment, September 5, 2007, **CL-21**, para 98.
[130] *Soufraki v. UAE*, para 85.

111. Indeed, during the drafting of the ICSID Convention, a proposal was rejected that would have made "*manifestly incorrect application of the law*" a ground for annulment[131].

112. Notwithstanding Hungary's initial formulation in the Memorial, the objection that has been advanced in this annulment proceeding is not to the failure by the Tribunal to apply the proper law, here the international law respecting damages. Rather, Hungary's complaint is that the international law respecting damages, or more specifically that part of that international law that concerns mitigation of loss, was erroneously applied. In Hungary's submission, the Tribunal's misapplication of a portion of the properly applicable law was not merely incorrect, but egregiously incorrect. Irrespective of the claimed egregiousness of what Hungary argues to have been legal error by the Tribunal, Hungary has not, in the judgement of the Committee, advanced the sort of objection on the basis of which an excess of power within the meaning of Article 52(1)(b) of the ICSID Convention may be found. The Committee does not view it as necessary or appropriate in this annulment proceeding, which is not an appeal, to consider whether the Tribunal did, or did not, err in its application of the law concerning mitigation.

113. The failure to apply the proper law, as a concept, has been subject to multiple interpretations. For example, the *ad hoc* committee in *Duke Energy v. Peru* decided that what mattered for purposes of annulment was the application of the right system of law, and not the application, or failure to apply, a particular rule of law. The *Duke Energy* decision put it as follows:

> […] the obligation upon a tribunal under Article 42(1) of the ICSID Convention to apply, *inter alia*, "*the law of the Contracting State*" is a reference to the whole of that law, such as the Tribunal may determine to be relevant and

[131] History of the ICSID Convention, Vol. II, **CL-5**, pp. 853-854.

> applicable to the issue before it, and not to any particular portion of it[132].

In contrast, in *Amco v. Indonesia*, the first *ad hoc* committee annulled the award because the tribunal had applied Indonesia's foreign investment law but, in the view of the committee, overlooked a provision of it[133]. Whether, and in what circumstances, the failure to apply some part of the properly applicable law appropriately may result in annulment has been frequently considered by *ad hoc* committees, sometimes with divergent outcomes[134]. In any event, although there is a question as to whether non-application of certain important rules of international law should be understood as an excess of powers for failure to apply the proper law[135], Hungary's claims that the Tribunal erred in not reducing the damages awarded to reflect the value of potato production on subleased land does not present a case of that kind.

B. FAILURE TO STATE THE REASONS ON WHICH THE AWARD IS BASED

(1) The Parties' Positions

a. Hungary's Position

i. Jurisdiction

[132] *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on annulment, March 1, 2011, **AL-36**, para 212 (emphasis in original).
[133] *Amco v. Indonesia*, paras 95 and 97.
[134] *Compare CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the application for annulment of the Argentine Republic, September 25, 2007, **CL-11**, paras 128-136 (finding international law applicable and that, although the tribunal had applied Article XI of the applicable BIT defectively, it had applied it, and accordingly that there had been no manifest excess of power) and *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's application for annulment of the award, June 29, 2010, **RL-11**, paras 206-209 (finding that the tribunal's interpretation of the same Article of the same treaty in light of the requirements of customary international law for a state of necessity had resulted in a failure to apply the proper law).
[135] See C. Schreuer, L. Malintoppi, A. Reinish, A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, **AL-10**, paras 263-264 (referring to peremptory rules such as the protection of basic human rights, principles of *pacta sunt servanda*, prohibition of bad faith and others).

114. Under Article 52(1)(e) of the ICSID Convention Hungary recalls the two-fold duty ensuing from Article 48(3) of the Convention: the obligation for the Tribunal to address every question submitted to it, and the obligation to highlight the rationale behind those points that are essential to the Tribunal's reasoning[136]. The Respondent contends that the Tribunal failed to address Hungary's jurisdictional argument based on Article 351 of the TFEU[137]. Hungary recalls that it invoked two separate and independent conflict rules of international law to resolve the incompatibility between Article 8 of the BIT and Articles 267 and 344 of the TFEU, namely Article 30(3) of the VCLT and Article 351 of the TFEU and, in Hungary's opinion, the Tribunal explicitly recognized these two separate basis[138] but failed to take into account Article 351 of the TFEU, considering that, after finding that it was not bound by the *Achmea* Decision nor by the 2019 Declaration, the only remaining question to address was whether "*by the time of the commencement of these proceedings, Article 8 of the BIT had been overridden as a consequence of Hungary's accession to the EU, pursuant to the conflict provisions of Article 30 of the VCLT*"[139]. Without denying the applicability of Article 30(3) of the VCLT, Hungary contends that the Tribunal failed to determine whether Article 351 could apply and resolve the incompatibility, a failure that affects the jurisdiction issue and the Award as a whole, which should therefore be annulled. Hungary also avers that the requirement for the application of Article 30 of the VCLT that the successive treaties relate to the "*same subject matter*" does not exist under Article 351 of the TFEU and that the applicability of Article 351 should therefore be examined separately and that the Tribunal failed to address this argument of the Respondent[140].

ii. Qualification of the dispute

115. The second argument of Hungary under Article 52(1)(e) of the ICSID Convention concerns the alleged failure of the Tribunal to address the investment as a whole and to consider the

[136] Memorial, paras 182-192.
[137] Hearing Transcript, 28:08-25, 29:01-25, 30:01-25, 31:01-25.
[138] Memorial, para 199.
[139] Memorial, para 201, quoting the Award, para 224.
[140] Memorial, paras 205-207; Reply paras 174-175.

argument that there has been no substantial deprivation of the investment as a whole. Hungary recalls that in its closing oral submissions in the arbitration, Hungary insisted that - because the Claimants continued farming in Hungary at profit[141] - their claim was not in substance an expropriation claim, but rather perhaps a claim for denial of fair and equitable treatment claim, which was not available to the Claimants under the BIT[142].

116. Hungary points to paragraph 10 of the Award as establishing that the Tribunal understood its "*investment as a whole*" argument[143]. In that paragraph, the Award states that "[t]*he Respondent also rejects having expropriated the Claimants' investment as a whole, as the Claimants still continue their farming activity in Hungary at profit*"[144]. It is against this backdrop, in Hungary's submission, that the Tribunal failed to address what should have been a decisive argument in its favor[145], and thereby failed to state reasons, warranting annulment of the Award pursuant to Article 52(1) of the ICSID Convention[146].

iii. Mitigation

117. The third argument concerns the alleged failure of the Tribunal to state reasons with respect to mitigation. The Applicant advances the Award's totally deficient reasoning by which Hungary's mitigation argument was rejected.

b. The Claimants' Position

118. The Claimants recall the legal test under Article 52(1)(e) of the ICSID Convention and state that the right to seek annulment only arises if the Tribunal failed to address a crucial or decisive argument[147]. The Claimants further contend that, even if an annullable error is

[141] Memorial, paras 215-222; Hearing Transcript, 35:07-25, 36:01-25, 37:01-25, 38:01-25, 39:01-25, 40:01-25, 41:01-25, 42:01-25, 43:01-25, 44:01-25, 45:01-25, 46:01-25, 47:01-13.
[142] Memorial, para 215.
[143] Memorial, para 216.
[144] Award, **AF-3**, para 10.
[145] Memorial, para 217.
[146] Memorial, paras 222-225.
[147] Counter-Memorial, para 98.

found, *ad hoc* committees have discretion under Article 52(3) of the ICSID Convention whether to annul the award[148].

i. Jurisdiction

119. The Claimants consider that the Tribunal did not fail to state reasons first on the jurisdiction issue, as the Tribunal implicitly addressed Article 351 of the TFEU. The Tribunal's determination that the issue of whether the EU Treaties overrode Article 8 of the BIT was governed by international law explains why the analysis that followed was solely through the lens of the VCLT[149] and did not diverge from the consistent line of investment awards according to which the EU Treaties and investment treaties do not bear on the same matter[150]. The issue of the applicability of the TFEU was also addressed by the Tribunal, considering that there is no conflict between Article 8 of the BIT and Articles 267 and 344 of the TFEU and that the applicability of Article 351 was subject to such a conflict[151].

ii. Qualification of the dispute

120. For the Claimants, Hungary's argument is a "*straw man*", as the Claimants maintain that they made clear in their memorial that the "*investment*" for the purposes of the dispute was not the farm, but rather the Claimants' leasehold rights over the State-owned agricultural land. The Claimants' definition of "*investment*" did not include the farm, they submit[152]. It follows for the Claimants that the Tribunal did not have jurisdiction *ratione materiae* to decide whether the farm had been expropriated[153]. Thus, Hungary's argument about the absence of substantial deprivation of the investment falls short and could not have affected the outcome[154].

[148] Counter-Memorial, para 104.
[149] Counter-Memorial, paras 106-108.
[150] Counter-Memorial, paras 109-113.
[151] Counter-Memorial, para 112.
[152] Counter-Memorial, paras 116-118.
[153] Counter-Memorial, para 125a.
[154] Counter-Memorial, para 121.

iii. Mitigation

121. Finally, concerning mitigation, the Claimants state that Hungary does not contend that the Tribunal failed to provide any reasons. In the Claimants' submission, the case law establishes that a distinction is to be made between the failure to state any reasons and the failure to state sufficient reasoning or an argument that would have been decisive for the outcome of the case[155].

(2) The Committee's Analysis

122. The present Committee fully adheres to the statement in the *MINE v. Guinea* decision, according to which: "[t]*he Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law*"[156].

i. Jurisdiction

123. Hungary argues that the Tribunal failed to state reasons for not using the right rule to solve an alleged conflict between Article 8 of the BIT and European treaty obligations, erroneously preferring to use the rule of Article 30(3) VCLT rather than Article 351 of the TFEU. According to the Respondent, this was a crucial and decisive argument which was neglected by the Tribunal with the consequence that the requisites of Article 52(1)(e) of the ICSID Convention are not met and the Award should be annulled.

124. The Tribunal recalled that the Parties agreed that the question whether EU Treaties override the dispute resolution clause of the BIT must be assessed under international law and that the interpretation and validity of the BIT, because it is an international treaty, is governed by the VCLT, to which Hungary and the United Kingdom are parties[157]. The Respondent recalls that throughout the proceeding it invoked two separate and independent conflict

[155] Counter-Memorial, paras 128-134.
[156] *Mine v. Guinea*, para 5.08.
[157] Award, **AF-3**, para 203.

rules of international law to resolve the incompatibility between Article 8 of the BIT and Articles 267 and 344 of the TFEU. These are Article 30(3) of the VCLT and Article 351 of the TFEU, which were presented on the same level with distinct arguments[158]. The Respondent objects that the Tribunal did not address Article 351 of the TFEU to solve the conflict between Article 8 of the BIT and Articles 267 and 344 of the TFEU.

125. In the Award, the Tribunal first turns to the rule of Article 30(3) of the VCLT to address the alleged conflict issue between the treaties. The Tribunal having examined whether intra-EU bilateral investment treaties and the TFEU related to the same subject matter concluded by the negative[159] and explained that, in any event, it did not see any conflict between Article 8 of the BIT and Articles 267 and 344 of the TFEU[160].

126. The demonstration is perfectly clear and enables the reader to follow the reasoning of the Tribunal. After beginning with the conflict rule of Article 30(3) of the VCLT to analyze the alleged conflict between the treaties, the Tribunal was logical with the above-mentioned affirmation that the rules of general international law should be applied first. Although the Tribunal did not consider that the "*same-subject matter*" requirement of Article 30(3) of the VCLT had been satisfied, it nonetheless explored whether a conflict could be found between Article 8 of the BIT and Articles 267 and 344 of the TFEU. Its conclusion was that no such conflict existed. Hence, in the absence of any conflict, there was no need for the Tribunal to analyze the relevance for the case of the special conflict rule enshrined in Article 351 of the TFEU.

127. The Committee concludes that the Tribunal did not fail to state the reasons on which its decision on jurisdiction was based.

[158] Memorial, paras 194-197.
[159] Award, **AF-3**, paras 228-238.
[160] Award, **AF-3**, paras 242-247.

ii. Qualification of the dispute

128. Even if the value of the farm, with and without the lease rights, was taken into account to determine the quantum of the damages resulting from the expropriation of the lease rights, it is clear that the discussion before the Tribunal, as defined in the Claimants' claim, was bearing on the expropriation of the lease rights as a consequence of the changes of the agriculture legislation in Hungary.

129. Hungary is correct that the Tribunal explicitly discussed the concept of investment only when considering its own subject-matter jurisdiction and that, when doing so, it stated that "*the existence of an investment must be assessed holistically*"[161] and that "*the Tribunal should look at the investment as a whole*"[162].

130. The Tribunal found that the Parties disagreed as to whether, by the time of the arbitration, the Claimants continued to possess leasehold rights capable of being expropriated, and described that disagreement as a "*legal dispute arising under Article 6*" of the BIT, and for that reason precisely within the jurisdiction of the Tribunal[163].

131. It is also true, as argued by Hungary, that the Tribunal, after having reaffirmed its subject-matter jurisdiction, did not expressly address Hungary's argument that the 2011 Amendment did not deprive the Claimants of their investment "*as a whole*" and, hence, did not amount to an "*expropriation*" for purposes of Article 6 of the BIT[164].

132. The Committee, nonetheless, shares the Claimants' view that the Tribunal consistently accepted the Claimants' assertion that the relevant "*investment*" for the purposes of Article 6 of the BIT was not the farm, but rather the leasehold rights. The following are among the passages of the Award from which it is clear that the Tribunal understood the "*investment*"

[161] Award, **AF-3**, para 274.
[162] Award, **AF-3**, para 276.
[163] Award, **AF-3**, paras 279-281.
[164] Hearing Transcript, 42:02-25, 43:01-25, 44:03-25, 45:01-04.

for the purposes of Article 6 of the BIT to be the pre-lease rights, rather than the farm as a whole:

> […] The present dispute, which concerns the alleged expropriation of the Claimants' leasehold rights […][165] (emphasis added)
>
> […] International law, and in particular the non-expropriation standard contained in Article 6 of the BIT, provides a certain degree of protection for vested rights […][166] (emphasis added)
>
> […] the lease fulfilled the same function as ownership in terms of the investor's expectation of legal certainty and stability. As a result, the pre-lease right must be deemed to benefit from the protection against uncompensated State interference[167].

133. In the Committees' view, the Award leaves no doubt that the Tribunal decided not to accept Hungary's argument that there was no "*expropriation*" of an "*investment*" (meaning, in Hungary's submission, the farm) because the farm remained profitable even after the Claimants were deprived of the pre-lease rights, since in the Tribunal's view the relevant investment to be considered in the expropriation were the lease rights, as stated by the Claimants in their claim. It is well established that awards need not be exhaustive in expressly addressing each and every argument raised by the parties, particularly when the implicit rejection of an argument follows clearly from the stated reasoning of the award. That the Tribunal did not explicitly spell out the reasons why Hungary's "*investment as a whole*" argument was not accepted cannot be regarded as a serious omission, if it can be regarded as an omission at all.

[165] Award, **AF-3**, para 273.
[166] Award, **AF-3**, para 347.
[167] Award, **AF-3**, para 360.

iii. Mitigation

134. The arguments presented by the Respondent concerning an alleged failure to state the reasons for the decision on mitigation are close to those presented under Article 52(1)(b) of the ICSID Convention. For the reasons already explained above, the Committee finds no deficiency in the Tribunal's determination of damages on the basis of which the Award could be annulled.

VI. COSTS

A. THE PARTIES' POSITIONS

(1) Hungary's Costs Submissions

135. In requesting the *ad hoc* Committee to annul the Award in its entirety or partially and asking that the Claimants bear all costs of the proceeding, Hungary seems to endorse the rule "*the cost follow the event*"[168]. Hungary quantifies its costs in HUF 375,532,592 plus USD 349,287.20[169].

(2) The Claimants' Costs Submissions

136. The Claimants concur to the rule endorsed by Hungary that "*costs follow the event*" as this rule is routinely applied by *ad hoc* committees[170]. The Claimants quantify their costs in GBP 210,000 plus EUR 95,250[171].

B. THE COMMITTEE'S DECISION ON COSTS

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

[168] Memorial, para 233; Reply, para 203; Hungary's Statement of Costs, para 4.
[169] Hungary's Statement of Costs, para 3.
[170] Counter-Memorial, paras 140-144; Rejoinder, paras 53-54; Email from the Claimants of July 9, 2021.
[171] Claimants' Statement of Costs, excel table.

> 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.

138. 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.

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

Committee Members' fees and expenses	
President	58,943.36
Manuel Conthe	42,668.05
Michael Nolan	37,595.46
ICSID's administrative fees	84,000.00
Direct expenses[172]	6,631.29
Total	**229,838.16**

140. The above costs have been paid out of the advances made by the Applicant pursuant to Administrative and Financial Regulation 14(3)(e)[173].

141. Accordingly, the Committee orders the Applicant to bear all costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses and, given that the Claimants have prevailed with respect to all the grounds for annulment advanced by Hungary, and thus are the prevailing party in this annulment

[172] This amount includes actual charges relating to the dispatch of this Decision (printing, copying and courier).
[173] The remaining balance will be reimbursed to the Applicant.

proceeding, GBP 210,000 plus EUR 95,250 to cover the Claimants' legal fees and expenses, which amount the Committee regards as reasonable. Although the Committee has required the Applicant to pay the Claimants' costs, the Committee wishes to express its appreciation for the professional and useful manner in which both sides have conducted themselves in this annulment proceeding and notes that the quality of the written and oral submissions has greatly aided the Committee in its determination of the Annulment Application.

VII. DECISION

142. For the reasons set forth above, the *ad hoc* Committee decides as follows:

(1) Hungary's Application for Annulment is dismissed in its entirety;

(2) The stay of enforcement of the Award, decided by the Committee on September 11, 2020, is terminated.

(3) Hungary shall bear the costs of the annulment proceeding, including the fees and expenses of the Members of the Committee.

(4) Hungary shall reimburse the Claimants GBP 210,000 and EUR 95,250 for their legal costs and expenses in the annulment proceeding.

[redacted]

Mr. Manuel Conthe
Member of the *ad hoc* Committee

Date: November 14, 2021

[redacted]

Mr. Michael Nolan
Member of the *ad hoc* Committee

Date: November 15, 2021

[redacted]

Prof. Geneviève Bastid Burdeau
President of the *ad hoc* Committee

Date: November 14, 2021