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Investment Protection in National Courts and the ECJ in Light of the Rule of Law Crisis

Av Stefan Mayr

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1. INTRODUCTION

Intra-EU investment protection is undergoing significant changes. In May 2020, 23 Member States – all but Austria, Finland, Sweden and Ireland as well as the UK – signed an agreement for the termination of Bilateral Investment Treaties between each other (intra-EU BITs) *with immediate effect*. The agreement, which entered into force on 29 August 2020, is an important step to comply with the ECJ's seminal *Achmea*[1] ruling. In this decision, the ECJ found

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[1] Case C-284/16 *Slovak Republic v. Achmea BV* [2018] ECLI:EU:C:2018:158. The judgment raises many intricate legal issues, which have been discussed extensively and controversially in the literature. See, for example, Claus Dieter Classen, 'Autonomie des Unionsrechts als Festungsring? – Anmerkungen zum Urteil des EuGH (GK) v. 6.3.2018, Rs. C-284/16 (Slowakische Republik/ Achmea BV)' [2018] 53 Europarecht 361; Cristina Contarese & Mads Andenas, 'EU autonomy and investor-state dispute settlement under inter se agreements between EU Member States: Achmea' [2019] 56 CMLR 157; Christina Eckes, 'Some Reflections on Achmea's Broader Consequences for Investment Arbitration' [2019] 4 European Papers, 79; Szilárd Gáspár-Szilágyi, 'It Is not Just About Investor-State Arbitration: A Look at Case C-284/16 Achmea' [2018] 3 European Papers 357; Szilárd Gáspár-Szilágyi & Maxim Usynin, 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's Achmea Judgment' [2019] 4 European Inv L & Arb Rev, 29; Andreas von Goldbeck, 'Achmea – the aftermath' [2018–19] Juridisk Tidskrift, 929; Steffen Hindelang, 'Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgment in Achmea Put in Perspective' [2019] 44 Eur L Rev 383; Verena Madner & Stefan Mayr, 'Die Zukunft der Investitionsschiedsgerichtsbarkeit im europäischen Mehrebenensystem' [2019] 74 Österreichische Juristen-Zeitung 207; Csongor István Nagy, 'Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward

that the arbitration clause in an intra-EU BIT had an adverse effect on the autonomy of EU law and was therefore incompatible with it.[2]

The termination of intra-EU BITs is also in line with the European Commission's (EC) long-standing efforts to end intra-EU investment arbitration. According to the EC, such arbitration is not only incompatible with key tenets of EU law but also unnecessary, as EU law "provides investors with a high level of protection".[3] This seems to be somewhat at odds with the perception of (some) investors who voice concerns over a deteriorating investment climate in the EU.[4]

It is certainly true that the EU legal system provides *some* protection to cross-border investors in the single market. In light of the current rule of law crisis, however, investors may face serious challenges when seeking investment protection in national courts and the ECJ.[5] Given the systematic interference with the independence of the judiciary and the rights of judges in some Member States, the "special role and responsibility"[6] of national judges in the protection of intra-EU investment casts doubts on the effective enforcement of investors' rights under EU law. At the same time, putting an end to intra-EU investment arbitration is often seen as "strengthen[ing] the equal application of EU law".[7]

This contribution takes a closer look at the functioning of intra-EU investment protection in national courts and the ECJ through the prism of the current rule of law crisis in the EU. After briefly sketching some post-*Achmea* developments (II.) and recent threats to judicial independence in some Member States (III.), we turn to the future protection of intra-EU investments. Building on an exemplary case study concerning the cancellation of investors' rights relating to agricultural land in Hungary, the main part of this contribution explores potential shortcomings of the protection provided to investors under EU law (IV. and V.). We find that important limitations are not only deeply rooted in key characteristics of the EU judicial order but that they potentially

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and What Holds You Back"' [2018] 19 German L J 981; Jens Hillebrand Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust? ECJ 6 March 2018, Case C-284/16, Slovak Republic v Achmea' [2018] 14 EuConst 767; Wojciech Sadowski, 'Protection of the rule of law in the European Union through investment treaty arbitration: Is judicial monopolism the right response to illiberal tendencies in Europe?' [2018] 55 CMLR 1025; Sebastian Wuschka, 'Investment protection and the EU after Achmea' [2018] 21 Zeitschrift für europarechtliche Studien 25.

2 *Achmea* (n 1) paras 58–60.

3 EC, *Protection of intra-EU investment*, COM(2018) 547 final, 1 (subsequently, 'Protection of intra-EU investment').

4 EC, *Public Consultation Document, An intra-EU investment protection and facilitation initiative* [2020] 5 (subsequently 'Public Consultation Document').

5 Critical, for example, Sadowski (n 1) 1025 ff.

6 Protection of intra-EU investment (n 3) 1.

7 Hindelang (n 1) 384, also identifying "cautious hints" of "interlinking and enriching [the principle of autonomy] with some notions of the rule of law" (at 389).

affect all EU citizens. Thus, improving solely the enforcement of investment rules within the EU should be considered a second best solution, at best.

2. SETTING THE SCENE: ACHMEA AND ITS AFTERMATH

In the 1990s, the Europe Agreements encouraged central and eastern European countries aspiring to accede to the EU to conclude agreements on investment promotion and protection with (then) Member States.[8] However, post-accession, these agreements continued to provide protection to investments by (certain) EU investors. According to the EC, the almost 200 intra-EU BITs "became a parallel treaty system overlapping with single market rules".[9] The EC was concerned that these BITs would prevent the full application of EU law, discriminate among EU investors and undermine the judicial dialogue between national courts and the ECJ.[10] Thus, the EC repeatedly intervened in intra-EU investment arbitrations trying – with limited success – to persuade tribunals of their lack of jurisdiction.[11] Moreover, it called on Member States to terminate their intra-EU BITs and initiated infringement procedures against some Member States for their failure to do so.[12]

In 2018, the ECJ ruled in *Achmea* that the arbitration clause in an intra-EU BIT had an adverse effect on the autonomy of EU law and was therefore incompatible with EU law.[13] This seminal judgment has been a turning point for intra-EU investment arbitration. In January 2019, all Member States, while divided on the exact legal consequences of the Court's *Achmea* ruling, announced their shared intention to terminate their intra-EU BITs by the end of 2019. With a little delay, 23 Member States signed a plurilateral agreement to terminate their intra-EU BITs on 5 May 2020.[14] With respect to the first

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8 Cf, for example, art 72 of the Agreement with Hungary [1993] OJ L 347/2; art 73 of the Agreement with Poland [1993] OJ L 348/2; art 74 of the Agreement with Slovakia [1994] OJ L 359/2.

9 Protection of intra-EU investment (n 3) 2.

10 Protection of intra-EU investment (n 3) 2.

11 More recent examples include *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v Republic of Estonia*, ICSID Case No ARB/14/24, Award (21 June 2019) paras 493 ff; *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No ARB/15/49, Decision on Jurisdiction (7 February 2020) paras 139 ff. Also note that in the latter case one arbitrator found that the tribunal lacked jurisdiction based on intra-EU considerations, see Statement of Dissent of Professor Marcelo G Kohen (3 February 2020).

12 Cf EC, Press release (18 June 2015) https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198.

13 *Achmea* (n 1) paras 58–60.

14 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L 169/1 (subsequently, 'Termination Agreement'). Cf also EC, 'EU Member States sign an agreement for the termination of intra-EU bilateral

two signatories who had ratified it, i.e. Denmark and Hungary, the agreement entered into force on 29 August 2020.[15] Other Member States that have since notified their ratifications include Bulgaria, Croatia, Cyprus, Malta and Slovakia. Moreover, Spain applies the agreement provisionally.[16] Only four Member States and the UK[17] have not signed the Termination Agreement. While Ireland had already terminated its intra-EU BITs previously, the other non-signatories now face infringement charges by the EC.[18]

Simply put, the purpose of the Termination Agreement is twofold. On the one hand, it provides for the termination of intra-EU BITs *with immediate effect*.[19] On the other hand, it contains specific provisions on "concluded", "pending" and "new" arbitral proceedings.[20]

Thus, while the termination itself raises complex questions,[21] the vast majority of Member States seems determined to entrust the future protection of intra-EU investments to national courts and the ECJ. It is, of course, neither new nor exceptional that investors *may* seek redress in the national courts of the host state. A recent study has shown that investment treaty arbitration is mostly a "last resort" measure for foreign investors.[22] Thus, treaty-based investor-state arbitration has been described as the "visible tip of the iceberg" of investor-state dispute settlement in a broader sense.[23] To the extent, however, that access to

investment treaties' (May 05, 2020) https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en.

15 Cf art 16 (2) of the Termination Agreement.

16 For an overview, cf https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en# (last checked 4 December 2020).

17 While the UK is no longer a member of the EU, under the Withdrawal Agreement, EU law continues to apply during the transition period.

18 Cf Michael de Boeck, 'Disagreement on intra-EU BITs continues: Infringement actions over intra-EU BITS' (European Law Blog, 15 June 15 2020) https://europeanlawblog.eu/2020/06/15/disagreement-on-intra-eu-bits-continues-infringement-actions-over-intra-eu-bits/.

19 Cf art 2 and art 3 of the Termination Agreement.

20 Cf art 5–8 of the Termination Agreement. Art 9 provides for a structured dialogue for pending arbitration proceedings. Article 10 provides for access to national courts even if national time limits have expired where investors withdraw pending arbitration proceedings and waive all rights and claims under a BIT.

21 These include, e.g., the effective termination of the sunset clauses and the attempted retroactive withdrawal of consent for 'new arbitrations', which have been initiated after the ECJ's *Achmea* decision.

22 Daniel Behn, 'Performance of Investment Treaty Arbitration', in Theresa Squatrito et al (eds), *The Performance of International Courts and Tribunals* (CUP 2018) 77, 94–95.

23 Szilárd Gáspár-Szilágyi, 'Let us not forget about the Role of Domestic Courts in Settling Investor-State Disputes' [2019] 18 Law & Prac Int'l Cts & Tribunals 389, 390. Cf. also Szilárd Gáspár-Szilágyi, 'Why Do or Should Foreign Investors Resort to the Courts of the Host Country Prior to Investment Treaty Arbitration – A Study of Two Transitional and Two Well-Established Judiciaries', in Ole Kristian Fauchald, Daniel Behn & Malcolm Langford (eds), *The Legitimacy of Investment Arbitration. Empirical Perspectives* (CUP forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3527592.

treaty-based investment arbitration will be more limited in an intra-EU context, the figurative tip of the iceberg is melting. While these developments are in line with the EC's claim that EU law "provides investors with a high level of protection",[24] investors argue that the investment climate in the EU has deteriorated over the past years "due to a loss of trust in the effective enforcement of their rights".[25] This seems relevant for at least two reasons. Firstly, the EC itself acknowledges that EU law "does not solve all problems investors may face in their activities".[26] Secondly, we have witnessed recurring attacks on the independence of the judiciary in several Member States over the past years. In light of this rule of law backsliding, the "special role and responsibility"[27] of national judges – together with the ECJ – deserve closer scrutiny.

3. JUDICIAL INDEPENDENCE UNDER THREAT

EU institutions have been grappling with rule of law backsliding and the rise of illiberalism and nationalistic tendencies in a number of Member States for years.[28] Much of the focus in current debates is on Poland and Hungary, which are currently subject to procedures under Article 7(1) TEU. The EC triggered the procedure against Poland in late 2017 after a dialogue under the *Rule of Law Framework*[29] did not help to resolve severe rule of law deficiencies.[30] A few months later, the European Parliament initiated proceedings against Hungary.[31] In both cases, key concerns relate to threats to the independence of the judiciary in the two Member States.[32] However, it should be noted that the rule of law and judicial independence are by no means sacrosanct in all other Member States.[33] For example, commentators report that judges in Bulgaria who refuse to follow political orders are often subject to abuse, ranging "from tarnishing

[24] Protection of intra-EU investment (n 3) 1.
[25] Public Consultation Document (n 4) 5.
[26] Protection of intra-EU investment (n 3) 26.
[27] Protection of intra-EU investment (n 3) 1.
[28] Cf Dariusz Adamski, 'The social contract of democratic backsliding in the "new EU" countries' [2019] 56 CMLR 623, 625–6.
[29] EC, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final.
[30] Cf EC, *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland*, COM(2017) 835 final (Dec. 20, 2017) [subsequently 'Reasoned Proposal'].
[31] Cf European Parliament, *Resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded* (2017/2131(INL)), P8_TA(2018)0340 (Sept. 12, 2018) [subsequently 'Resolution'].
[32] Cf Reasoned Proposal (n 30) para 5; Resolution (n 31) para 1 and paras 7–19 of the Annex to the resolution.
[33] For a recent assessment see EC, *2020 Rule of Law Report – The rule of law situation in the European Union* COM(2020) 580 final (subsequently 'Rule of Law Report').

campaigns in pro-government media, through disciplinary proceedings and attempts of impeachment, to physical threats."[34] In addition to the countries mentioned, the EC's recent Rule of Law Report also identifies concerns regarding judicial independence in Croatia, Romania and Slovakia.[35]

In light of the sobering experiences with Article 7 TEU and the Rule of Law Framework, the Court of Justice has increasingly been called upon to deal with cases that involve systemic rule of law issues. Starting with its landmark ruling in *Associação Sindical dos Juízes Portugueses*,[36] the ECJ has transformed the value of the rule of law into a justiciable standard of review. As commentators have argued, the Court proactively used the case on Portuguese austerity measures to "creat[e] an opportunity to assess the controversial judicial reforms in Poland".[37] In the meanwhile, the EC has accepted the Court's "invitation"[38] and has repeatedly initiated infringement proceedings based on Article 19 TEU.[39]

The Court's "operationalization" of the rule of law is arguably also relevant for intra-EU investment protection. Member States must ensure that national courts, which decide on issues of intra-EU investment protection, meet the requirements identified in the Court's case law and provide effective judicial protection. As will be discussed in more detail below, however, the role of intra-EU investors – as well as other EU citizens and economic operators – in the enforcement of these obligations is limited.

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[34] Radosveta Vassileva, Is Bulgaria's Rule of Law about to Die under the European Commission's Nose? The Country's Highest-Ranking Judge Fears So (Verfassungsblog, 23 April 2019) https://verfassungsblog.de/is-bulgarias-rule-of-law-about-to-die-under-the-european-commissions-nose-the-countrys-highest-ranking-judge-fears-so/.

[35] Rule of Law Report (n 33) 11.

[36] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117.

[37] Matteo Bonelli & Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary' [2018] 14 EuConst 622, 635; Laurent Pech and Sébastien Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case' [2018] 55 CMLR 1827, 1828.

[38] Bonelli & Claes (n 37) 636.

[39] For example, Case C-619/18, *Commission v Poland (Independence of the Supreme Court)* [2019] ECLI:EU:C:2019:531; Case C-192/18, *Commission v Poland (retirement age of judges)* [2019] ECLI:EU:C:2019:924. Already earlier, commentators had explored the use of infringement proceedings to address systemic rule of law issues. Eg, Christophe Hillion, 'Overseeing the Rule of Law in the EU', in Carlos Closa & Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 59, 66–74; Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in Carlos Closa & Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 105–132; Matthias Schmidt and Piotr Bogdanowicz, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' [2018] 55 CMLR 1061.

4. PROTECTION OF INTRA-EU INVESTMENT – A "COMPLETE SYSTEM OF JUDICIAL REMEDIES"?

The EC emphasizes that intra-EU investors benefit from a wide variety of substantive and procedural safeguards. The former derive from the fundamental freedoms, the rights enshrined in the Charter, general principles of EU law as well as extensive secondary EU law.[40] However, in light of the rule of law backsliding in some of the Member States, the crux seems to be less with the existence of substantive safeguards but rather with the procedural safeguards and the effective judicial protection of cross-border investors.

According to the EC, EU law "enables the protection of cross-border investors in the EU through multiple ways and at different levels".[41] Investors seeking to enforce their rights ensuing from EU law can rely on "[a] complete system of judicial remedies at EU and Member State level".[42] As Koen Lenaerts has pointed out, "[t]he authors of the Treaties took the view that national courts were best placed to protect the […] rights of individuals [under EU law] as they are insulated from political considerations and are, in cooperation with the ECJ, entrusted with the task of upholding the rule of law within the EU."[43] Thus, cross-border investors can bring actions in the national courts of the host Member State. These courts may grant interim relief, disapply domestic acts conflicting with EU law or award damages under state liability rules, where the Member State has violated EU law. And if questions regarding the interpretation of EU law occur, a national court may – and courts of last instance must – request the ECJ for a preliminary ruling.[44]

However, the effectiveness of EU law – and individual rights derived from it – depends on "the willingness of its subjects to comply".[45] For example, Article 19(1) TEU obliges the Member States "to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law".[46] Yet, as the following section illustrates, cross-border investors are in a relatively week position as regards the enforcement of this obligation. They may request the EC or their home state to launch infringement proceedings

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40 Protection of intra-EU investment (n 3) 3.

41 Protection of intra-EU investment (n 3) 17. The judicial enforcement of their rights is considered "one of several possible solutions" (ibid).

42 Ibid.

43 Koen Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (not yet blind) trust' [2017] 54 CMLR 805, 809.

44 Cf art 267 TFEU.

45 Andreas Hofmann, 'Resistance against the Court of Justice of the European Union' [2018] 14 Int'l J L in Context 258, 259.

46 *Associação Sindical dos Juízes Portugueses* (n 36) para 34.

but they cannot themselves initiate such proceedings with the ECJ.[47] Similarly, it is for the domestic courts to decide whether to ask the Court of Justice for a preliminary ruling according to Article 267 TFEU or not. This is why, "where judicial independence is lacking, the preliminary reference procedure becomes devoid of purpose".[48]

Against this background, we now turn to what appears to be a "test case" for future intra-EU investment protection in national courts and the ECJ. Drawing on this case, we will analyse potential limitations and weaknesses of the legal remedies available to cross-border investors under EU law and discuss their wider implications as regards effective judicial protection in the EU.

5. CASE STUDY – CANCELLING OF USUFRUCT RIGHTS OVER AGRICULTURAL LAND IN HUNGARY

In light of the rule of law backsliding in several Member States, the termination of intra-EU BITs with immediate effect may expose investors to unexpected risks. The following section thus takes a closer look at the protection available to intra-EU investors under the EU legal system. We will conduct our analysis in the context of Hungarian legislation cancelling usufruct rights over agricultural land.

5.1 The measure at issue

The measure at issue – i.e. the *ex lege* cancelling of rights of usufruct over agricultural land in Hungary and their deletion from the property register – has its roots in the late 1980s and early 1990s. For a better understanding of the dispute, a brief outline of its development in a politically charged regulatory context seems useful.

In the early 1990s, Hungary privatized substantial parts of previously state-owned agricultural land.[49] At the same time, Hungary gradually introduced prohibitions on the acquisition of agricultural land by natural persons not possessing Hungarian nationality and by legal persons whether established in Hun-

[47] Of course, the EC, as "guardian of the Treaty" can always take the initiative and review national measures and take action in order to ensure compliance with EU safeguards protecting investors, cf art 17(1) TEU.

[48] Koen Lenaerts, 'The Court of Justice and national courts: a dialogue based on mutual trust and judicial independence', Speech at the Supreme Administrative Court of the Republic of Poland, Warsaw (19 March 2018), www.nsa.gov.pl/download.php?id=753&mod=m/11/pliki_edit.php.

[49] Cf *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v Hungary*, ICSID Case No ARB/17/27, Award (13 Nov 2019) para 109.

gary or not.[50] At least initially, however, investors falling under this prohibition remained free to acquire usufruct rights over agricultural land. This opportunity to invest in agricultural land was only eliminated as of 1 January 2002. Importantly, when acceding to the EU, Hungary was granted a temporary right to maintain the then existing prohibitions on the acquisition of agricultural land.[51] The initial 7-year transitional period was later extended until 30 April 2014.[52]

In 2012, a further amendment to the 1994 law on arable land provided that "any right of usufruct existing on 1 January 2013 and created, for an indefinite period or for a fixed term expiring after 30 December 2032, by a contract between persons who are not close members of the same family shall be extinguished by operation of law on 1 January 2033."[53] Only a few months later, in December 2013, the 20-year transitional period was abolished and replaced by a transitional period of barely 4 ½ months before existing rights of usufruct created by contract between persons who are not close members of the same family were to be cancelled *ex lege* on 1 May 2014. Additionally, the amendment provided for the swift deletion of such usufruct rights from the property register.[54]

5.2 Why is this an instructive example?

The Hungarian measure provides an instructive example for a number of reasons. Firstly, the circumstances of its introduction and its expropriating effects arguably make it a textbook case of investment protection, be it at the domestic or international level.[55] Secondly, Hungary is one of the EU Member States at the epicentre of the rule of law crisis. It has been undergoing a "constitutional metamorphosis"[56] for years.[57] Its Constitutional Court has been captured and largely neutralized; the age-limit for compulsory retirement of judges has been lowered;[58] decisions on the appointment and careers of judges in ordinary

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[50] While a government decree had previously precluded the acquisition of productive land by natural persons not having Hungarian nationality, the 1994 law on arable land extended this prohibition to legal persons, cf case C-235/17, *Commission v Hungary (usufruct rights)* [2019] EU:C:2019:432, paras 8–9.

[51] Art 24 of the 2003 Act concerning the conditions of accession in conjunction with its Annex X Chapter 3 paragraph 2, [2003] OJ L 236/33.

[52] Cf Commission Decision 2010/792/EU of Dec. 20, 2010.

[53] Joined cases C-52/16 & C-113/ 16 *SEGRO & Horváth* [2018] ECLI:EU:C:2018:157 para 8; *Commission v Hungary* (n 50) para 11.

[54] Cf. *SEGRO & Horváth* (n 53) paras 5–14; *Commission v. Hungary* (n 50) paras 7–17.

[55] On differences that help explain the choice of remedies see Gáspár-Szilágyi, (n 23) 403–407.

[56] Renáta Uitz, 'Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary' [2015] 13 ICON 279, 280.

[57] Cf, for example, Mark Dawson & Elise Muir, 'Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law' [2013] 14 German LJ 1959.

[58] Cf case C-286/12 *Commission v Hungary (retirement age of judges)* [2012] ECLI:EU:C:2012:68. Scheppele (n 39) notes that "[w]hile the Commission […] won a resounding victory at the

courts have been politicized; and a separate system of administrative courts dealing with cases of public interest has been established.[59] Moreover, the Hungarian case is interesting, as some economic policies in Hungary in recent years have been described as "extortionary towards foreign investors […] with EU law essentially unable to effectively confront [them]".[60]

Thus, it is probably no coincidence that the ECJ first ruled on the cancelling of usufruct rights *on the same day* as it issued its *Achmea* decision. More precisely, the Court of Justice has dealt with the cancellation of usufruct rights over agricultural land in Hungary in two cases. The first case, *SEGRO & Horváth*,[61] concerned two references for preliminary rulings under Article 267 TFEU. *Commission v. Hungary*[62] concerned an infringement action brought by the Commission under Article 258 TFEU. As the measures at issue and key findings of the ECJ in both cases largely overlap, they will subsequently be analysed together. Importantly, the focus is not on the details of the ECJ's reasoning regarding the substantive safeguards, but rather on what the cases can tell us about the enforcement of investors' rights under EU law.[63] Taken together, these cases are not only a prime example for how intra-EU investment protection in national courts and the ECJ functions but also reveal potential weaknesses of the protection provided.

5.3 Brief summary of key findings of the ECJ

In both cases, concerns were raised, *inter alia*, with regard to the compatibility of the Hungarian measure with the freedom of establishment enshrined in Article 49 TFEU, the free movement of capital enshrined in Article 63 TFEU and the right to property enshrined in Article 17 CFR.

ECJ, the Hungarian government was able to avoid restoring the most important judges to their prior jobs" (at 109, references omitted).

59 For a detailed overview, e.g., Kriszta Kovács & Kim Lane Scheppele, 'The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union' [2018] 51 Communist & Post-Communist Studies 189, 191–3; on the separate system of administrative courts see Venice Commission, *Hungary: Opinion on the Law on Administrative Courts and on the Law on the Entry into Force of the Law on Administrative Courts and Certain Transitional Rules*, CDL-AD(2019)004 (19 March 2019); Renáta Uitz, 'What Does the Spring Bring for the Rule of Law in Europe?' (Verfassungsblog, 6 April 2019) https://verfassungsblog.de/what-does-the-spring-bring-for-the-rule-of-law-in-europe/.

60 Adamski (n 28) 631–2. Cf. also Marton Varju & Mónika Papp, 'The Crisis, National Economic Particularism and EU Law: What Can We Learn from the Hungarian Case?' [2016] 53 CMLR 1647, 1656 ff.

61 Cf *SEGRO & Horváth* (n 53).

62 Cf *Commission v Hungary* (n 50).

63 For a detailed analysis of *SEGRO & Horváth*, see Xavier Groussot, Niels Kirst & Patrick Leisure, 'SEGRO and its Aftermath: Between Economic Freedoms, Property Rights and the "Essence of the Rule of Law"' [2019] 2 Nordic J Eur L 69.

In essence, the ECJ found that the measure restricts the free movement of capital "by virtue of its subject matter".[64] This raised the question whether the measure could be justified by overriding reasons in the public interest or by the reasons referred to in Article 65 TFEU and whether it complied with the principle of proportionality. In *SEGRO & Horváth*, the ECJ emphasized that it was ultimately for the national court to determine whether these requirements were met in the concrete case, as it had sole jurisdiction to assess the facts and interpret the national legislation.[65] However, in order to "enable the national court to give judgment", the ECJ then moved on to providing detailed *guidance* as to whether the measure may be justified.[66]

For example, Hungary had argued that the measure was justified by public interest objectives relating to the farming of agricultural land, such as "limit[ing] the ownership of productive land to the persons who work it and [preventing] its acquisition for purely speculative purposes".[67] The Court considered that these objectives were in line with common agricultural policy goals and could therefore, in principle, justify restrictions on the free movement of capital.[68] However, the Court found that the measure at issue had no direct connection with any of the legitimate objectives. In particular, the Court explained why preserving existing usufruct rights only if the usufructuary is a close relation of the landowner was neither appropriate nor necessary for pursuing these objectives.[69]

Furthermore, the justifications put forward by Hungary under Article 65(1)(b) were eventually rejected under proportionality considerations. Hungary had argued that the measure aimed to penalize infringements of national exchange control laws and that it was justified on grounds of public policy, as a means to prevent abusive practices circumventing the statutory prohibition that prevented non-nationals from acquiring agricultural land.[70] As regards the first argument, the Court, found systematically extinguishing usufruct rights except where right holders demonstrate a close family tie with the landowner was unrelated to the legislation concerning exchange controls, in particular, as the overwhelming majority of usufructuaries affected by the legislation at issue were Hungarian nationals.[71] Moreover, the Court pointed out that less restrictive alternatives, such as administrative fines, make the measure appear dispropor-

64 *SEGRO & Horváth* (n 53) para 62; *Commission v Hungary* (n 50) para 58.
65 *SEGRO & Horváth* (n 53) para 79.
66 Ibid paras 79 ff.
67 Ibid para 81. Further public interest objectives put forward by Hungary included facilitation of the creation of properties that allow for viable and competitive agricultural production, or preventing migration from rural areas, which leads to depopulation of the countryside.
68 *SEGRO & Horváth* (n 53) para 82; *Commission v Hungary* (n 50) paras 91–92.
69 *SEGRO & Horváth* (n 53) paras 86–94; *Commission v Hungary* (n 50) paras 95, 99–100.
70 Cf *SEGRO & Horváth* (n 53) paras 97, 112.
71 Interestingly, the Court here used the Hungarian government's own argument – unsuccessfully invoked to demonstrate the non-discriminatory nature of the measure.

tionate at any rate.[72] As regards the prevention of practices designed to circumvent national law, the Court pointed out that such a justification is only permissible "in so far as it specifically targets wholly artificial arrangements".[73] The usufruct rights in question, however, were created at a time when this was not (yet) prohibited by national legislation. Moreover, the Court clarified that a *general presumption* of abusive practices could not justify restrictions on the free movement of capital, as the principle of proportionality requires a case-by-case assessment of any allegedly fraudulent conduct.[74]

As the restriction on the free movement of capital could not be justified, the Court refrained from addressing the concerns raised with regard to Articles 17 and 47 of the Charter in *SEGRO & Horváth*. However, the fundamental rights issue was raised again in *Commission v Hungary* with regard to the right to property guaranteed by Article 17 CFR. The Court found the Charter to be applicable where national legislation conflicts with fundamental freedoms and the Member State "relies on grounds envisaged in Article 65 TFEU, or on overriding reasons in the public interest that are recognized by EU law, in order to justify such an obstacle".[75] Consequently, a measure can only be justified under the fundamental freedoms if it *also* complies with the relevant fundamental rights enshrined in the Charter.[76] The Court reiterated that Article 17 CFR protected "rights with an asset value creating an established legal position […] enabling the holder to exercise those rights autonomously and for his or her own benefit".[77] It found that the measure at issue deprived the right holders of their possessions unlawfully because, among other things, it did not provide for fair compensation.[78] Thus, in *Commission v Hungary*, the Court found that the Hungarian measure infringed both the free movement of capital and the right to property and that Hungary had "failed to fulfil its obligations under Article 63 TFEU in conjunction with Article 17 of the Charter".[79]

5.4 Lessons for future intra-EU investment protection in national courts and the ECJ

SEGRO & Horváth and *Commission v Hungary* illustrate key tenets of the functioning of intra-EU investment protection in national courts and the ECJ. *SEGRO & Horváth* presented an opportunity to reassure intra-EU investors

[72] *SEGRO & Horváth* (n 53) paras 102–7; *Commission v Hungary* (n 50) paras 102–9.
[73] *SEGRO & Horváth* (n 53) para 115; *Commission v Hungary* (n 50) para 112.
[74] *SEGRO & Horváth* (n 53) paras 116–7; *Commission v Hungary* (n 50) paras 114–5.
[75] *Commission v Hungary* (n 50) para 64.
[76] Ibid para 66.
[77] Ibid para 69.
[78] Ibid para 125.
[79] Ibid para 131.

that their rights will be protected despite the far-reaching consequences of the *Achmea* decision of the same day. Additionally, finding infringements of the free movement of capital *and* the right to property enshrined in the Charter in *Commission v Hungary* seems to underline the robustness of the protection EU law offers in light of the rule of law backsliding. Hungary has a duty to comply with the declaratory judgment of the Court of Justice. Non-compliance would constitute another infringement and could lead to an enforcement action, pursuant to which the Court can impose financial sanctions.[80] Moreover, individuals or companies affected by the cancellation of their rights may bring claims of state liability and seek damages in the national courts.[81] However, despite the overall positive results, the two cases also reveal limitations and potential weaknesses of investment protection in national courts and the ECJ.

5.4.1 Preliminary references – National courts in the limelight

5.4.1.1 Wide discretion and importance of judicial non-conformism

In *SEGRO & Horváth*, the Administrative and Labour Court of Szombathely had requested the Hungarian Constitutional Court – without success – to declare the cancellation and deletion of the rights of usufruct unconstitutional prior to its preliminary references. Subsequently, the national court "side-lined" the Constitutional Court, making use of its right to request a preliminary ruling. The ECJ rejected the government's argument that the national court was bound by the decision of the Constitutional Court and emphasized that "national courts have the widest discretion to refer to the Court of Justice questions of interpretation of relevant provisions of EU law".[82] *SEGRO & Horváth* can thus be seen as a textbook example of successful cooperation between national courts and the ECJ.

However, the case also highlights the extent to which the functioning of this cooperation depends on national judges' willingness to make use of their wide discretion, possibly even to contradict higher courts, and thus to risk exposing themselves. When facing the threat that such *judicial non-conformism* may lead to severe disciplinary measures – as seems to be the case under Polish legislation,

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[80] Cf art 260 TFEU. On risks of non-enforceability with the ECJ's rulings, cf Schmidt & Bogdanowicz (n 39) 1074.

[81] Richard Schmidt, 'European Union: European Investors vs Hungary 2:0 – Hungarian Land Act Condemned Again in Luxembourg' (27 May 2019), https://www.mondaq.com/corporate-and-company-law/808764/european-investors-vs-hungary-20-hungarian-land-act-condemned-again-in-luxembourg.

[82] *SEGRO & Horváth* (n 53) para 48.

which is currently subject to an infringement action[83] – this willingness may subside quickly. National courts may then choose not to refer questions to the Court of Justice in order to avoid any adverse consequences. While consistent with Article 267 TFEU (unless there is no judicial remedy against the court's decision under national law), such submissiveness could seriously undermine the system of judicial cooperation.[84] Moreover, from an investor perspective the national courts' wide discretion to refer questions for a preliminary ruling may be perceived as a weakness even in less extraordinary circumstances. As the Court recalled in *SEGRO & Horváth*, "it is solely for the national court before which the dispute has been brought […] to determine […] the need for a preliminary ruling in order to enable it to deliver judgment".[85] Thus, an investor's influence on whether a reference is made and which questions are submitted is limited.

5.4.1.2 Providing guidance, ensuring compliance?

The effectiveness of the judicial dialogue generally hinges on national courts' compliance with preliminary rulings. As noted above, the *guidance* provided by the ECJ in *SEGRO & Horváth* as regards the justification of the measure at issue is strikingly detailed. Commentators have pointed out that "[t]he tight leash is indicative of the fact that the Court is wary of Hungarian courts spinning the reasoning against the desired protection of the free movement of capital".[86] Indeed, the ECJ seems to anticipate – and, thus, try to avoid *ex ante* – difficulties in ensuring compliance with its preliminary ruling. Still, in the context of preliminary rulings, it is ultimately the national court, which has jurisdiction to assess the facts and interpret domestic legislation. Given the large number of former usufructuaries who might seek damages for having their rights deleted from the property registers in violation of EU law, it has been pointed out that Hungarian courts may indeed have "an incentive to follow the Constitutional Court's reasoning rather than that of the Court of Justice".[87] From an investor perspective, the danger of national courts being exposed or even susceptible to

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[83] Case C-791/19, *Commission v Poland (disciplinary measures)* [pending]. See also the recent granting of interim measures case C-791/19 R *Commission v Poland (disciplinary measures)* [2020] ECLI:EU:C:2020:277.

[84] According to art 267(3) TFEU, only courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law, are principally under an obligation to bring questions regarding the interpretation of EU law before the Court of Justice. A failure to refer may exceptionally lead to infringement proceedings or state liability claims. However, the Court has also recognized certain exceptions to the obligation under art 267(3) TFEU (so-called acte clair doctrine), cf case 283/81 *CILFIT* [1982] ECLI:EU:C:1982:335.

[85] *SEGRO & Horváth* (n 53) para 42.

[86] Groussot, Kirst & Leisure (n 63) 79.

[87] Ibid 80.

government pressure is obviously a fundamental problem and has been one of the standard arguments in favour of investor-state arbitration.

5.4.2 Infringement proceedings – A new kind of diplomatic protection?

5.4.2.1 Addressing systemic weaknesses

Infringement proceedings offer a way of dealing with the failure of a Member State to fulfil its obligations under EU law. The EC as "guardian of the Treaty" can review national measures and initiate infringement proceedings to ensure compliance with EU safeguards protecting investors.[88]

In its communication on the protection of intra-EU investment, the EC underlines its commitment "to act firmly on infringements which obstruct the implementation of important EU policy objectives or which risk undermining the four fundamental freedoms, which are essential for investors".[89] The EC, however, also makes clear that its priority is on "infringements that reveal systemic weaknesses and in particular to those which affect the capacity of national judicial systems to contribute to the effective enforcement of EU law".[90] Thus, infringement proceedings, for example, have been used (and proved remarkably effective so far) in the context of a series of "judicial reforms" in Poland.[91]

However, it is important to keep in mind that investors can only complain about infringements to their home state or the EC. Whether a state or the EC initiate proceedings under Articles 258 or 259 TFEU is within their political discretion.[92] In many ways, this resembles the system of diplomatic protection under traditional international law.[93] While the infringement process may be effective in addressing systemic weaknesses, it is clearly neither suited nor intended to substitute actions by individual investors seeking either the annulment of a contentious measure or financial compensation for damages caused.

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88 Protection of intra-EU investment (n 3) 25.

89 Ibid 26.

90 Ibid.

91 Cf Adamski (n 28) 657.

92 Member States may initiate infringement proceedings pursuant to art 259 TFEU, they have been rather reluctant to do so. For a recent example see case C-591/17 *Austria v Germany* [2019] ECLI:EU:C:2019:504. Obviously, investors will often seek government support already at earlier stages; cf, for example, *Magyar Farming* (n 49) paras 137–40, 158–63.

93 On "traditional" diplomatic protection in the context of investment protection, for example, Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 232–4.

5.4.2.2 No substitute for individual actions

An interesting example illustrating this dilemma concerns another aspect of agricultural land reform in Hungary: certain changes regarding statutory prelease rights on state-owned agricultural land.[94] In one case which involved allegations of manipulating tenders and political favoritism, these changes to the legal regime eventually led to an arbitral award under the UK-Hungary BIT[95] finding the intra-EU investor had been expropriated.[96] Yet, despite high-level political interventions and extensive litigation in domestic courts, these changes to the legal regime have not – to our knowledge – given rise to any preliminary references or infringement proceedings.[97] Rather, and not without a certain irony, the EC intervened in the arbitral proceedings as a non-disputing party, trying to persuade the tribunal of its own lack of jurisdiction in light of the *Achmea* judgment.[98]

6. CONCLUSION AND OUTLOOK

While it is certainly true that the EU legal system provides *some* protection to cross-border investors in the single market, the present article identifies a number of limitations when it comes to the enforcement of investment rules under EU law. Importantly, given the "special role and responsibility" of national judges in the protection of individual rights, attacks on their independence in certain Member States pose a serious threat of exacerbating these limitations.

As regards the preliminary reference procedure, two limitations arguably stand out from an investor's perspective: the national courts' wide and sole discretion whether to make a reference and the vital importance of judicial non-conformism. The case study shows that even in Member States at the epicentre of the rule of law crisis, the judiciary is no "monolithic sector"[99] that has been fully captured and politicized (yet). However, judicial non-conformism is likely to crumble under persistent political pressure, for example, where dis-

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[94] Subject to further conditions, leasing agricultural land from Hungarian nationals or the state was an alternative to acquiring rights of usufruct for non-nationals under the 1994 law on productive land. For a summary of the legislative developments cf *Magyar Farming* (n 49) paras 109 et seq.

[95] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments, 1987.

[96] Note that Hungary has filed a request for annulment of the award in March 2020.

[97] As regards the domestic court proceedings in Hungary cf *Magyar Farming* (n 49) paras 144–8. This is in line with studies showing that investors tend to first seek redress in domestic courts. See Gáspár-Szilágyi (n 23) 401.

[98] *Magyar Farming* (n 49) paras 59–61.

[99] Theodore Konstadinides, 'Judicial independence and the rule of law in the context of non-execution of a European Arrest Warrant: LM' [2019] 56 CMLR 743, 754.

ciplinary measures are imposed on non-conformist judges for making preliminary references. The EC has shown its commitment to pursue such systemic threats and has brought a number of infringement proceedings against Member States which have undermined the independence and effectiveness of their own courts. Infringement proceedings are, however, neither suited nor intended to substitute actions by individual investors. Investors can only complain about infringements to their home state or the EC. However, whether a state or the EC initiates proceedings is within their political discretion. Thus, in many ways, infringement proceedings appear similar to diplomatic protection under traditional international law. Moreover, even if the ECJ finds an infringement, investors who have suffered harm and have a right to reparation might experience difficulties when trying to enforce their state liability claim in national courts.[100]

In light of these limitations, investors are likely to pursue alternative avenues in the future protection of their intra-EU investments.

Firstly, EU investors may restructure their investments in a way that gives them access to investor-state arbitration under existing BITs with third countries. For example, Switzerland and the UK currently have 23 BITs with EU Member States. This may explain, at least partially, the UK's hesitation to terminate its "intra-EU" BITs.[101]

Secondly, it should be noted that the most frequent basis for intra-EU investment arbitration is the Energy Charter Treaty (ECT).[102] Whether intra-EU investment arbitration under the ECT is compatible with EU law is subject to much debate, including among EU Member States. In their 2019 declarations, a majority of 22 Member States inferred from the *Achmea* judgment that intra-EU investment arbitration under the ECT is incompatible with EU law, while a group of five Member States[103] noted that *Achmea* is silent on the matter and therefore considered it inappropriate to express any views. Hungary explicitly stated that *Achmea* "does not concern any pending of prospective arbitration proceedings under the ECT."[104] The question remains unresolved. While an Advocate General at the ECJ recently opined that "it may even be the case […] that the Energy Charter is entirely inapplicable to [intra-EU] disputes",[105]

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[100] Cf Public Consultation Document (n 4) 14.

[101] Cf also de Boeck (n 18).

[102] A 2018 survey by UNCTAD found that the ECT accounted for roughly 45% of known intra-EU cases. See UNCTAD, Fact Sheet on Intra-European Union Investor-State Arbitration Cases, IIA Issues Note, December 2018, 3.

[103] Finland, Luxembourg, Malta, Slovenia and Sweden.

[104] All three declarations are available at https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.

[105] Joined Cases C-798/18 and C-799/18 *Federazione nazionale delle imprese elettrotecniche ed elettroniche (Anie) and Others* [2020] Opinion of AG Saugmandsgaard Øe, ECLI:EU:C:2020:876 footnote 55.

the ECJ has not, thus far, ruled on this question.[106] In this context, it deserves mention that an EU proposal for the modernization of the ECT published in May 2020 does not address the issue of intra-EU investment arbitration.[107] Belgium, however, recently submitted a request to the ECJ for an opinion on the intra-EU application of the arbitration provisions of a future modernized ECT.[108]

Thirdly, another alternative could be increasingly resorting to *contract-based* investor-state arbitration. In *Achmea*, the Court drew a seemingly clear-cut line between investment arbitration based on intra-EU BITs and commercial arbitration.[109] Does this mean that *contract-based* investor-state arbitration (sometimes referred to as "investomercial arbitration"[110]) is compatible with EU law, as long as the parties have freely expressed their wish to resolve their dispute via arbitration? If so, EU investors could still rely on international arbitration based on such a contract as a "substitute for domestic inadequacies",[111] despite the termination of intra-EU BITs. However, even if some older case law could be seen as supporting this view,[112] the compatibility of contract-based investor-state arbitration with the post-*Achmea* understanding of the autonomy of EU law appears highly doubtful. In Achmea, the Court took issue with Member States establishing a mechanism for settling disputes between an investor and a Member State, "which could prevent those disputes from being resolved in a manner that ensures the full effectiveness of EU law, even though they might concern the interpretation or application of that law".[113] In our view, concluding an investment contract that provides for investor-state arbitration may lead to a similar result as regards "the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling proce-

[106] In this context, it is noteworthy that the Svea Court of Appeal has repeatedly rejected Spain's requests to make references for preliminary rulings in the domestic set-aside proceedings concerning the awards in *Novenergia v Spain* (SCC Case No 2015/063) as well as *Foresight, Greentech, GWM v Spain* (SCC Case No 2015/150). Cf, for example Damien Charlotin, 'Swedish Court Declines to Refer Preliminary Questions to the CJEU in Foresight Case; EU Commission Authorised to Intervene in Set-Aside Proceedings' (*IAReporter*, 6 November 2020) https://www.iareporter.com/articles/swedish-court-declines-to-refer-preliminary-questions-to-the-cjeu-in-foresight-case-eu-commission-authorised-to-intervene-in-set-aside-proceedings/.

[107] The proposal is available at https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf.

[108] Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation, Press release (3 December 2020) https://diplomatie.belgium.be/en/newsroom/news/2020/belgium_requests_opinion_intra_european_application_arbitration_provisions.

[109] *Achmea* (n 1) paras 54–55.

[110] Charles N Brower, 'State Parties in Contract-Based Arbitration: Origins, Problems and Prospects of Private-Public Arbitration' [2019] 1 ITA in Review 107, 108.

[111] David Collins, *Performance Requirements and Investment Incentives Under International Economic Law* (Edward Elgar 2015) 189.

[112] Cf case C-536/13 *Gazprom* [2015] ECLI:EU:C.2015:316.

[113] *Achmea* (n 1) para 56.

dure provided for in Article 267 TFEU".[114] A case currently pending in the ECJ is likely to shed light on the implications of the *Achmea* decision on such forms of public-private arbitration.[115]

In conclusion, it should be recalled that where judicial independence is under threat, shortcomings in judicial protection affect EU citizens more broadly, not only cross-border investors. Unlike (some) EU investors, the vast majority of EU citizens cannot bypass national courts. For better or worse, they depend on these courts for the protection of their rights. Thus, solely improving the enforcement of EU investment rules – for example, by establishing a specialized body or court at the EU level[116] – falls short of addressing the limitations of judicial protection in the EU legal system more broadly. Whether *Achmea* and the subsequent developments will, in the long run, contribute to more effective judicial protection *for all investors and EU citizens* "inside – not outside – the EU legal system and the Member States' courts"[117] remains to be seen.

[114] *Achmea* (n 1) para 58.
[115] Case C-109/20, *PL Holdings* [pending].
[116] Cf. Public Consultation Document (n 4) 15. Cf also the declarations of Luxembourg and Portugal in connection with the Termination Agreement, available at https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en.
[117] Hindelang (n 1) 391.