

Decision 3284/2020 (VII. 17.) AB

on the dismissal of a petition seeking an *ex post facto* review

In the matter of an *ex post facto* abstract norm control, with the concurring reasonings by Justices *dr. Ágnes Czine* and *dr. Egon Dienes-Oehm*, as well as the dissenting opinion by Justice *dr. Béla Pokol*, the Constitutional Court, sitting as the Full Court, adopted the following

decision:

The Constitutional Court hereby dismisses the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Clauses 5.2 to 5.4, 6.1 and 6.4 as well as Clause 11.1 of the Agreement between the International Investment Bank and the Government of Hungary regarding the Headquarters of the International Investment Bank in Hungary, as contained in Section 3 of Act XI of 2019 on the Promulgation of the Agreement between the International Investment Bank and the Government of Hungary regarding the Headquarters of the International Investment Bank in Hungary and of the Amendment to the Charter annexed to the Agreement on the Establishment of the International Investment Bank, signed in Moscow signed on 10 July 1970 and amended on 20 December 1990 as promulgated by Act XLI of 2015.

Reasoning

I

[1] 1. Fifty-three Members of Parliament (hereinafter referred to as the "petitioners") have petitioned the Constitutional Court relying on Article 24 (2) (e) of the Fundamental Law and Section 24 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act") seeking an *ex post facto* norm control for a finding that Clauses 5.2 to 5.4, 6.1 and 6.4 as well as Clause 11.1 of the Agreement between the International Investment Bank and the Government of Hungary regarding the Headquarters of the International Investment Bank in Hungary, as contained in Section 3 of Act XI of 2019 on the Promulgation of the Agreement between the International Investment Bank and the Government of Hungary regarding the Headquarters of the International Investment Bank in Hungary (hereinafter referred to as the "Act") and of the Amendment to the Charter annexed to the Agreement on the Establishment of the International Investment Bank, signed in Moscow signed on 10 July 1970 and amended on 20 December 1990 as promulgated by Act XLI of 2015 (hereinafter referred to as the "Agreement") are contrary to Article E (1), Article XXVIII (1) and (7), Article 25, Article 41 (2) and Article 46 (1) of the Fundamental Law and

the Members have also requested that the Constitutional Court annul said provisions retroactively to their entry into force.

[2] The petitioners referred to the findings of Decision 4/1997 (I. 22.) AB and Decision 30/1998 (VI. 25.) AB, as their petition is directed to finding the provisions of an Act promulgating an international treaty to be in breach of the Constitution. Consequently, although the Constitutional Court's decision cannot directly affect the content of the international legal obligation entered into by Hungary, the petitioners consider, in accordance with the Constitutional Court's previous decision, that Hungarian law cannot give effect to an international obligation whose content would result in a violation of the Fundamental Law.

[3] 2. The grounds for the initiation of the proceedings set out in the petition are as follows.

[4] The fundamental purpose of the International Investment Bank (hereinafter referred to as the "Investment Bank") is to promote economic development, the competitiveness of national economies, trade and economic relations and investment-related cooperation opportunities in the interests of its member states. It is alleged by the petitioners that Clause 5 of the Agreement recognises in the Hungarian legal order the Investment Bank's financial institution powers which go far beyond its function as a development and investment bank. Indeed, pursuant to Clause 5.1 of the Act, "[t]he Bank shall have powers (without any limitation) to:

(a) arrange and provide financing (or co-financing) for the investment projects and programmes of the Bank's members and organisations operating in the territory of the Bank's member states, as well as other projects consistent with the Bank's lending policy, including in the form of providing loans to, or acquiring equity interests in, organisations, using its own funds and funds raised in international and national financial markets, as well as other available resources;

(b) engage in securities and derivatives transactions, conclude financial contracts, issue bonds and other financial instruments, receive, purchase, hold and dispose of any funds, currencies, financial instruments, securities and precious metals and other commodities, operate accounts in any currency;

(c) provide investment and banking services;

(d) provide financial leasing services;

(e) finance, and provide guarantees for, export and import operations between organisations operating in the territory of member states, between member states of the Bank and other states, and between organisations operating in the territory of member states and organisations of other states;

(f) act as a trustee of special purpose and investment funds established by the Bank's members, organisations of the Bank's member states and other organisations;

(g) provide consulting, information and analytical services;

(h) provide advisory assistance to organisations and government agencies of the Bank's member states regarding arranging and providing financing for investment projects and

programmes, as well as foreign trade operations within the framework of the Bank's development strategy;

(i) cooperate with government authorities and agencies, international organisations and other establishments, procure cooperation between organisations of the Bank's member states and organisations in other states; and

(j) conclude any other deals and transactions that are consistent with the aims and objectives provided for in the Agreement Establishing the Bank."

[5] The petitioners refer in particular to the fact of being "without any limitation", which allows the Investment Bank to provide a very wide range of financial services, both within and outside its core function of banking services, not based on a licence granted by the competent authority, that is, the National Bank of Hungary, based on the existence of legal conditions, but on the Act itself and the international treaty.

[6] In the petitioners' view, the privileges provided for in the Clauses 5.2 to 5.4, 6.1, 6.4 and 11.1 of the Act ensure that the Investment Bank can carry out its activities in Hungary fully and independently, on the basis of requirements determined by itself, free from the imposition of accounting standards. Its banking activities are not subject to domestic financial and regulatory supervision, licensing and registration requirements, and its assets, archives and operations are exempt from any legal proceedings and any official or judicial measures. Finally, the Investment Bank may engage in any banking or investment activity, regardless of any conditions, restrictions or prohibitions under Hungarian law.

[7] The petitioners refer to Decision 36/2014 (XII. 18.) AB (hereinafter referred to as the "2014 Court Decision") and Decision 9/2018 (VII. 9.) AB (hereinafter referred to as the "2018 Court Decision"), the former in particular because it considers in detail the legal nature of the privileges and immunities granted to international organisations, the latter decision being relevant in relation to the jurisdiction of Hungarian bodies and the invocability of Article 25 of the Fundamental Law.

[8] The petitioners cite the fact that the 2014 Court Decision held that the immunity granted to international organisations is functional in nature, that is, it may constitute recognition of a limited immunity granted to the extent justified by the tasks performed. That being so, in the context of Article XXVIII of the Fundamental Law, the petitioners submit that the recognition of the Investment Bank's immunity cannot have the effect of depriving any person of the effective assertion of his legal claims against the Investment Bank. They also submit that the right of access to a court and the right to judicial remedy, as recognised by Article XXVIII (1) and (7) of the Fundamental Law, are infringed, since they are completely denied by the Investment Bank's failure to provide an effective remedy to persons who have legal relations with it. This also leads to a violation of Article 25 of the Fundamental Law, which defines the constitutional functions of the Hungarian courts.

[9] Furthermore, the petitioners submit that Article 41 (2) of the Fundamental Law is also infringed. Article 41 (2) of the Fundamental Law provides that "[t]he National Bank of Hungary shall perform the supervision of the financial intermediary system". They consider that each of

the provisions listed is in itself contrary to that constitutional provision, since they have the combined effect, but also individually, of precluding the National Bank of Hungary from exercising any supervisory power over financial services and operations which the Investment Bank may provide in Hungary in a manner not linked to the achievement of its fundamental purpose.

[10] In their petition, the Members of Parliament referred to the first sentence of Article 46 (1) of the Fundamental Law, which provides that “[t]he core duties of the police shall be the prevention and investigation of criminal offences, and the protection of public safety, public order, and the order of State borders.” They consider that the Investment Bank has absolute immunity under the Agreement which provides a safe harbour from Hungarian law enforcement even in the event of a crime being committed. This has the indirect consequence, of course, that in the case of potential victims of such an offence, the Hungarian State is in no way able to ensure the protection of the fundamental rights infringed by the offence, either by conducting criminal proceedings or by pursuing claims for damages caused by the criminal offence in civil proceedings.

[11] Finally, the petitioners consider the contested provisions to be contrary to Article E (1) of the Fundamental Law, which sets out the State’s objective of contributing to the building of European unity. The Agreement does not contain a provision assessing compliance with European Union law or subjecting it to European Union law. The petitioners submit that the provision of financial services at EU level is a harmonised regulatory subject matter under Article 64 (2) of the Treaty on the Functioning of the European Union (hereinafter referred to as the “TFEU”) and other Treaty provisions, governed by a number of secondary sources of EU law, and that, in the absence of a statement of submission, granting the Investment Bank absolute immunity would lead to a complete disregard of the requirements of EU law.

II

[12] 1. The interpreted provisions of the Fundamental Law read as follows:

“Article E (1) In order to enhance the liberty, well-being and security of the people of Europe, Hungary shall contribute to the creation of European unity.”

“Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.

[...]

(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.”

“Article 25 (1) Courts shall administer justice. The supreme judicial body shall be the Curia.

(2) The general courts shall decide on criminal cases, private disputes and other cases specified by an Act. The supreme body of the general courts shall be the Curia, which shall ensure the unity of the administration of justice of the general courts, and shall issue uniformity decisions on the law binding on the general courts.”

“Article 41 (2) The National Bank of Hungary shall perform the supervision of the financial intermediary system.”

“Article 46 (1) The core duties of the police shall be the prevention and investigation of criminal offences, and the protection of public safety, public order, and the order of State borders. The police shall participate in preventing illegal immigration.”

[13] 2. The contested provisions of the Act read as follows:

Section 3 [...]

5.2 The Bank shall have power to make rules and regulations operative within the Bank for the full and independent exercise of its activities and performance of its functions in Hungary.

5.3 The Bank and any of its operations shall not:

(a) be subject to any form of financial or regulatory supervision or control (either in the form of disclosure or reporting requirements, capital control or adequacy requirements or otherwise);

(b) be obliged to implement any form of accounting standard; or

(c) comply with any form of licensing or registration requirement.

5.4 If the types of activities or operations and transactions carried out by the Bank in accordance with the Agreement Establishing the Bank require the existence of a specific licence or permit or a regulatory status (e.g. of a credit institution, professional market participant, insurance company), with respect to such activities or operations and transactions the Bank shall be deemed to have the required licence or permit or regulatory status and any third party shall not be restricted from dealing with the Bank or its assets (including financial instruments issued by the Bank) on the ground that the Bank does not have the required licence or permit or regulatory status.

[...]

6.1 The Bank, its property and assets, the Archives of the Bank, wherever located and whoever possessed by, as well as the Bank’s operations, shall be immune from any form of legal process, administrative or court proceedings, with the exception of those cases where the Bank has waived immunity.

[...]

6.4 The property and assets of the Bank shall, wherever located and by whomever held, be immune from all forms of seizure, search, requisition, confiscation, expropriation or any other form of taking or foreclosure or interference, whether by executive, administrative, judicial or legislative action. To the extent necessary to carry out the purpose and functions of the Bank

and subject to the provisions of this Agreement, all property and other assets of the Bank shall be exempt from restrictions, regulations, controls and moratoria of any nature.

[...]

11.1 Notwithstanding financial controls, regulations or moratoria of any kind, the Bank may freely:

(a) receive, purchase, hold and dispose of any funds, currencies, financial instruments, securities and gold, operate accounts in any currency, engage in financial transactions and conclude financial contracts;

(b) transfer its funds, currencies, financial instruments, securities and gold, to or from the Bank or within the Bank and convert any currency held by it into any other currency; and

(c) carry out any other banking or investment activities.”

III

[14] 1. The Constitutional Court primarily determined whether the petition complied with the requirements of the Fundamental Law and the law, that is, whether it was suitable for substantive adjudication. As a result, the Constitutional Court finds that the petition for ex post facto review was submitted by the fifty-three Members of Parliament entitled to do so, in accordance with Article 24 (2) (e) of the Fundamental Law, in a number equal to one quarter of the Members of Parliament.

[15] 2. The Constitutional Court found that the petition did not contain an explicit request in relation to Article E of the Fundamental Law. The petitioners merely stated, without giving reasons, that in their view the contested provision of the legislation was contrary to EU law. They failed to specify the provisions of EU law which might be infringed, and merely referred in general terms to Article 64 (2) TFEU, which lays down the free movement of capital within the European Union and is the legal basis for secondary EU acts regulating capital movements. In the light of this, this element of the petition cannot be considered on its merits.

[16] 3. Moreover, the petitioners, raising the issue of immunity from jurisdiction, allege a violation of the right to a fair trial under Article XXVIII (1) of the Fundamental Law and of the fundamental right to a remedy under Article XXVIII (7) of the Fundamental Law. With regard to the latter, however, there is no separate argument in the petition; the Constitutional Court found that the petitioners' argument in relation to the designation of both fundamental rights in fact alleges a violation of the right to a fair trial, a partial right of access to a court, and therefore the Constitutional Court did not address the alleged violation of the fundamental right to a remedy under Article XXVIII (7) of the Fundamental Law.

[17] 4. Prior to adopting its decision, the Constitutional Court sought the opinion of the National Bank of Hungary (hereinafter referred to as the “National Bank”), the Ministry of Justice and the Ministry of Finance. In its reply, the National Bank stated that, in view of the

taxonomic interpretation of the relevant legislation, its remit did not extend to the National Bank; the Ministry of Justice replied on behalf of the two Ministries, and replied in unison, concluding that no violation of the Fundamental Law had arisen.

IV

[18] The Constitutional Court considered it necessary to review its own competence before deciding on the specific case. Article Q (2) of the Fundamental Law provides, as in the case of Article 7 (1) of the former Constitution, that Hungary shall ensure the conformity of international law with Hungarian law in order to fulfil its obligations under international law. Pursuant to Article Q (3) of the Fundamental Law, Hungary accepts the generally recognised rules of international law, similarly to Article 7 (1) of the former Constitution. Other sources of international law become part of the Hungarian legal system when they are promulgated in legislation. In view of the high degree of textual and substantive similarity between the two texts, the Constitutional Court considered it necessary to take into account some of its previous decisions after the entry into force of the Fundamental Law in the assessment of cases involving international law {reaffirmed, for instance in Decision 6/2013 (III. 1.) AB, Reasoning [105] to [107]; Decision 6/2014 (II. 16.) AB, Reasoning [29] to [31]; Decision 3157/2018 (V. 16.) AB, Reasoning [19]}.

[19] This is necessary because the Constitutional Court Act, similarly to the previous legislation under the Constitution, mentions the assessment of the conformity of an international treaty or one of its provisions with the Fundamental Law in the scope of the *ex ante* norm control [Section 23 (3) of the Constitutional Court Act]. In this context, pursuant to Section 23 (4) of the Constitutional Court Act, the President of the Republic, prior to the recognition of the binding force of an international treaty by the President of the Republic, or, if the international treaty is promulgated by a government decree, the Government, prior to the recognition of the binding force of the international treaty, may request the Constitutional Court to conduct a preliminary examination of the conformity of the international treaty or a provision thereof with the Fundamental Law. The legal consequence of this assessment is laid down in Section 40 (3) of the Constitutional Court Act, which provides that if the Constitutional Court, in the procedure laid down in Section 23 of the Constitutional Court Act, finds that a provision of an international treaty is contrary to the Fundamental Law, the binding force of the international treaty may not be recognised until that time, until the States which have concluded the international treaty or other subjects of international law with the capacity to conclude treaties have removed the conflict with the Fundamental Law, or until Hungary has ruled out the conflict between the international treaty and the Fundamental Law by making a reservation, if this is permitted by the international treaty in question, or by making use of another legal instrument recognised by international law.

[20] However, the case is different where the procedure of the Constitutional Court is initiated by those entitled to do so in the context of abstract *ex post* normative control on the basis of Article 24 (2) (e) of the Fundamental Law and Section 24 (1) of the Constitutional Court Act. In

this case, the transposed or promulgated rule of international law is now an internal legal act and can be reviewed as internal, domestic legislation. This issue of competence was also encountered by the Constitutional Court under the previous Constitution, and it summarised its guiding practice in Decision 4/1997 (I. 22.) AB. Pursuant to this decision “ensuring the coherence of the assumed international legal obligations and the domestic law, applies to all »assumed« international obligations, including the generally recognised rules. On the other hand, consistency must be ensured with the entire body of domestic law, including the Constitution. Thus, Article 7 (1) of the Constitution requires the conformity of the Constitution, the obligations arising from international law, assumed by a treaty or directly by the Constitution, and domestic law; the specificities of each must be taken into account to ensure consistency.” In the view of the Constitutional Court “[t]here is no constitutional basis for the Constitutional Court to treat a law promulgating an international treaty differently from any other law in terms of constitutional review. As it follows from the Constitution that ex-post norm control extends to all laws, this completeness could not be narrowed down even by legislation.” (ABH 1997, 41, 48)

[21] In the light of this practice, the Constitutional Court has also carried out an ex post facto normative control of the Lisbon Treaty. The Constitutional Court held that “such an Act may be the subject of an ex post review of constitutionality pursuant to Section 1 (b) of the Constitutional Court Act. However, should the Constitutional Court declare such an Act, that is, an Act amending the founding and amending treaties of the European Union, promulgating the treaty, to be unconstitutional, the decision of the Constitutional Court establishing unconstitutionality of such Act cannot affect the commitments arising from the membership of the Republic of Hungary in the European Union. Due to the decision of the Constitutional Court, the legislator must create a situation where the obligations of the European Union can be completely fulfilled by the Republic of Hungary without prejudice to the Constitution.” [Decision 143/2010 (VII. 14.) AB, ABH 2010, 698, 703]

[22] It was in this light that the Constitutional Court, in the context of a judicial initiative, examined the relationship between the provisions of Government Decree 90/1996 (VI. 21.) on the promulgation of the Agreement between the Government of the Republic of Hungary and the Board of Directors of the Regional Environmental Centre for Central and Eastern Europe on the legal status of the Budapest Regional Centre and the constitutional aspects arising from the Fundamental Law in the case referred to by the petitioner in the 2014 Court Decision. As a result of this assessment, the Constitutional Court has remedied the existing constitutional issue with a constitutional requirement regarding the immunity from jurisdiction.

[23] On the basis of the foregoing, the Constitutional Court upholds its previously established practice and holds that, in order to ensure the consistency of domestic law and international law, as provided for in Article Q of the Fundamental Law, it may, pursuant to Article 24 of the Fundamental Law, review international treaties promulgated in Hungarian law and certain provisions thereof in the context of an abstract norm control procedure. If this assessment reveals an infringement of the Fundamental Law, the Constitutional Court shall take into account the specific features of international law in drawing its legal conclusions. However,

these legal consequences may not have a direct impact on the international obligations assumed by Hungary.

V

[24] The petition is unfounded.

[25] 1. The petitioners allege that certain provisions of the Act promulgating the Headquarters Agreement of the Investment Bank are contrary to the Fundamental Law. In that regard, the Constitutional Court recalls, first, that Hungary was one of the founding members of the Investment Bank, which was established in 1970, is based in Moscow, is registered with the United Nations and enjoys tax exemption for its activities in the territory of the member States. The international treaty and the charter of the Investment Bank were promulgated by Law Decree No 7 of 1971. Hungary's membership was terminated on 15 December 2000 after six months' notice.

[26] In 2014, the drafting of the multilateral intergovernmental Protocol to clarify the agreement on the establishment and Charter of the bank, which restructured the operations of the Investment Bank, was completed, and Hungary applied for membership of the Investment Bank. Accession to the Investment Bank was regulated by Act XLI of 2015 on the promulgation of the Agreement Establishing the International Investment Bank, signed in Moscow on 10 July 1970 and amended on 20 December 1990 (hereinafter referred to as the "Founding Agreement"), the Charter annexed to the Agreement (hereinafter referred to as the "Charter"), the Protocol amending the Charter and the notifications of becoming a party to the Protocol. Pursuant thereto, the Investment Bank is considered a multilateral international development institution, an international organisation. Pursuant thereto, the Investment Bank is considered a multilateral international development institution, an international organisation.

[27] The fundamental objective of the Investment Bank is to promote economic development, the competitiveness of national economies, trade and economic relations and investment-related cooperation opportunities in the interests of its member states. The main task of the Investment Bank is to finance and co-finance economically sound investment projects and programmes for the development and diversification of the economies of the member countries and of organisations operating in the territory of the member states, in accordance with the generally accepted principles of banking activity, as well as other projects in line with the Investment Bank's objectives. The Investment Bank seeks to provide loans for projects that meet the highest scientific and technical standards, ensure the introduction of new technological processes and the development of new product technologies.

[28] In carrying out its activities, the Investment Bank takes targeted measures to minimise credit, foreign exchange and other risks and to provide collateral. The Investment Bank seeks to diversify its activities geographically and to support the economies of all its member countries. The Investment Bank is entitled to: (a) enter into international agreements; (b)

acquire, dispose of, lease and rent various assets, including real estate and other assets, and to carry out other transactions not in conflict with the Charter; (c) appear as plaintiff or defendant in ordinary State and arbitration courts, and in the territory of the member countries the Investment Bank has the same rights of action as other legal entities in the member state concerned; (d) open its own branches and representative offices; (e) establish subsidiaries; (f) to adopt internal normative documents on matters relating to its own activities; and (g) carry out other activities aimed at achieving the objectives laid down in the Founding Agreement and the Charter.

[29] The membership of the Investment Bank is open to countries and international financial institutions. Banking resources are constituted by deposits of the membership in the Investment Bank's share capital, by the withdrawal of assets in any form from the membership and from the financial markets, by the share of profits paid into the reserve fund and by the Investment Bank's own special funds. These banking resources may only be used to achieve the objectives and perform the functions laid down in the Charter.

[30] The Investment Bank's governing bodies are the Board of Governors, the Board of Directors and the Management Board. For decisions of the Board of Governors, each member of the Bank shall be entitled to a number of votes in proportion to its share of the Bank's paid-up share capital. The Board of Governors determines, inter alia, the general direction of Investment Bank's activities and approves Investment Bank's development strategy. The body responsible for the general management of Investment Bank's activities is the Board of Directors, to which each member may delegate one member and which reports to the Board of Governors. The Bank's executive body is the Management Board, which consists of the President and his deputies, appointed for a five-year term from among nationals of the Investment Bank's member states. The Management Board reports to the Board of Directors and the Board of Governors.

[31] The Audit Committee, appointed by the Board of Governors for a term of five years, is responsible for supervising the activities of the Investment Bank, including the implementation of the decisions of the Board of Governors and the Board of Directors, the annual accounts, the financial and assets position, the accounting and the management of the Investment Bank and its divisions, agencies and subsidiaries. The Audit Committee shall be composed of its Chairperson and its members. In addition, the annual financial statements of the Investment Bank are audited and certified each year by an independent external audit of the Investment Bank's financial statements. The Board of Governors approves the arrangements for the selection of the Investment Bank's independent external auditor.

[32] The Investment Bank was based in Moscow, and in autumn 2018 the Government of Hungary proposed to the members and the Board of Directors of the Investment Bank to consider the possibility of relocating NBB's headquarters to Hungary. The proposal was supported by the parties concerned, and the Board of Governors formally approved the proposal on 4 December 2018 and authorised the Management Board to sign the Headquarters Agreement. The Act which is the subject of this petition promulgated this Headquarters Agreement.

[33] The other members of the Investment Bank are the Republic of Bulgaria, the Socialist Republic of Vietnam, the Republic of Cuba, Mongolia, the Russian Federation, Romania, the Slovak Republic and the Czech Republic.

[34] 2. The petitioners raised the issue of immunity from jurisdiction by reference to the 2014 Court Decision, in the context of which they alleged a violation of the right of access to a court, a fundamental right to a fair trial under Article XXVIII (1) of the Fundamental Law, and the Constitutional Court therefore considered the petition first in this respect.

[35] 2.1 The Constitutional Court confirmed its practice on the right to a fair trial in its Decision 7/2013 (III. 1.) AB. The Constitutional Court summarised its position on the essence of the right to a fair trial in principle in Decision 6/1998 (III. 11.) AB, which was subsequently confirmed and further developed in several decisions [Decision 5/1999 (III. 31.) AB, ABH 1999, 75; Decision 14/2002 (III. 20.) AB, ABH 2002, 101, 108; Decision 15/2002 (III. 29.) AB, ABH 2002, 116, 118-120; Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, 211]. In accordance with the established constitutional standard, the requirement of a fair trial encompasses the enforcement of procedural guarantees and constitutes a quality that can only be assessed by taking into account the whole of the proceedings and the circumstances surrounding them. It follows that a procedure may be unfair, unjust or inequitable because of the absence of certain detailed rules, just as it may be unfair or inequitable despite the existence of all detailed rules. "The right to a fair trial consists of a number of guarantee rules. In particular, the right to a fair trial enshrined in Article XXVIII (1) of the Fundamental Law includes the right of access to a court, the fairness of the hearing, the requirement of publicity of the hearing and of public publication of the court's decision, the right to a court established by law, the requirement of judicial independence and impartiality and the requirement of a judgement within a reasonable time. The rule does not establish de facto, but according to the interpretation of the Constitutional Court, part of the fairness of the proceedings is to ensure equality of arms in the proceedings {Decision 22/2014 (VII. 15.) AB, Reasoning [49]}." {Decision 2/2017 (II. 10.) AB, Reasoning [50]}

[36] The right to a fair trial is closely linked to all fundamental rights, since they can be enforced in the context of fair judicial proceedings. In this sense, the right to a fair trial is of substantive importance, since it plays a catalytic role in relation to the other fundamental rights. The Constitutional Court referred to this in its Decision 19/2015 (VI. 15.) AB, in which it pointed out that "the right to a fair trial includes the requirement of effective judicial legal protection, whereby it is a constitutional requirement that the court should be able to rule on the merits of the rights at issue. The formal guarantee of recourse to the courts is not in itself sufficient for the procedural guarantees to be fulfilled, since the guarantees provided for in a constitutional rule are intended precisely to enable the court to reach a decision on the merits by upholding them, with the requirement of finality." (Reasoning [35]) In a case concerning the right of assembly, the Constitutional Court stated that "[t]he relationship between the right of appeal and the requirements of a fair trial is clear, since they must also be respected in the appeal procedure. Thus, if a case indirectly raises a suspicion of another fundamental right violation, the remedy is deemed to be effective if there is a possibility of actual redressability

of the fundamental right violation complained of and if the merits of the complained of violation are reviewed.” {Decision 24/2015 (VII. 7.) AB, Reasoning [19]}

[37] 2.2 The violation of the right of access to the courts and the constitutionality requirements arising from the Fundamental Law in relation to the immunity granted under international law have already been analysed by the 2014 Court Decision. In this respect, the main subject of the analysis was to determine the content and constitutional limits of the immunity from jurisdiction granted to the Regional Centre established by the international treaty. As a result, in the 2014 Court Decision, the Constitutional Court established as a constitutional requirement that the immunity from jurisdiction must not, in the light of Article XXVIII (1) of the Fundamental Law, lead to the result that employees are deprived of any possibility of asserting their alleged or real labour law claims. The court initiating the proceedings must therefore consider, in applying the provision at issue in the case, whether the staff member of the Regional Centre has another effective procedure available to him for pursuing his employment rights. The jurisdiction of the court is excluded, and the procedural consequence of that jurisdiction could be applied if there is an effective procedure available to the employee.

[38] The basis for this is that the autonomy of the international organisation in labour law matters is generally recognised in international law. “However, this autonomy, and with it immunity from national jurisdiction, is not unconditional. Indeed, it is a typical requirement that [...] an alternative procedural channel be provided for the settlement of labour disputes between the organisation and its employees. This approach places a human rights condition (the right to a fair trial) on the immunity of the international organisation.” (the 2014 Court Decision, Reasoning [51]) “The basis for this approach derives from the obligation under international law to respect fundamental human rights, which binds States as well as international organisations. An international organisation has an international legal obligation to ensure to its employees the application of the principle of the right to take action in the court. It may do so in any form that satisfies the requirement of a fair trial. The State is also bound by its obligation under international law to enforce human rights on its territory. Consequently, if the international organisation does not apply an appropriate alternative dispute resolution mechanism, the State must ensure that the right to take action in the court is enforced. On the other hand, if the international organisation guarantees its employees the possibility to settle labour disputes through an appropriate procedure, the immunity of the international organisation cannot be challenged by a national court. In this way, both the right to take action in the court and the protection of immunity can be respected.” (the 2014 Court Decision, Reasoning [52])

[39] The immunity granted to international organisations may therefore limit the right of access to a court. However, a restriction of the right of access to the courts may not, under Article I (3) of the Fundamental Law, affect the essential content of a fundamental right; it may be limited to the extent strictly necessary for the protection of another fundamental right or constitutional value and in proportion to the objective pursued.

[40] As stated by the Constitutional Court in the 2014 Court Decision, the restriction in relation to international organisations is justified by the fact that it serves to ensure the function of the international organisation and protects it from State interference in the performance of its

tasks. On the basis of what is known as functional immunity, “the achievement of the purposes of an international organisation requires staff to give effect to those purposes. In the case of acts of employment by an international organisation, the national court's judgement may be liable to jeopardise the functions of the international organisation.” (the 2014 Court Decision, Reasoning [50]) Since the definition of the scope of the employees is in general directly relevant to the achievement of the objectives and functions of the international organisation, the immunity guaranteed to the international organisation is a necessary limitation on the right of access to the courts in the light of Article Q of the Constitution.

[41] The provision on immunity may be considered a proportionate restriction on a fundamental right if the immunity does not have the effect of excluding the employee from asserting his legal claims against the employer.

[42] 2.3 The Constitutional Court has examined the regulatory regime of the Act. Clause 19 of this was entitled “Settlement of Disputes”. It covers two cases: the settlement of disputes between the Bank and Hungary as a member (Clause 19.1), and the settlement of disputes between the Bank and any non-member party with whom the Bank has concluded an agreement (Clause 19.2), the latter providing that “[d]isputes between the Bank and any party with which the Bank has entered into an agreement (other than a Member), shall be resolved according to the terms of said agreement to be concluded in accordance with paragraph 1, Article 29 of the Charter of the Bank.”

[43] The Act thus refers back to the Charter of the Bank. The English version of the latter contains the following provision: “DISPUTE RESOLUTION Article 29 1. Disputes between the Bank and any party with which the Bank has entered into an agreement (other than a member of the Bank), shall be resolved in accordance with the terms of said agreement. The Bank shall strive to ensure that the relevant documents include a provision referring any disputes to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation or to similar arbitration tribunals in other member states.” Thus, pursuant to Article 29 (1) of the Charter, the NBB must ensure that the individual agreements concluded include a dispute settlement provision referring any disputes to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation or to similar arbitration tribunals in other member states.

[44] The Constitutional Court concluded, on the basis of the cited Constitutional Court practice and the provision of the Charter, that alternative dispute resolution in individual labour disputes is guaranteed, and the petitioner did not provide any arguments to refute this. On the basis of the above, the Constitutional Court concluded that the limitation of the right of access to the courts under Article XXVIII of the Fundamental Law by the Act is proportionate and therefore dismissed the petition in this part.

[45] 3. In connection with the right of access to the courts, the petitioners also considered Article 25 of the Fundamental Law to be infringed, in connection with which they also referred to the 2018 Court Decision.

[46] In the 2018 Court Decision, the Constitutional Court held that “Article 25 (2) (a) of the Fundamental Law provides by disallowing any exception that the national courts shall decide

on all domestic legal disputes of private law. In this respect, Article 25 (7) of the Fundamental Law, which provides that an Act of Parliament may authorise other organs to act in particular legal disputes, does not allow any exception of international character as it provides a constitutional ground for other domestic procedures, more commonly known as alternative dispute settlement procedures (Cf. Section 1:6 of Act V of 2013 on the Civil Code and Act LX of 2017 on Arbitration)" (Reasoning [52]).

[47] The Constitutional Court has deduced from the above that "Article 25 of the Fundamental Law lays down not only the separation of the courts from other constitutional bodies; thus, it can be interpreted not only in the conceptual system of internal sovereignty, but also in the context of the external aspect of sovereignty. In the latter scope, delivering judgements in direct actions between private individuals is of primary importance and, pursuant to Article 25 (2) of the Fundamental Law, this duty is performed in a general manner by the domestic judicial fora. As Article 25 (2) of the Fundamental Law provides for no exceptions, the Constitutional Court concluded that an international agreement, which transfers to an international institution the jurisdiction of adjudicating a group of private law disputes under Article 25 (2) (a) of the Fundamental Law and in this manner entirely withdraws the adjudication of such legal disputes and the constitutional review under Article 24 (2) (c) and (d) of the Fundamental Law of the judicial decisions delivered in these disputes from the jurisdiction of the State of Hungary may not be promulgated on the basis of Article Q) (3) of the Fundamental Law." (Reasoning [53])

[48] The Constitutional Court, however, does not see the present case as analogous to the situation in 2018 Court Decision for the following reasons. In the case of the 2018 Court Decision, a group of disputes would have been excluded from Hungarian jurisdiction in its entirety, that is, an entire slice of private law. In contrast, in the present case, there is an ad hoc waiver in relation to participation in an international organisation in respect of possible subsequent employment or other disputes. It is not generally the labour dispute as such that is transferred to the jurisdiction of an international court to be set up (as patent litigation would have been transferred to the exclusive jurisdiction of the European Patent Court), but, as is customary in international case-law, an international organisation provides for appropriate alternative dispute resolution before the fora established by its statutes, the dispute resolution bodies operating alongside the chambers of commerce and industry in the member countries.

[49] Pursuant to Article 29 (1) of the Charter cited above, the Investment Bank must ensure that the individual agreements concluded contain a dispute settlement provision referring any disputes to the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of the Russian Federation or to similar arbitration courts in other member states. In the light of the foregoing, the Constitutional Court considers that the Charter does not preclude the existence of a clause providing for the Hungarian alternative dispute settlement forum, the Permanent Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, the constitutional legal basis for which is Article 25 (7) of the Fundamental Law, as stated in the 2018 Court Decision.

[50] In the light of the above, the Constitutional Court finds that Article 25 of the Fundamental Law has not been infringed and dismisses the petition on that ground as well.

[51] 4. The petitioners also consider that there has been a breach of Article 46 of the Fundamental Law, which singles out the police as one of the bodies with law enforcement functions and states that the fundamental task of the police is to prevent and detect crime, to protect public safety, public order and the order of the State border. The police are involved in preventing illegal immigration.

[52] 4.1 First of all, the Constitutional Court has seen fit to refer briefly to the following with regard to international practice concerning the immunity of international organisations.

[53] As already stated by the Constitutional Court in the 2014 Court Decision, "the reason for immunity was to ensure the independence of the international organisation from its founding States and to enable it to carry out its activities (purpose and function) and fulfil its mission without interference. The principle of sovereignty is therefore not at the root of the immunity of international organisations, unlike state immunity, since international organisations are not sovereign: in other words, the root of the immunity of international organisations is fundamentally different from that of states. This is reinforced by the fact that the reciprocity that prevails in the system of relations between states is absent in the case of international organisations. Indeed, while the international organisation is granted immunity by the States, mainly its members, it cannot, by definition, guarantee immunity itself." (Reasoning [37])

[54] "Despite the different legal basis, in the case of the first international organizations, that is, in the years immediately following the Second World War, no distinction was made between the immunity granted to States and that granted to international organizations. It is in the spirit of this understanding that the United States' law governing the immunities of international organizations, the International Organizations Immunities Act of 1945, was born, which explicitly provides that international organizations in which the United States participates enjoy immunities accorded to states. But, as the court in *OSS Nokalva* put it, it is unjustifiable that the activities of an international organization should enjoy greater immunity than those of its participating States when acting alone." (*OSS Nokalva v. European Space Agency*, No. 09-3601. Appeals Court for the Third Circuit, 2010) (Reasoning [38]) In this context, the approach that the immunity of international organisations is functional has emerged in judicial practice. Such immunity serves and is conferred only to the extent, and to the extent that, the purpose for which the international organisation was established is fulfilled without interference.

[55] The prototype of the rule of immunity of international organisations can be seen in Article II, paragraph 2, of the New York Convention on the Privileges and Immunities of the United Nations. Pursuant to this provision, "[t]he United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity shall extend to any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution." (*cf.* the 2014 Court Decision, Reasoning [41])

[56] 4.2 In the context of Article 46 of the Fundamental Law invoked by the petitioners, the Constitutional Court reiterates, first of all, that in its Decision 26/2013 (X. 4.) AB it held that Article 46 (1) and (3) of the Fundamental Law is similar in substance to the earlier constitutional

provisions and that it may therefore use the findings of the earlier Constitutional Court practice for the constitutional examination in the specific case (Reasoning [145]).

[57] In Decision 13/2001 (V. 14.) AB, the Constitutional Court pointed out that “[p]ublic safety is an indispensable condition for the institutional system of the State governed by the rule of law and the operation of a democratic society and, therefore, it is in general a constitutional value and a constitutional objective” (ABH 2001, 177, 198). In Decision 44/2004 (XI. 23.) AB, the panel further emphasised that “[a] constituent element of public safety and public order is public tranquillity, the prevention and punishment of the threat to which by means of criminal law is an overriding public interest. The establishment and safeguarding of public order and public tranquillity require that the perpetrators be punished and that the public be informed, in particular, of the circumstances of the offences which disturb public order or other serious criminal offences and of the measures taken to investigate them, the state of the proceedings and the identity of the perpetrators.”

[58] It is a fundamental requirement of the rule of law that bodies vested with public authority exercise their functions within the organisational framework laid down by law, within the limits of a system of operation established by law and within limits which the law imposes in a manner which is known and predictable to the citizen. In this respect, the Constitutional Court has already formulated in several decisions the constitutional rights and obligations of the State deriving from its punitive powers. In this sense, the exclusive right to prosecution of crime also implies the obligation to ensure the enforcement of criminal law. The apprehension and production of offenders and suspects is indispensable for the fulfilment of the constitutional obligation to prosecute. This may, where appropriate, result in a restriction of individual rights within the framework of Article I (3) of the Fundamental Law, allowing for example, for good cause and with due regard for proportionality, a constitutional restriction of the right to personal data or the right to respect for one’s home. In the present case, the Act regulates the operation of the Hungarian law enforcement bodies in relation to the Investment Bank as an international legal entity, which also constitutes an international legal self-limitation on the part of Hungary, and which international legal self-limitation is constitutionally possible under Article Q of the Fundamental Law, provided that the self-limitation remains within the limits of the functional immunity which can be granted to international organisations.

[59] 4.3 As pointed out in the opinion of the Ministry of Justice, the main rule on immunity in the case of the Investment Bank is already contained in Article 11 (2) of the Agreement as contained in Act LXI of 2015 promulgating the Agreement establishing the Investment Bank, whereby “[i]n the territory of each of the Bank’s member states, the Bank, the representatives of the members in the Board of Governors and the Board of Directors, and the officers and employees of the Bank shall enjoy the privileges and immunities necessary to perform the functions and achieve the aims set forth in this Agreement and the Bank’s Charter. Said privileges and immunities are defined in Articles 13, 14 and 15 of this Agreement.”

[60] Of these, Article 13 governs the immunity of the Investment Bank as an international organisation. It provides that, except in cases where the Investment Bank voluntarily waives its immunity, “[t]he Bank, its property and assets, its archives and documents, wherever located and whoever possessed by, as well as the Bank’s operations, shall be immune from any form

of administrative or court proceedings, with the exception of those cases where the Bank has waived immunity. 2. The premises of the Bank and of its branches and representative offices, as well as the Bank's archives and documents, shall be inviolable in the territory of any of the Bank's member states."

[61] Articles 14 and 15 provide for immunity for the officers of the Investment Bank. Article 14 provides for the privileges and immunities of the representatives and their deputies delegated to the Board of Governors in the exercise of their official duties in the territory of each member state. It is important for the purposes of the petition to specify that these persons are immune from legal or administrative proceedings in respect of acts committed in the performance of their duties, but that this does not extend to cases of civil liability for damage caused in the event of a road traffic accident.

[62] However, under Article 14 (2), a member of the Investment Bank "shall be obliged to waive any privileges or immunities granted to its representative in the Board of Governors or its deputy where it considers those privileges or immunities would obstruct justice and can be waived with no detriment to the Bank's interests, to the extent and on the terms and conditions that it considers would satisfy the Bank's interests."

[63] Article 15 shall apply to members of the Board of Directors, officers and employees of the Bank performing their duties in the territory of a member state, who, under item (a) shall "be immune from any court or administrative proceedings with respect to any action taken by them in their official capacity. This immunity shall not apply to civil liability in cases of damage arising from road traffic accidents."

[64] According to the petitioners, the NBB enjoys absolute immunity under the Agreement, which provides a means of evading proceedings by the Hungarian police authorities even in the event of the commission of a criminal offence. By contrast, in the Constitutional Court's assessment, the scope of the immunities listed does not fall within the scope of absolute immunity, but within that of functional immunity. This is expressed in a general manner by the concept of "privileges and immunities necessary to perform the functions and achieve the aims" in Article 11 (2), and Articles 14 and 15, which set out the content of the immunity granted to officials, make use of a similar limitation when they grant procedural immunity "in performing their official duties".

[65] The only exception in this respect is Article 13, which lays down immunity in respect of the NBB's assets, to which Clauses 6.1 and 6.4 challenged in the petition are linked. This provides that "6.1 The Bank, its property and assets, the Archives of the Bank, wherever located and whoever possessed by, as well as the Bank's operations, shall be immune from any form of legal process, administrative or court proceedings, with the exception of those cases where the Bank has waived immunity." Also, "6.4 The property and assets of the Bank shall, wherever located and by whomever held, be immune from all forms of seizure, search, requisition, confiscation, expropriation or any other form of taking or foreclosure or interference, whether by executive, administrative, judicial or legislative action. To the extent necessary to carry out the purpose and functions of the Bank and subject to the provisions of this Agreement, all property and other assets of the Bank shall be exempt from restrictions, regulations, controls

and moratoria of any nature.” The Constitutional Court points out that the latter clause also narrows the scope of functional immunity by specifying “to the extent necessary to carry out the purpose and functions of the Bank” and also refers to the fact that the New York Convention on the Privileges and Immunities of the United Nations contains a similar immunity from property law.

[66] The Legislative Explanatory Memorandum to Article 46 of the Fundamental Law states that the Fundamental Law “uses a functional, competence-based definition: the fundamental task of the police is to prevent and detect criminal offences, to protect public safety, public order and the order of the State borders.” In the assessment of the Constitutional Court, the performance of these tasks is not restricted if Hungary grants to an international organisation the right of immunity which is considered classic in international law. In this respect, the Constitutional Court also agrees with the Minister of Justice’s statement that “the mere fact that the assets and property of the Bank cannot be seized or searched does not preclude the authorities from conducting effective criminal proceedings against an officer of the Bank.” In that connection, the Constitutional Court emphasises that it regards as a rule of guarantee that, under Article 15 (2) of the Founding Agreement, a member of the Investment Bank is obliged to waive any privilege or immunity conferred on the person appointed to the Board of Directors or his deputy in cases where, in the opinion of the member, the said privilege or immunity is likely to obstruct the course of justice and may be waived without prejudice to the interests of the Investment Bank to such extent and subject to such conditions as the member considers to be in the interests of the Investment Bank. In similar cases and on the same conditions, the Board of Governors shall waive any privileges or immunities which the members of the Board of Directors may enjoy, and the Chairperson of the Management Board shall also waive any privileges or immunities which any officer or employee of Investment Bank may enjoy, with the exception of the members of the Board of Governors and the members of the Management Board. Under paragraph 4 of the same Article, the Investment Bank must regularly communicate to the competent authorities of the member states the names of the persons covered by the privileges and immunities listed in Article 14 of the Founding Agreement.

[67] In the light of the foregoing, the Constitutional Court dismisses the petition based on Article 46 (1) of the Fundamental Law.

[68] 5. Finally, the petitioners claim that the constitutional functions of the National Bank of Hungary are threatened and that Article 41 (2) of the Fundamental Law has been infringed.

[69] In Decision 8/2016 (IV. 6.) AB, the Constitutional Court held that the operational framework of the National Bank of Hungary is defined by the Fundamental Law and Act CXXXIX of 2013 on the National Bank of Hungary (hereinafter referred to as the “National Bank Act”). Pursuant to the Decision, the National Bank of Hungary “has constitutional status [Article 41 of the Fundamental Law], is an independent institution [see, e.g., the preamble to the National Bank Act, as well as its Section 1 (2), Section 131, etc.], which is not part of the competitive sphere. The National Bank of Hungary, as a wholly State-owned body in the form of a joint stock company, which manages and controls the financial system of the country, undisputedly performs a public task and manages public funds.” (Reasoning [16]) “The National Bank of Hungary is a legal entity in the form of a joint stock company, its share capital is

provided by the State and its shares are owned by the State, the State as shareholder is represented by the Minister responsible for public finance [Article 5(1) and (4) of the National Bank Act], and its primary objective and basic tasks are defined in Sections 3 to 4 of the National Bank Act. Pursuant to these provisions, the primary objective of the National Bank of Hungary is to achieve and maintain price stability. Without compromising this, it is also responsible for supporting the stability of the financial intermediary system, increasing its resilience, ensuring its sustainable contribution to economic growth and supporting the economic policy of the Government with the instruments at its disposal. The National Bank of Hungary is also responsible for the definition and implementation of monetary policy, the issuance of banknotes and coins, and the establishment and management of official foreign exchange and gold reserves. In addition, it carries out foreign exchange operations in connection with the management of foreign exchange reserves and the implementation of exchange rate policy, supervises the payment and clearing and securities settlement systems, collects and publishes statistical information to fulfil its statistical reporting obligations to the European Central Bank, formulates macro-prudential policy for the stability of the financial intermediary system as a whole and acts as a resolution authority within the scope of its powers as defined in a separate law. These tasks are the core tasks of the National Bank of Hungary under the National Bank Act; it may only carry out its other tasks without jeopardising its primary objective and the fulfilment of its core tasks." (Reasoning [14])

[70] Pursuant to Section 4 (9) of the National Bank Act, the supervision of the financial intermediary system is therefore one of the National Bank's basic tasks, the content of which is defined in Section 39 of the National Bank Act. The importance of this task is indicated by the fact that the Fundamental Law only mentions two tasks at the constitutional level: the responsibility for monetary policy [Article 41 (1) of the Fundamental Law] and the supervisory function [Article 41 (2) of the Fundamental Law].

[71] The task of supervising the financial intermediary system means the supervision of entities, persons and activities of those subject to the legislation defined in Section 39 of the National Bank Act. However, as the National Bank of Hungary and the Ministry of Justice, in its position statement, have both pointed out, the Investment Bank does not fall within the scope of this legislation. Indeed, point 15 of Annex 1 to Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings specifies the Investment Bank as one of the international financial institutions excluded from the scope of the Act, among others. In this respect, the Investment Bank, as a multilateral international financial institution, is considered to be in the same category as the European Investment Bank and the International Monetary Fund.

[72] On that basis, the Constitutional Court also dismissed the petition in respect of Article 41 (2) of the Fundamental Law.

Budapest, 30 June 2020

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court, Justice-Rapporteur

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court,
on behalf of dr. Ágnes Czine Justice
prevented from signing

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court,
on behalf of dr. Egon Dienes-Oehm Justice
prevented from signing

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court,
on behalf of dr. Tünde Handó Justice
prevented from signing

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court,
on behalf of dr. Attila Horváth Justice
prevented from signing

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court,
on behalf of dr. Ildikó Hörcher-Marosi
Justice
prevented from signing

Dr. Tamás Sulyok sgd.,
Chief Justice of the Constitutional Court,
on behalf of dr. Imre Juhász Justice
prevented from signing

Dr. Tamás Sulyok sgd.,
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on behalf of dr. Miklós Juhász Justice
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