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EDITORIAL

Editorial Comments: The Relevance of Foreign Investment Protection in International and EU Law

Foreword to Vol. 8 (2020) of the Hungarian Yearbook of International Law and European Law

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In today's global economy, foreign direct investments are of great importance: according to UNCTAD's latest 2018-year statistics, although the total value of foreign direct investment was less than the previous year, it still amounted to USD 1.3 trillion.[1] With this level of foreign investments, states must follow a very nuanced strategy to observe the requirements stemming from their sovereignty, as well as strengthening their position on the world market, contributing to the country's GDP growth and the well-being of their population.

On the one hand, attracting foreign investments in specific states is a priority for almost every country in the world, suffice to mention the competition in each region among the states to implement a bigger transnational corporate investment in the given state. For example, in 2019 Hungary proudly announced that a total of 101 projects had resulted in investment worth EUR 5,350 million in Hungary, creating a total of 13,493 workplaces and exceeding the previous year's results by 24 per cent.[2] The relevance of foreign investments in the Hungarian economic policy is well demonstrated by the fact that since 2014 Hungarian foreign policy is inextricably intertwined with foreign trade policy as the designation Ministry of Foreign Affairs and Trade also suggests.

When attracting foreign investment to a country, investors are swayed by the general situation in the potential destination country (including the stability of the government as well as the amount of the minimum wage and corporate tax, the experience of other companies, the development of infrastructure), yet very often this does not prove to be enough: active government measures are also needed to win the competition between potential target countries. Such measures may include the provision of a tax credit (such as a write-down of new investment value from corporate tax, job creation aids), the construction of the necessary infrastructure (such as the construction or renovation of the road network or a railway line) but even the simplification of related administrative procedures (*e.g.*

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1 *World Investment Report 2019,* UNCTAD, p. 1.

2 *See* at https://hipa.hu/2019-marks-another-record-year-in-fdi-for-hungary.

doi: 10.5553/HYIEL/266627012020008001001

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in Hungary the legal institution of 'investments of particular importance for the national economy' is aimed at achieving this purpose).[3] There are also many examples for a particular transnational company to conclude a cooperation agreement with the university where the investment is implemented so that students with the knowledge necessary to operate such investment enter the labor market and the company's operation is not jeopardized by a lack of skilled labor.[4] However, overt or covert state aids granted to individual companies may also distort competition in the market – it is no coincidence that this issue is examined very rigorously, *e.g.* by the European Commission throughout the EU.

Meanwhile, states are bound to make the strategic decision not to allow foreign direct investment into basic infrastructure for reasons of national security, public policy or other reasons, or to try and terminate previously made investments of this kind. There are several reasons for taking such a strategic decision: *e.g.* the US considers that the expansion of Huawei and ZTE Chinese telecommunication companies represents a specific risk for national security,[5] Croatia suspects that the Hungarian MOL took the strategic control over the Croatian INA oil company through corruption (by corrupting the former Croatian prime minister),[6] and Hungary excluded foreign companies from the market of employee fringe benefits services for strategic and political reasons.[7]

While states have an almost complete set of administrative tools to prevent an investment that has not been launched yet (*e.g.* by taking the decision on the issuing of the necessary permits or by amending the law, or simply by not facilitating the arrival of investment in the area by failing to grant extra support), a dispute between an investor and the host state in respect of investments already implemented may raise significant issues and result in a serious dispute. Rules concerning the legal protection of foreign investments in international and EU law, to which the thematic chapter of Vol. 8 (2020) of the Hungarian Yearbook is dedicated, have a particular relevance in this respect. While certain states may, of their own accord, amend a provision of their domestic law, international agreements providing for foreign investment may, where appropriate, ensure sufficient guarantees for investors engaging in an investment dispute with the host state. Such a system of guarantees is also necessary because in recent years there has been an increasing shift of foreign investment towards

3 Act LIII of 2006 on accelerating and simplifying the implementation of investments of particular relevance for the national economy.

4 *See e.g.* the Faculty of Audi Hungaria Automotive Engineering of Széchenyi István University in Győr.

5 In detail, *see e.g.* John S. McCain National Defense Authorization Act for Fiscal Year 2019, at www.congress.gov/bill/115th-congress/house-bill/5515/text.

6 For details about an element of the dispute *see* at https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/548/mol-v-croatia.

7 Judgment of 23 February 2016, *Case C-179/14, Commission v. Hungary.* The case was introduced in Vol. 4 (2016) of the Hungarian Yearbook. *See* Ernő Várnay, 'National Interests in the Common Market', *Hungarian Yearbook of International Law and European Law,* Vol. 4 (2016), pp. 101-114; Réka Somssich, 'The Hungarian Cold Food Voucher Case', *Hungarian Yearbook of International Law and European Law*, Vol. 4 (2016), pp. 115-123.

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developing (or at least less developed) countries[8] where both wage costs and administrative barriers, as well as the labor market ensure an operating environment that is significantly more favorable. At the same time, in case of investments in developing countries, the (primarily political) risk of investment may also be higher, in the mitigation of which the institutions of international law play an important role. This trend is well reflected by the fact that only in 2018 forty foreign investment related new international treaties were concluded by the states (while at least 24 treaties were terminated, which is a good indication of the dynamic changes in the regulatory environment for foreign investments, even in terms of international law).[9] Of the 40 new treaties, 30 are bilateral, of which eight were concluded by Turkey and six by the United Arab Emirates. According to the register of UNCTAD World Investment Report, the number of foreign investment-related international treaties was amazingly high, amounting to 2,658 on 31 December 2018.

1. Legal Underpinnings of the International Protection of Foreign Investment

The protection of foreign investment under international law is based on the right to property as a universally recognized fundamental right,[10] yet the otherwise extremely diverse system of human rights institutions is only indirectly relevant for the protection of foreign investment.[11] As regards the exercise of the right to property, it worth mentioning the "Charter of Economic Rights and Duties of States" adopted on the 6th Extraordinary Session of the UN General Assembly in 1974, which, albeit a soft law document of international law, enshrines as a principle the right of states to dispose over national property, including the right to nationalization. Consequently, nationalization as a deprivation of property, cannot be regarded as unlawful *per se* in case it is carried out in a proper procedure and, in particular, with adequate compensation. The doctrine of the minimum standard for the protection of foreign property was first formulated by US Foreign Minister Cordell Hull's in his diplomatic note in relation to Mexican nationalization and has become widely accepted since the 1930s. According to the note,

> "When aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations."[12]

8 World Investment Report 2019, UNCTAD, p. 2.

9 Id., p. XII.

10 Internationally among the first *see* Article 17 of the Universal Declaration of Human Rights.

11 All the three major regional human rights conventions, so including the ECHR, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights contain the right to property.

12 American Journal of International Law Supplement: Official Documents, Vol. 32 (1938), Issue 4, p. 198.

doi: 10.5553/HYIEL/266627012020008001001

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This set of requirements also known as the Hull formula governs the permanent sovereignty of states over their natural resources and was accepted in Resolution 1803 (XVII) adopted unanimously at the 14 December 1962 session of the UN General Assembly.[13] According to the Resolution, a state retains its sovereignty over its natural resources even if it has outsourced the exploitation thereof to a foreign investor (*e.g.* under a concession agreement) provided that the exercise of sovereignty is in accordance with international law. Although this Resolution was taken in a significantly different political environment, its statements of principle are still relevant for the regulation of the protection of foreign investments under international law. The key part of the Resolution reads:

> "Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."[14]

According to established customary international law, the deprivation of foreign property is considered lawful if *(i)* it is carried out in good faith for the fulfillment of a public purpose; *(ii)* in accordance with applicable legal procedures; *(iii)* without discrimination on the basis of nationality; *(iv)* subject to payment of appropriate compensation. Compensation is equitable in case it is adequate, effective and prompt.[15] However, the investor's and the host state's positions typically differ on the question of exactly what full compensation should cover, and thus when it may be considered adequate. Therefore, it is extremely important that a non-state forum decide this question where appropriate. This holds true even in cases where the states enshrine the basic principles of foreign investment protection in their own domestic law.[16] The setting-up of an institutional international guarantee scheme is also important because the international protection of foreign investment is more than the simple international protection of foreign property. This is because capital assets are used in the framework of a long-term economic undertaking (invested in construction, high-value equipment, or even real estate) and are difficult to move (or cannot be moved at all) and do not allow for a rapid profile change.

13 UNGA Res. 1803(XVII), at https://undocs.org/en/A/RES/1803(XVII).

14 *See* paragraph 4 of the Resolution.

15 *Guidelines on the Treatment of Foreign Direct Investment,* IV.1. and IV.2., World Bank, 1992, at http://documents.worldbank.org/curated/en/955221468766167766/pdf/multi-page.pdf.

16 It is interesting that in Hungary this Act was adopted before the political transition took place; *see* Act XXIV of 1988 on the investments of foreign nationals in Hungary.

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1.1. Individual Investment Agreements

Nowadays, there is a trend for investors (*i.e.* transnational corporations) to enter into an individual investment agreement with the host state, which does not constitute an international treaty, since one of the parties to the agreement cannot be considered a subject of international law in the traditional sense. As regards their substance, these treaties are much closer to civil law contracts, with the parties excluding the possibility that the contracting state subsequently and unilaterally amend the laws applicable to the investment in question (so-called freezing in clause). In this sense, so-called 'strategic agreements' concluded by the government can be considered individual investment agreements. In the period between 2012 and 2020, eighty-three strategic agreements were concluded by the Hungarian Government, including *inter alia* also with prominent market players such as Coca-Cola, Microsoft, Audi, Siemens, ExxonMobil or Samsung.[17]

1.2. Bilateral Investment Protection Treaties (BITs)

The first generation of truly international investment protection treaties included the so-called FCN treaties. These treaties of friendship, commerce and navigation, adapted to the requirements of their age, duly meeting the needs which arose at the time of their conclusion, yet with the intensification of international economic and trade relations, they have gradually been replaced by BITs (bilateral investment treaties) aimed at mutually promoting and protecting the investments implemented in foreign states. Their regulation under international law is extremely important: while the investor and host state interests align prior to the investment, over time, these interests may become increasingly different. Foreign investors seek to protect and maintain their investments and generate as much profit as possible, while preserving their unrestricted right to dispose over them. Meanwhile, host countries want the benefits of foreign investment to be reflected in their own national economies as a part of their economic development (*e.g.* by inducing further investments, research and development or through the increase in wages). It is no coincidence, therefore, that BITs, almost without exception, designate some kind of international forum for resolving investment-related disputes under the relevant treaty.

By examining the BITs concluded by a specific state, we have the opportunity to draw conclusions beyond the text of those treaties as regards the economic situation and foreign policy orientation of the given state. Thus, for example, while in the 1980s and the first half of the 1990s (during the political transition) Hungary concluded bilateral agreements primarily with states whose companies it considered to be potential investors,[18] nowadays it concludes bilateral treaties for the mutual promotion and protection of investments also with states where

17 *See* at www.kormany.hu/hu/kulgazdasagi-es-kulugyminiszterium/strategiai-partnersegi-megallapodasok.

18 Just an example: the treaty concluded with Austria was promulgated by Government Decree No. 12 of 24 July 1990, the treaty concluded with Great Britain was promulgated by MT Decree of the Council of Ministers No. 5 of 12 February 1988, whilst the treaty with Germany was promulgated by Decree-Law No. 5 of 1988.

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Hungarian investors are represented. In its bilateral investment protection treaties, Hungary provides, almost without exception, for the application of the ICSID procedure (described in the next section) for the settlement of investment disputes.[19] It is worth mentioning, however, that such BITs may be considered a kind of *lex generalis* and they are only relied on where there are no *lex specialis* rules that could be applied in the given case.[20] As analyzed in our thematic chapter, the legal position (the question of compatibility with the law of the EU) of intra-EU BITs changed dramatically after the CJEU's *Achmea* judgment in 2018.

1.3. Multilateral Investment Protection Treaties and Investment Property Insurance

Today, there are at least two multilateral investment protection treaties that are widely accepted and effective: the Washington Convention which was elaborated by the World Bank in 1965 and which set up the International Centre for Settlement of Investment Disputes (ICSID), and the MIGA (Multilateral Investment Guarantee Agency) which was set up by the World Bank in 1985.

The Washington Convention covers all disputes resulting directly from an investment, which arise between a contracting state (or an entity or agency subordinated to it) and the natural or legal persons of another state provided that the parties to the dispute give their written consent to the settlement of their dispute by ICSID. However, the Convention contains mainly procedural provisions, while the applicable substantive law is determined primarily by the express agreement of the parties, failing which it is designated by the law of the host State and international law. The real importance of ICSID is underlined by the fact that many BITs explicitly stipulate the jurisdiction of ICSID in the event of a dispute between the investor and the host state. Certain elements of ICSID case-law are introduced in the current volume of the Hungarian Yearbook of International Law and European Law.

MIGA is a company limited by shares with a share capital corresponding to 1 billion SDR (Special Drawing Rights). Its main scope of activities is to insure the commercial risks of investments implemented in a participating country by means of resources from other participating countries. Non-commercial risks include *inter alia* the so-called repudiation risk (where the authorities of the host state do not provide for the protection of the investor, therefore, the investor cannot enforce its legitimate claims before the courts), war and other armed conflicts, as well as other individually accepted risk factors. In essence, MIGA insurance is similar to traditional insurance: where an insured event occurs, MIGA indemnifies the investor, and the investor transfers its rights and obligations attached to the insured investment on to MIGA. Therefore, it is safe to say that if the regulatory environment of foreign investments in a given state

19 Just an example: AES Summit Generation Ltd. brought proceedings before ICSID, alleging that the measures adopted by the Hungarian Government in relation to the electricity price regulation were contrary to the relevant treaty, *see* ICSID Case No. ARB/07/22.

20 As regards electricity-related investments, such a *lex specialis* includes *e.g.* the European Energy Charter which was ratified by Hungary under Act XXXV of 1999.

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cannot be considered sufficiently stable, recourse to the investment insurance facilities provided by MIGA may reduce the risk of foreign investments significantly.

While ICSID still plays a role in settling disputes related to foreign investments implemented in the EU, MIGA has virtually no impact on EU Member States, nevertheless it does help EU investors who want to make new investments in politically less stable areas and in developing countries.

Let me refer again to the thematic chapter of Vol. 8 (2020) of the Hungarian Yearbook: the CETA Agreement (especially after the CJEU's *CETA Opinion*) has opened a spacious room for reconsidering the role of ICSID in EU Member States' legal systems.

2. Investment Protection Treaties and EU Law

EU Member States also concluded several BITs with third countries in the previous decades, but only two so-called intra-EU BITs were in effect until the enlargement wave of 1 May 2004: Germany concluded bilateral investment protection treaties with Greece and Portugal. However, during the transition from socialism, it was important for new Member States to tie their economies to Western states, therefore, almost without exception, all Central and Eastern European states concluded dozens of BITs with EU Member States in the first half of the 1990s. As these states also became members of the EU, the BITs specifically regulated foreign investment in relations between EU Member States under international law, stipulating the jurisdiction of an arbitration court or, as the case may be, of ICSID, notwithstanding the fact that this field was inextricably linked with EU law. While the arbitration tribunal acting in the *Eastern Sugar* case considered that international law and EU law may be interpreted as complementing each other when it comes to of foreign investments,[21] the European Commission disputed this position consistently from the outset and argued that BITs are contrary to EU law.

The Lisbon Treaty amended Article 207 TFEU so that measures applicable to 'foreign direct investment' now unquestionably fall within the common trade policy for which the EU has exclusive competence. Next, Regulation (EU) 1219/2012 required Member States to notify to the Commission all BITs concluded with third countries by 8 February 2013, which treaties may remain in force until the EU concludes the relevant BIT with the same third country. The provisions of the regulation may hardly be interpreted in any other way than that the EU will gradually, step by step, abolish bilateral treaties concluded individually by the Member States and replace them with international treaties that apply uniformly to all EU Member States. This approach follows entirely from the concept of the single internal market and will significantly reshape the EU's external relations policy.

21 *Eastern Sugar B.V. (the Netherlands) v. the Czech Republic*, SCC No. 088/2004, Partial Award, 27 March 2007, para. 169.

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However, having regard to the fact that BITs between two Member States cannot certainly be considered as 'foreign direct investments' within the meaning of EU law, the compatibility of BITs concluded by Member States with EU law arises as an increasingly unavoidable question. This question may also be raised from the perspective of both EU law and international law. From the perspective of EU law, the principle of the primacy of EU law provides a simple answer to the issue: if BITs are compatible with EU law they may be applied by Member States, but provisions that are contrary to EU law must be set aside, as such, all possible conflicts may always be settled in favor of EU law. From the perspective of international law, however, the situation is more complex and it is difficult to provide an international law response under the 1969 Vienna Convention on the Law of Treaties (VCLT) that would ensure the primacy of EU law in every case. This is particularly so if the parties initiated arbitration or ICSID proceedings in relation to a foreign investment, that is they applied a provision of a BIT also in practice. Although the Commission had informed the arbitration court of its position in all such cases,[22] for a long time, the Member States apparently failed to take any steps to terminate intra-EU BITs. The interesting thing about these proceedings is that the EU Member States sued wishing to be exempted from their liability argued in such proceedings that BITs should be considered null and void under EU law. Yet these arguments were not accepted by the arbitration courts and the international treaties that had been concluded earlier were accepted as valid in the absence of a lawful termination (which is clearly correct from the perspective of international law). In fact, the acting *fora* argued that under Article 59 of the 1969 VCLT, the provisions of (what is now known as) TFEU or TEU cannot be considered to have terminated the BITs concluded earlier by two EU Member States. Finally, in its deservedly famous decision in *Achmea*, the CJEU conceptually found that the provisions of the TFEU preclude a provision in an intra-EU BIT under which

> "an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."

Although this finding may be considered a significant step towards the abolition of intra-EU BITs that are still in force (only because they may easily become the basis for an infringement procedure), they may be expected to have little impact on proceedings pending before arbitration courts. It is a whole other issue that the European Commission seems to have more than just infringement procedures at its disposal for eliminating intra-EU BITs. On several occasions, the Commission declared the payment made by a Member State of damages granted

22 *Eastern Sugar,* para. 119; *Eureko B.V. v. the Slovak Republic,* PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras. 175-196; *EURAM v. the Slovak Republic,* PCA Case No. 2010-17, European Commission Observations, 13 October 2011; *Micula v. Romania,* ICSID Case No. ARB/05/20, Award, 11 December 2013, paras. 316-317.

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by an arbitration court to constitute a prohibited State aid; on this issue the CJEU will have the final say in the near future (following the Tribunal's decision).

While the EU seeks, with great impetus, to abolish the BITs concluded by the Member States (be they concluded between the Member States or by a Member State with a third country), EU law has a fundamental impact on the protection of foreign investment also in another area. Canada and the EU signed the EU-Canada free trade agreement (Comprehensive Economic and Trade Agreement, CETA) on 26 September 2014, which entered provisionally into effect on 21 September 2017. This provisional entry into force does not apply to the CETA investment protection dispute settlement mechanism which is to reform the current practice of investment dispute resolution in several respects. Among others, it is to render the functioning of the *fora* public and transparent, to limit the right to bring an action and restrict it to companies with a real economic connection, meanwhile, the Member State sued will not be obliged to change its legislation or pay punitive damages.[23] Although the precise impact of CETA is yet unknown, it is safe to say that if the agreement enters into force, it will revolutionize the practice of legal protection of foreign investment consolidated over the decades. For the sake of completeness it should be observed that the EU attempted to conclude a similar agreement with the US (Transatlantic Trade and Investment Partnership, TTIP) but the negotiations initiated in 2013 were closed unsuccessfully in 2013 and the conclusion of the agreement was postponed to an uncertain future date.

3. Lessons from the Protection of Foreign Investment in International Law and EU Law in Vol. 8 (2020) of the Hungarian Yearbook

The thematic chapter of Vol. 8 (2020) of the Hungarian Yearbook of International Law and European Law examines several aspects of the protection of foreign investment under international law and EU law.

Our current Volume discusses several questions relating to the regulation of foreign investments under EU law. In its *Opinion 1/17*, the CJEU confirmed that the investor-state dispute settlement mechanism of CETA is compatible with EU law. Two of our contributions deal with the possible consequences of the *CETA Opinion*: *Wolfgang Weiss* examines how the investor protection is (will be) implemented under the operation of the CETA Investment Court Regime. *Tamás Szabados* assesses the compliance of the CETA dispute settlement mechanism with EU law on the basis of *Opinion 1/17*. As he concludes, "In order to establish a mechanism for a multilateral investment tribunal, it does not suffice that it is compatible with EU law. It is also necessary that third states accept the limits set by the *CETA Opinion* of the CJEU." *Veronika Korom* examines the practical consequences of the *Achmea* ruling on intra-EU BIT arbitration from Hungary's perspective. As she concludes, the final termination of intra-EU BITs will be a win

23 For an overview *see e.g.* https://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf.

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for Hungary in the short term as no new investment arbitrations can be pursued by EU investors against Hungary, but in the long term, however, the termination of these BITs will leave Hungarian companies who invest in the EU without solid legal protection and may even adversely impact Hungary's standing as an attractive place for EU investment.

Among the studies on international law, *Gábor Hajdu* examines in detail the relationship between (international) investment arbitration and public interest. His study analyses the legal consequences of cases where public interest (*e.g.* environmental protection, rights of employees or public health issues) played a significant role. Last but not least, in their co-authored study, *János Ede Szilágyi and Tamás Andréka* investigate the brand new decision of ICSID in *Inícia v. Hungary,* adopted in November 2019 which is related to the cross-border acquisition of agricultural lands (in which the application of the *Achmea* doctrine was also one of the procedural questions). The authors conclude that the case may have a significant role in the future of the cross-border land transactions among EU Member States and beyond.

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On behalf of the entire Editorial Team, I wish you a good read and hope you enjoy the current thematic chapter, our brand new 'Anniversaries' part dealing with certain aspects of the centenary of the Trianon Peace Treaty concluded at the end of World War I, and our well-known 'traditional' chapters (Developments in international law; Developments in EU law; Hungarian state practice; Case notes; Conference reports; Book reviews). I also hope to welcome you among the authors of the next, Vol. 9 (2021) volume of the Hungarian Yearbook of International Law and European Law. We plan to dedicate the thematic chapter of Vol. 9 (2021) to the international law and European law aspects of public health emergency, including, but not limited to, the COVID-19 crisis. Please feel free to share your next contribution (to be published in any of our chapters) with us no later than 15 April 2021.

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doi: 10.5553/HYIEL/266627012020008001001