János Ede SZILÁGYI*

The international investment treaties and the Hungarian land transfer law**

The number and the volume of cross-border acquisitions of agricultural land has increased sensibly since the beginning of the new millennium. All these changes could have happened mainly because the well-capitalised countries interested in increasing their food security and the international enterprises pay – beside the commercial issues of agricultural products (i.e. goods) – growing attention to ensure in the long run the capacities necessary for the preparation of agricultural products for their citizens or consumers, namely the agricultural lands and the connected water resources.[1] This study analyses in the context of cross-border acquisitions of agricultural lands mainly those international treaties which may concern the Hungarian[2] agricultural lands as well. At the same time – for reasons of space – we cannot give a full scale overview of this problem in this study. Instead, essentially we engage in three tasks. First, we define shortly what we mean by *`cross-border acquisition of agricultural lands´* (or shortly *`cross-border land-acquisition´*. On the other hand, we define what is meant by *`international investment treaties´* and their possible connections to the issues of cross-border land-acquisition. At this point we try to give a short overview of the relevant international investment treaties. Finally – using the principle of the freedom of authors in choosing their subjects – some pending international investment treaties of the European Union (Canada,[3] Japan,[4] Singapore,[5] Vietnam[6]) are sketchily analyzed in

János Ede Szilágyi: The international investment treaties and the Hungarian land transfer law – A nemzetközi beruházási megállapodások és a magyar földforgalmi jog. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2018 Vol. XIII No. 24 pp. 194-222 doi: 10.21029/JAEL.2018.24.194

* dr. jur., PhD, dr. habil., associate professor, University of Miskolc, Faculty of Law, Department of Agricultural and Labour Law, ORCID: 0000-0002-7938-6860, e-mail: civdrede@uni-miskolc.hu

** *This study has been written as part of the Ministry of Justice programme aiming to raise the standard of law education.*

[1] Olivier De Schutter: The Green Rush – The Global Race for Farmland and the Rights of Land Users, *Harvard International Law Journal*, 2011/2, 511-513; Lorenzo Cotula – Sonja Vermeulen – Rebeca Leonard – James Keeley: *Land grab or development opportunity?*, London – Rome, IIED – FAO – IFAD, 2009, 4-5; Megan Dooly: International land grabbing: How Iowa anti-corporate farming and alien landowner laws, as a model, can decrease the practice in developing countries, *Drake Journal of Agricultural Law*, 2014/3, 306-307.

[2] As to a more detailed assessment of other countries' investment treaties see e.g. Muthucumaraswamy Sornarajah – Jiangyu Wang (edit.): *China, India and International Economic Order*, New York, Cambridge University Press, 2010, 132-166.

[3] Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, published in Official Journal of the EU on 14 January 2017, L 11 (hereinafter referred to as CETA). The CETA's ratification is underway in the EU Member

connection with their regulations influencing the cross-border acquisitions of agricultural lands (but it is important to stress that the text of some of these treaties has not been finalised yet, thus our remarks should be treated accordingly.)

At this point it is worth to note that after the Lisbon Treaty entered into force in December 2009, the EU gained exclusive competence on foreign direct investment as part of the common commercial policy.[7] Nevertheless, in connection with foreign investments some competence anomalies still have remained which the Court of Justice of European Union (CJEU) attempted to solve[8] – just in connection with the pending Singapore-EU FTA. Earlier, the EU member states have concluded 1400 or so bilateral foreign investment treaties,[9] which continue to exist until they are replaced by EU agreements.[10] During this time, the EU has launched essential reforms in the system of international investments, an important element of these reforms is the creation of a new investment court[11] (the important elements of this have already appeared in the finalised international investment treaties concluded with Vietnam and Canada).

States now (i.e. on 31.01.2018). The CETA is provisionally applied since 21.09.2017. About the previous text-version of the CETA, see: Szilágyi János Ede: A magyar földforgalmi szabályozás új rezsimje és a határon átnyúló tulajdonszerzések, *Miskolci Jogi Szemle*, 2017a/klszm 1, 107-124; Szilágyi János Ede: A magyar földforgalmi rezsimet befolyásoló tényezők, in: Szilágyi János Ede (edit.): *Agrárjog*, Miskolc, Miskolci Egyetemi Kiadó, 2017b, 49-55.

[4] The Economic Partnership Agreement between Japan and the EU is awaiting signature now (i.e. on 31.01.2018). The present article is based on the consolidated version of the agreement as of 7 December 2017 (hereinafter referred to as Japan-EU EPA).

[5] The Free Trade Agreement between the EU and the Republic of Singapore is awaiting signature now (i.e. on 31.01.2018). The present article is based on the authentic text of the agreement as of May 2015 (hereinafter referred to as Singapore-EU FTA).

[6] The Free Trade Agreement between the EU and the Socialist Republic of Vietnam is awaiting the completion of the ratification process now (i.e. on 31.01.2018). The present article is based on the agreed text as of January 2016 (hereinafter referred to as Vietnam-EU FTA).

[7] Articles 206-207 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU). In this regard see European Commission: *Towards a comprehensive European international investment policy*, COM(2010) 343, 07.07.2010.

[8] Interpreting Article 218 of the TFEU – and referring among others to Article 207 of the TFEU – the CJEU stated the followings: The provisions of the agreement relating to non-direct foreign investment and those relating to dispute settlement between investors and Member States do not fall within the exclusive competence of the EU, so that the agreement cannot, as it stands, be concluded without the participation of the Member States; Opinion 2/15 of the CJEU of 16 May 2017.

[9] See (29.01.2018): http://ec.europa.eu/trade/policy/accessing-markets/investment/

[10] Regulation No 1219/2012/EU on establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

[11] European Commission: *Investment in TTIP and beyond – the path for reform Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court*, Concept paper, [2015], source (29.01.2018): http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF

The investment law of the EU is largely influenced by the international organizations[12] where the EU is one of the members.

It is important to emphasize that we do not deal with the EU or the EU law in other aspects than analyzing its international investment treaties. Thus this study does not extend to the EU law aspects of cross-border land-acquisition (i.e. what are the frames of the EU law set up for the national regulations of cross-border land-acquisition) in detail since – among several other reasons – they have been assessed in another study.[13] Finally, considering all these, we just note that the Treaty on the Functioning of the European Union (TFEU) specifies real estate investments within the EU as *direct investments*, in the scope of the *free movement of capital*.[14] This remark is important because – as seen later – in the case of several international treaties the regulations on the acquisition of real estate, among them that of agricultural lands are specified at other places e.g. in connection with the liberalization of services or establishment.

[12] Organisation for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD), World Trade Organization (WTO), United Nations Commission on International Trade Law (UNCITRAL), International Centre for Settlement of Investment Disputes (ICSID), Energy Charter.

[13] In this regard see recently Szilágyi János Ede: European legislation and Hungarian law regime of transfer of agricultural and forestry lands, *Journal of Agricultural and Environmental Law (JAEL)*, 2017c/23, 148-181, doi: 10.21029/JAEL.2017.23.148. In connection with this topic, see the work of the following authors: Andréka Tamás – Olajos István: A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése, *Magyar Jog*, 2017/7-8, 410-424; Csák Csilla: Die ungarische Regulierung der Eigentums- und Nutzungsverhältnisse des Ackerbodens nach dem Beitritt zur Europäischen Union, *JAEL*, 2010/9, 20-31; Csák Csilla – Kocsis Bianka – Raisz Anikó: Vectors and indicators of agricultural policy and law from the point of view of the agricultural land structure, *JAEL*, 2015/19, 32-43; Korom Ágoston: A birtokpolitika közösségi jogi problémái, *Gazdálkodás*, 2010/3, 344-350; Korom Ágoston – Bokor Réka: Gondolatok az új tagállamok birtokpolitikájával kapcsolatban, in: Gellén Klára (edit.): *Honori et Virtuti*, Szeged, Iurisperitus, 2017, 259-267; Korom Ágoston: A földpiacra vonatkozó kettős jogalap tételének bírálata, *Magyar Jog*, 2011/3, 152-159; Kurucz Mihály: Gondolatok a magyar földforgalmi törvény uniós feszültségpontjainak kérdéseiről, in: Szalma József (edit.): *A Magyar Tudomány Napja a Délvidéken 2014*, Újvidék, VMTT, 2015, 120-173; Raisz Anikó: Topical issues of the Hungarian land-transfer law, *CEDR Journal of Rural Law*, 2017/1, 69, 73-74.

[14] Articles 63-64 of the TFEU. According to Article 63 (1) of the TFEU: „Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited." However, according to Article 64 (1) of the TFEU: „The provisions of Article 63 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets. In respect of restrictions existing under national law in Bulgaria, Estonia and Hungary, the relevant date shall be 31 December 1999."

10.21029/JAEL.2018.24.194

1. Determining the cross-border acquisition of agricultural lands

When defining *cross-border acquisition of agricultural lands* first we have to mention that this definition largely depends on the national law of the country in question, and, in case of the European Union, on the EU law and the jurisprudence of the courts (e.g. the CJEU) applying it. Thus this is conceptually an extremely varied category at national, European Union and international level. This is why we suggest a broad approximation to make possible the full-case analysis of the concept. We gave a similar motion in Commission II of the Potsdam Conference 2015 of the European Council for Rural Law (CEDR according to its acronym in French), and the Commission II itself – in this respect – accepted our suggestion. On this basis, the cross-border acquisition of rural lands in the conclusions of the Commission got the following form. „Cross-border acquisitions of agricultural lands and forests, and – if the national law knows this category – also of agricultural holdings (hereinafter referred to all of them as `agricultural land´ or `land´), furthermore, the acquisition of agricultural lands are regulated quite differently in every country."[15] „Beside the inland land transfer, also the cross-border acquisition plays a more and more important role in the ownership and/or the use of agricultural lands and holdings (hereinafter together referred to as cross-border acquisition). However, it is worth emphasizing that the distinction between internal and cross-border acquisitions cannot be exact. According to the national reports, cross-border acquisition primarily means the situation in which citizens and legal entities of a country (hereinafter referred to as `foreigners´ or `investors´) gain the ownership or long-term use of an agricultural land situated in another country (hereinafter referred to as `target´ country or area). The goals of this acquisition can be various: (a) to produce agricultural products, (b) to speculate on the land market, (c) others, (d) the combination of points (a)-(c). In a wider sense, the situation in which foreigners establish legal entities in the target country and gain the lands of the target country may be regarded as cross-border acquisition as well. In the EU law, this interpretation of a cross-border acquisition could become quite difficult due to the forms of the European Cooperative Society (SCE) and the European Company (SE). Otherwise, it is worth noticing that in the EU law, the `cross-border´ element with regard to land acquisitions has been typically assessed in the frame of preliminary ruling."[16]

2. Determination of international investment treaties and their system

The issues of the cross-border acquisition of agricultural lands – as we have already mentioned – are assessed through certain international investment treaties. It is important to stress that in this study `international investment treaty´ is a collective category, since at international level the several thousand[17] treaties on the issues of the

[15] Szilágyi János Ede: Conclusions, *JAEL*, 2015/19, 91.
[16] Szilágyi 2015, 91-92.
[17] According to a scientific publication of 2010, the estimated number of the bilateral international investment treaties is approximately three thousands (beyond that, there are

10.21029/JAEL.2018.24.194

existing investments live with extremely varied denomination, forms and content. Therefore, these treaties may affect the issues of cross-border acquisition of land in extremely varied ways. On the one hand, we note that in international law the issues of investments are governed not only by international treaties, but other sources of international law may be important, nevertheless, in this study we do not analyze the other types of sources of law.[18] On the other hand, turning back to the denomination of international investment treaties, we emphasize that they are equipped with rather varied names (the word investment perhaps does not occur in the denomination!),[19] while the issues of acquisition of agricultural lands are similarly regulated; in the new international investment agreements of the EU for example these issues are typically settled in the form of reservations. (Since beyond the issues of acquisition of lands there are several other issues to be regulated in these agreements, therefore, the different denominations are logically understandable.) It is interesting to note in connection with the investment policy of the EU that the subject of the China–EU trading negotiations starting in 2013 got the denomination `Investment Agreement´, while the USA-EU negotiations starting at the same time lead to the `Transatlantic Trade and Investment Partnership´ (TTIP). The EU has and had negotiations with several countries (Singapore, Vietnam, etc.) to conclude documents under the name `Free Trade Agreement´. For these denominations there exists a method of sorting in the EU Common Trading Policy.[20] In our experience – since we are considering the denominations of these agreements exclusively from the point of view of investment – they do not reveal much about the specific regulations of a given agreement neither about the regulatory concept concerning investment which forms their background.

Following all these introductions we investigate first the notion of cross-border investment in international relations, after that we review the agreements dealing with investments sketchily – for reasons of volume considered only from one aspect – the number of the states involved in the agreement.

I. In general the scientific literature on `foreign investment´ means the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate higher profit under the total or partial control of the owner

---

numerous regional international investment treaties as well); see Muthucumaraswamy Sornarajah: *The International Law on Foreign Investment*, Cambridge, Cambridge University Press, 2010, 81.

[18] Sornarajah 2010, 79-87.

[19] See (29.01.2018): http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/

[20] There are three main types of EU trade agreements: (a) Customs Unions: (a1) to eliminate customs duties in bilateral trade, and (a2) to establish a joint customs tariff for foreign importers. (b) Association Agreements, Stabilisation Agreements, (Deep and Comprehensive) Free Trade Agreements and Economic Partnership Agreements: to remove or reduce customs tariffs in bilateral trade. (c) Partnership and Cooperation Agreements: (c1) to provide a general framework for bilateral economic relations, (c2) to leave customs tariffs as they are. These trade agreements might be supplemented by the investment issues in different ways; see (28.01.2018): http://ec.europa.eu/trade/policy/

10.21029/JAEL.2018.24.194

and with the exploitation of the assets.[21] The documents having legal relevancy[22] and the scientific literature[23] differentiate two types of foreign investments. The first is the `foreign direct investment´ (FDI), the other type is the `foreign portfolio investment´ (FPI). Typical examples of the first (FDI) are when an existing *physical property* (such as equipment) is transferred or physical property (e.g. a plantation or industrial factory) is purchased or built in another country. Examples of the other type (FPI) are financial flows (i.e. movement of *money*) where the aim is purchasing shares in factories founded or operated abroad. In case of the FPI it is generally accepted that the risk is met by the investor, thus he/she cannot litigate the inland exchange or the legal person operating the exchange for compensation when suffering loss. Thus we can establish that international customary law so far has not protected the FPI in itself. On the contrary, even international customary law considered the other type of investment (the FDI) as to be defended through rules of diplomatic protection and state responsibility. Nevertheless, nowadays it is a tendency to try to protect more and more the FPI by way of international investment agreements, there are even opinions that the FPI should be treated as part of FDI. This opinion could form mainly – according to *Sornarajah* – because international investment treaties frequently specify the shares at the concept of international investments. But, adds Sornajarah, in this context the share frequently refers to the share of a joint venture and through this a foreigner invested who is present in the country, and this category does not involve the shares got to an investor not present in the country, and even the shares were bought abroad. Therefore Sornarajah thinks more correct the interpretation that in case of a particular agreement the `foreign investment´ notion may involve the FPI if the notion decidedly specifies the portfolio investments.[24]

There are several categories of the cross-border investments, but in the scientific literature[25] in connection with the cross-border acquisition of lands among

---

[21] Muthucumaraswamy Sornarajah: *The International Law on Foreign Investment*, Cambridge, Cambridge University Press, 2017, 11.

[22] *OECD Code of Liberalisation of Capital Movements*, 2017, 23-24.; International Monetary Fund (IMF): *Foreign Direct Investment Statistics – How countries measure FDI – 2001*, Washington D.C., IMF – OECD, 2003, 23., 37., 39-41., 151.; etc.

[23] Sornarajah 2017, 11-13.; Karl Kreuzer: *Legal aspects of international joint ventures in agriculture*, FAO Legislative Study 45, Rome, FAO, 1990, 3.

[24] Sornarajah 2017, 11-13.

[25] Lorenzo Cotula: `Land Grabbing´ and International Investment Law: Toward a Global Reconfiguration of Property?, in: Andrea K. Bjorklund (edit.): *Yearbook on International Investment Law and policy 2014-2015*, New York, Oxford University Press, 2016, 201-214; Christian Häberli – Fiona Smith: Food Security and Agri-Foreign Direct Investment in Weak States: Finding the Governance Gap to Avoid `Land Grab´, *The Modern Law Review*, 2014/2, 189-222; Elizabeth R. Gorman: When the poor have nothing to eat: The United States' obligation to regulate American investment in the African land grab, *Ohio State Law Journal*, 2014/1, 200, 213-214; Dooly 2014, 311-314; Jessica Ball: A step in the wrong direction, *Fordham International Law Journal*, 2012, 1744; De Schutter 2011, 512, 520; Cotula – Vermeulen – Leonard – Keeley 2009, 17-18; Stephen Hodgson – Cormac Cullinan – Karen Campbell: *Land Ownership and Foreigners*, FAO Legal Papers Online 6, [-], FAO, December 1999, 2-3. See furthermore: Klaus Deininger –

10.21029/JAEL.2018.24.194

these categories most frequently the FDI type is dealt with. According to this practice as a starting point we treat this issue as part of investments and within this category as part of FDI. At the same time we call the attention that in the case of agricultural lands there are other approaches as well. Such examples can be found in the Association Agreements of the EU (then called European Community) with Central European and East-European countries, (Europe Agreements), where – among other things, – the Central and East European countries expressed their intention to reach full membership in the EU. In the European Agreement with Hungary for example the issues of the use of lands were denominated in connection with the freedom of establishment, which is connected to the free movement of persons in the EU law. In some of the international investment agreements of the EU (see the free trade agreements with South-Korea, Singapore or Vietnam) land-transfer issues are settled not only with regard to establishment but also as to the cross-border supply of *services*.

It is important to note that at certain types of cross-border land acquisition the scientific literature[26] discussing international investment treaties raises the question of sovereignty connections of these transactions.

II. The systematized review of the international investment treaties can be done in several ways. In this paper the sketchy review of the binding international investment agreements – mainly affecting Hungary – goes along differentiating the universal, regional and bilateral international treaties. In this connection we think it is important to emphasize the following.

II.1. So far[27] there is no universal agreement on investments which were able to settle each issue of investments in general and in details. But the agreements devising the dispute settling procedure and system are more or less mature such as e.g. those connected to the International Centre for Settlement of Investment Disputes (ICSID) and to the 1965 Washington Convention,[28] the generator of ICSID.[29] In the following we pick out two agreements which – although neither in a general nor in a detailed way, but – touch upon the *ratione materiae* rules of foreign investments.

Here first it is worth to digress to OECD. The OECD in itself cannot considered as an universal international organization, but at the same time the OECD Code on the liberalisation of movement of capital,[30] which is binding for the 35 OECD

Derek Byerlee: *Rising global interest in farmland*, Washington D.C., The World Bank, 2011, doi: 10.1596/978-0-8213-8591-3.

[26] For example Sornarajah 2010, 1-2, 4-5, 243-244, 252-253, 280, etc; Häberli – Smith 2014, 209, 213; Hodgson – Cullinan – Campbell 1999, 1-2, 32. Cf. Szilágyi János Ede: Acquisition of the ownership of agricultural lands in Hungary, taking the EU's and other Countries' law into consideration, *Zbornik Radova Pravnog Fakulteta u Novom Sadu*, 2016/4, 1438-1439, doi: 10.5937/ZRPFNS50-12226.

[27] Contrarily, numerous drafts and non-binding documents were adopted by different organisations; see Ball 2012, 1756-1757; Hodgson – Cullinan – Campbell 1999, 2-4; Kreuzer 1990, 4-5; Sornarajah 2010, 79-82, 236-242, 257-262.

[28] In connection with Hungary, the Washington Convention was published by the decree law No 27 of 1987.

[29] About the assessment of the practice of the ICSID, see Cotula 2016, 201-211.

[30] *OECD Code of Liberalisation of Capital Movements*, 2017.

countries, and since 2012 has also been open to non-OECD countries. This means that although the OECD Code in its present stage cannot be treated as multilateral, but potentially it can turn out to be that. This Code wishes to give a sort of legal framework for the member states in order to gradually dismantle the restrictions on movement of capital.[31] The measures designed to eliminate such restrictions are called `measures of liberalisation´.[32] A member state may make reservations relating to the obligations resulting from liberalisation measures on the List A and List B to the Code. The List A and List B are contained in the Annex A to the Code. The reservations of the member states are contained in Annex B to the Code.[33] In the Code cross-border acquisitions of land appear typically in connection with direct investments (List A, Chapter I) and operations in real estate (List A, Chapter III and List B, Chapter III). Some of the states have reservations referring to these Lists in order to sustain the restrictions on movement of capital in connection with cross-border acquire of land. This is the case for Hungary in connection with operations in real estate (List B, Chapter III). We have to note that it is high time to modify the text of the Hungarian reservation, since the text still contains partial regulations for the transitional period ended in 2014.[34]

In connection with the universal agreements it is similarly important to deal with the legislation of World Trade Organization (WTO). Among the WTO agreements in force[35] which are relevant with regard to investments, the following are especially significant:[36] (a) Agreement on Trade-Related Investment Measures (TRIMS) connected to trade in goods, (b) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), (c) the General Agreement on Trade in Services (GATS). Among these the GATS agreement is the most important regarding the agricultural lands. The following supports these statements. In some international agreements (see for example: Singapore-EU FTA, Korea-EU FTA[37]) namely both at the cross-border supply of services and at the establishment appear the national limitations[38] on cross-border land-acquisition; some of these limitations refer to the rules of the GATS. Notably, for example in connection with Hungarian land transfer limitations, there are references with the following contents: „As regards services sectors, these limitations do not go beyond the limitations reflected in the existing GATS commitments."[39]

[31] *OECD Code of Liberalisation of Capital Movements*, 2017, Article 1.
[32] *OECD Code of Liberalisation of Capital Movements*, 2017, Article 1.
[33] *OECD Code of Liberalisation of Capital Movements*, 2017, Article 2.
[34] *OECD Code of Liberalisation of Capital Movements*, 2017, Annex B, Hungary.
[35] The improvement of the fragmented law of the WTO connected to investments got stuck during the Doha Round of the WTO.
[36] Sornarajah 2010, 263.
[37] Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, published in Official Journal of the EU on 14 May 2011, L 127 (hereinafter referred to as Korea-EU FTA).
[38] See: Korea-EU FTA, Articles 7.5-7.7, 7.11-7.13 and Annexes 7-A-1 (EU), 7-A-2 (EU) and 7-A-4 (Korea); Singapore-EU FTA, Articles 8.5-8.7, 8.10-8.12 and Annexes 8-A-1 (EU), 8-A-2 (EU) and 8-B-1 (Singapore).
[39] Korea-EU FTA, footnote 2 of Annex 7-A-1 and footnote 3 of Annex 7-A-2; furthermore Singapore-EU FTA, footnote 2 of Annex 8-A-1 and footnote 3 of Annex 8-A-2.

10.21029/JAEL.2018.24.194

The GATS – similarly to the Code on Liberalisation of Capital Movements – makes possible just a gradual construction in the field of supply of services, largely relying on the free will of the WTO member states. The GATS is concerned with services supplied by foreign firms. "*Of the four modes of supply that are covered by GATS, one is the provision of services `through commercial presence´ in the territory of a member.*[40] *This `commercial presence´ could be created through the establishment of a judicial person or through a branch or office for the supply of services within the territory of a member. Thus GATS covers foreign investment in the services sector.*"[41] "*The most important principles of GATS are non-discrimination and national treatment, but these principles are not general in scope... Countries could list exemptions from the general most-favoured-nation standard.*"[42]

II.2. At the regional level of agreements, the situation is quite different.[43] With regard to Hungary, we deem the four freedoms of the European Union worth to be mentioned in this aspect (free movement of capital, services, persons and goods). (In this context the investments in real estate – including agricultural lands as well – are treated by the EU law in the frame of free movement of capital.[44]) When speaking of regional agreements, it is an interesting question that – beyond the EU – in what way the Eurasian Economic Union (EAEU; which its present form largely depends on Russia) regulates the issues of investments, including acquiring agricultural lands. This is a rather interesting question, because the basis of this regional economic integration, similarly to the EU, is the creation of the common market for goods, services, labour and capital.[45] Thus it can serve as an interesting example to the renewal of the EU. In connection with the EAEU it is important to mention: In the third part of the Treaty on the Eurasian Economic Union[46] (TEAEU) on the Common Economic Space, in Section XV on trade of services, incorporation, activities and investment can be found the general rules on investments, (the other sections of the TEAEU give full particulars of several special branches and situation.) Several particulars on chapter XV of the TEAEU can be found in the protocol of the Annex 16 to the TEAEU.

According to measures in the Annex 16 to the TEAEU, the provisions of TEAEU on investments – as a general rule – shall apply to any and all measures taken by the member states. But exceptions are possible in the form of `restrictions´. Now we are interested in two types of these restrictions. One of them is specified in the Annex 2 to the protocol of the Annex 16 to the TEAEU as the groups of `horizontal

[40] GATS, Article I.2 (c).
[41] Sornarajah 2010, 263-264.
[42] Sornarajah 2010, 264.
[43] There are numerous important regional treaties: NAFTA, ASEAN, etc; these agreements are realtively well-known; see e.g. Sornarajah 2017, 298-303.
[44] See Annex I of Council Directive 88/361/EEC. It is worth noticing that this directive denominates the investments in real estate separately from the FDIs; i.e. as a special group of investments. Cf. EUMSz 63-64. cikk.
[45] TEAEU, Article 4.
[46] The present article is based on the 2014 version of the TEAEU (signed by three member states of the EAEU, i.e. Russia, Belarus and Kasahstan), which entered into force on 1st January 2015. Meanwhile other countries have joined EAEU: Armenia, Kyrgyzstan. There are numerous states negotiating about a partnership with the EAEU, e.g. Iran, India, Turkey, Korea, Serbia.

restrictions´ which extends to each sector and activity. The other type is group of restrictions, exceptions, additional requirements and conditions (altogether `national list´) submitted by the member states and approved by the Supreme Council of the EAEU.[47] We only mention that among the horizontal restrictions there are several restrictions on land transfer (but this does not mean anything about the existence or non-existence of restrictions on the national list, we simply skipped the analysis of the national list for reasons of volume.) Namely, among the horizontal restrictions we can find restrictions on land-transfer from each founder member states. This raises the question whether the denomination of similar restrictions in the Treaty on the Functioning of the European Union – having in a pretty difficult period – could help the European integration.

It is not by chance – but rather due to the short-stop of development within the WTO – to arrange a spanning regulation of international investment issues are such mega-regional[48] international investment treaties like the signed CETA, the EU-Canada treaty, and several other mega-regional investment treaties, which are to be analysed in the next chapter of the research. At present, we mention due to the potential importance of the Transatlantic Trade and Investment Partnership (TTIP) under negotiations between the EU and USA, and has been suspended by the new American president[49] (officially published text of the TTIP's draft is not available, one can use only the material leaked by the Greenpeace). Similarly negotiations of great importance are between the EU and China to reach a bilateral international mega-regional treaty. This raises the question what sort of investment regulations will be adopted, and what will be their relations to the Belt and Road Initiative (BRI, or with its previous name: One Belt and One Road, i.e. OBOR). The last question may affect Hungary as well, since Hungary takes part in the negotiations.

II.3. With regard to the above-mentioned we can conclude that at present in several countries the investment issues are settled through bilateral aggreements. It had and has significance for Hungary. For the first we mention the European Agreement preparing Hungary accession to the European Union. On this basis Hungary was not obliged to satisfy Union law on the acquisition of the ownership of agricultural land. But at the acquisition of the use of agricultural lands we had the obligation of national treatment. As we have mentioned earlier, these regulatory issues appeared not at the issue of free movement of capital but at the right of establishment (which is connected to the free movement of persons).

A bilateral international investment agreement – namely the one between Cyprus and Hungary – served the international legal background of the *Vigitop Limited*

[47] TEAEU, Annex 16, § 2.
[48] This denomination is applied by Sornarajah 2017, 322.
[49] As for the TTIP, an European citizens' initiative was submitted; in connection with this see judgement of the General Court in Case T-754/14, Michael Efler and Others vs Commission, 10 May 2017. About the assessment of the judgement, see Kecsmár Krisztián: Stop TTIP ügy: a jogi aktus fogalmának kategorizálása a fogalom múltján, jelenén és jövőjén keresztül – Affaire Stop TTIP: Categorization of the Notion of Legal Act through the Past, Present and Future of the Notion, *Európai Tükör*, 2017/1, 77-84.

vs Hungary case at the ICSID[50] (the well-known name was the Sukoro-case; it essentially began in 2008, and appeared at the Hungarian Courts both as a civil-law and as a penal case). Probably this case may have had serious impact on the 2011 forming of the regulation on the national assets when Hungarian legislator in case of investment disputes – as a general rule – made possible just the terms to fall within the jurisdiction of Hungarian Courts.[51]

3. Some of the pending international investment agreements of European Union

In this study some of the pending international investment agreements are analyzed in connection with the cross-border acquisition of lands. As a starting point a little more detailed analysis of the agreement between EU and Canada is used, and later the conditions of other international investment agreements are assessed compared with the relevant conditions of CETA.

In the context of cross-border acquisition of land especially[52] Chapter 8 on investment of CETA may be adequate, the chapter mentioning the „immovable property and related rights" at the denomination of investments and their types.[53] The annexes connected even to Chapter 8 – Annex I (Reservations for existing measures and liberalisation commitments) and Annex II (Reservations for future measures) – involve reservations on investment regulations both on part of Canada and on part of EU member states. These reservations are on obligations imposed by Article 8 of CETA, such as obligation of national treatment,[54] market access,[55] most-favoured

[50] Vigotop Limited v Hungary (Award, 2014) ICSID Case No ARB/11/22.

[51] § 17(3) of Act CXCVI of 2011 on national assets. About the interpretation of this criteria, see Decision 14/2013 of the Constitutional Court of Hungary.

[52] Cf. Chapter 10 of the CETA (Temporary entry and stay of natural persons for business purposes).

[53] CETA, Article 8.1, points f) and h).

[54] CETA, Article 8.6. In the Annex I, see e.g., in connection with Canada, the Canadian federal reservation I-C-5, furthermore the Canadian provincial and territorial reservations I-PT-6, I-PT-38, I-PT-41, I-PT-83, I-PT-129, I-PT-138, I-PT-174, I-PT-183, I-PT-184; in connection with the EU, the following Member States took reservations on this principle: Croatia, Cyprus, Czech Republic, Denmark, Greece, Hungary, Latvia, Malta, Poland, Romania. In the Annex II, in connection with the EU, see the reservations of the following Member States: Bulgaria, Czech Republic, Estonia, Finland, Lithuania, Hungary, Slovakia.

[55] CETA, Article 8.6. In the Annex I, see e.g., in connection with Canada, the Canadian provincial and territorial reservations I-PT-6, I-PT-38, I-PT-41, I-PT-129, I-PT-138, I-PT-174; in connection with the EU, the following Member States took reservations on this principle: Croatia, Cyprus, Greece, Hungary, Latvia, Malta, Poland, Romania. In the Annex II, in connection with the EU, see the reservations of the following Member States: Czech Republic, Finland, Lithuania, Hungary, Slovakia.

10.21029/JAEL.2018.24.194

nation treatment,[56] performance requirements[57] and the measures of senior management and board of directors.[58]

On the Canadian side, these reservations are typically national regulations on `land´, `agricultural land´, `forest and other wooded land´, while as to the member states of the EU, these national regulations were most frequently called `acquisition of real estate´ (in our opinion, a more general category). Although these national regulations restrict the other party's citizens' and enterprises' acquisition of land compared with the inland persons, the parties of CETA do not consider these national measures as illegal restriction of investment chapter of CETA, since they were annexed to the CETA, as regular restrictions of the contracting parties. The CETA makes an important statement referring GATS on the reservations in Annex I and II of CETA "The reservations of a party are without prejudice to the rights and obligations of the parties under the GATS".[59] There is an essential difference in the legal effects of the reservations in Annexes I and II. Annex II (Reservations for future measures) is a collection of reservations of a larger scope, giving a `political playing field´ to introduce future measures for countries who wanted to use this opportunity. Finally Hungary here in the Annex II made reservation on acquisition of agricultural lands (appraising the Act CXXII of 2013 concerning agricultural and forestry land trade and Act CCXII of 2013 laying down certain provisions and transition rules in connection with Act CXXII of 2013) concerning the CETA regulations on national treatment and market access. "*Hungary reserves the right to adopt or maintain any measure with regard to the acquisitions of arable land by foreign legal persons and non-resident natural persons, including with regard to the authorisation process for the acquisition of arable land.*" In connection with this reservation *Anikó Raisz* remarked that "*in order to reach a more perfect defence of the Hungarian interests it could have been better to use the denomination of `agricultural lands´ instead of `arable lands´ and similarly to some member states – besides national treatment and market access – to extend the reservation to other types as well e.g. to the most-favoured nation treatment.*"[60] In our opinion in connection with the Hungarian reservation in Annex II a question may arise: Is there any relevance to our freedom hidden in Annex II and the decision of the Court of Justice of the EU in the Hungarian land transfer cases.[61] Annex II has relevance even in case of the state-owned properties, since Hungary made a reservation with respect to the CETA investment rules, in details market access, obligation of national treatment and with respect to the senior management and boards of directors. "Hungary reserves the right to adopt or maintain any measures with respect to the acquisition of state-

[56] CETA, Article 8.7. In the Annex I, see e.g. the reservations of Latvia and Romania.
[57] CETA, Article 8.5. In the Annex I, see e.g. the reservations I-PT-183 and I-PT-184.
[58] CETA, Article 8.8. In the Annex I, see e.g. the reservations I-PT-183 and I-PT-184. In the Annex II, see the reservation of Hungary with respect to the alienation of real estates owned by the state.
[59] Annexes I and II, Headnote 2.
[60] Raisz Anikó: A magyar földforgalom szabályozásának aktuális kérdéseiről, *Publicationes Universitatis Miskolcinensis Sectio Juridica et Politica*, 2017/35, 443. About the importance of most-favoured nation treatment in connection with investments, see Sornarajah 2010, 264-265.
[61] See Szilágyi 2017c, 157-161.

owned properties". Finally we mention that Hungary made a reservation in the defence of real estate other than land used for agricultural or forestry purpose (appraising the Government Decree No. 251/2014 on the Acquisition by Foreign Nationals of Real Estate other than Land Used for Agricultural or Forestry Purposes), but this reservation takes place just in Annex I: "*The purchase of real estate by non-residents is subject to obtaining authorisation from the appropriate administrative authority responsible for the geographical location of the property.*"

In our opinion the above-listed reservations are of fundamental importance, since those countries who failed to make reservation with respect to their agricultural land, in the future may face with the possibility – that in the CETA investment disputes settlement procedure the CETA regulations will be applied for the acquisition of their agricultural land.[62]

The pending agreement between EU and Japan, the EU-Japan EPA at present is waiting for signature. The Japan-EU EPA arranges the acquisition of cross-border lands with a logic, similar to that of CETA. This issue is settled in a separate chapter.[63] In connection with some liberalization measures of the chapter both parties took reservations in Annexes of the two separate schedules. Several member states of the EU and Japan used this possibility in connection with the cross-border acquisition of land. Similarly to the CETA the reservations can be taken in two ways, that is in Annex I are the reservations in connection with the existing national measures, while in Annex II are the reservations in connection with the existing national measures and reservations for future measures, to leave space for political movement. Hungary made its reservations along the same logic as in case of the CETA. Thus in its reservation N° 1 (all sectors) of Annex I of the EU schedule Hungary extended its reservation to all sectors in connection with the acquisition of real estate referring to its national measures restricting the acquisition of the ownership of non-agricultural lands (it is word by word the same text and reference to the same statute as in the case of the CETA). The maintenance and the future acceptance of the Hungarian measures to limit the acquisition of the ownership of agricultural lands can be reached by the reservations N° 1 to all sectors in Annex II (again it is word by word the same text and reference to the same statute as in the case of the CETA). We find just here the well-known reservation from CETA in connection with the Hungarian state-owned lands. Here we note that Japan took its reservation N° 12 connected to its own cross-border acquisition of land – similarly to Hungary – took in the Annex II of the Japan schedule extending the reservations for the future. But in Annex II in addition to the national treatment and market access Japan used this possibility in connection with the most-favoured nation treatment.

As refers to the Singapore-EU FTA and the Vietnam-EU FTA it can be established that they approach the cross-border land-acquisition through a different concept. This concept is rather similar to that of the formerly concluded Korea-EU FTA. In these international investment agreements the issue of the cross-border land-

[62] Szilágyi 2017a, 123-124; Szilágyi 2017b, 54.

[63] Japan-EU EPA, Chapter 8 (Trade in services, investment liberalization and electronic commerce).

acquisition is apraised on one hand in connection with cross-border supply of services on the other hand in connection with the establishment. Actually the issue of the acquisition of cross-border land-acquisition is dealt with in the chapter on services and establishment[64] in connection with the regulation concerning market access[65] and national treatment.[66] The cross-border land-acquisitions are connected to the cross-border supply of services and the establishment since the land-transfer regulations of some countries are as reservations on the list, which list contains those national regulations as exceptions of the main rules of Korea-EU FTA, Singapore-EU FTA or Vietnam-EU FTA. Among these reservations are both the agricultural and non-agricultural real estates transfer regulations of Hungary. Thus the Hungarian land transfer rules, need not comply with the market access and obligation of national treatment regulations of Korea-EU FTA, Singapore-EU FTA or Vietnam-EU FTA. It is important to note that the Korea-EU FTA, Singapore-EU FTA or Vietnam-EU FTA mention "As regards services section, these limitations do not go beyond the limitations reflected in the existing GATS commitments."[67]

Conclusions

In our view this study may highlight several potential research subjects and may direct attention to the diversity of the ways how the issue of cross-border land-acquisition can be approached in an international investment agreement. We think that the given interest that is to be defended decides which of the approaches is expedient. The study did not deal with the essential question – besides several other questions – whether it is right to handle the issue of the cross-border acquisition of land in the XXI century as a pure investment question, and what are the possible alternatives. In other words the subject of this study is a good field for future research.

[64] See Chapter 7 of the Korea-EU FTA and Chapter 8 of the Singapore-EU FTA on trade in services, establishment and electronic commerce. The denomination of the Chapter 8 of the Viet Nam-EU FTA is „Trade in services, investment and electronic commerce"; i.e. „establishment" is lacking. However, the denominations of the annexes containing reservations concerning limitations on cross-border acquisition of lands are the followings: Annex 8-a (establishment) and Annex 8-c (cross-border supply of services).

[65] Articles 7.5 and 7.11 of the Korea-EU FTA, furthermore Articles 8.5 and 8.10 of the Singapore-EU FTA. The inner numeration system of the Chapter 8 of the Viet Nam-EU FTA is inconsistent in the text version available for public.

[66] Articles 7.6 and 7.12 of the Korea-EU FTA, furthermore Articles 8.6 and 8.11 of the Singapore-EU FTA. The inner numeration system of the Chapter 8 of the Viet Nam-EU FTA is inconsistent in the text version available for public.

[67] Korea-EU FTA, footnote 2 of Annex 7-A-1 and footnote 3 of Annex 7-A-2; furthermore Singapore-EU FTA, footnote 2 of Annex 8-A-1 and footnote 3 of Annex 8-A-2; furthermore Viet Nam-EU FTA, footnote 3 of Annex 8-a and footnote 2 of Annex 8-c.

10.21029/JAEL.2018.24.194