A New Aspect of the Cross-Border Acquisition of Agricultural Lands

The Inícia Case Before the ICSID*

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Abstract

The Inícia case concluded at the International Centre for Settlement of Investment Disputes (ICSID) on 13 November 2019 shows that international arbitration institutions may have a significant role even in the EU Member States' disputes concerning the cross-border acquisition of agricultural lands. Taking the regulation concerning cross-border acquisition into consideration, the last decade was extremely eventful: (i) Following the expiration of transitional periods, the new Member States were obliged to adopt new, EU law-conform national rules concerning the cross-border acquisition of agricultural lands. (ii) The European Commission began to generally and comprehensively assess the national land law of the new Member States. (iii) The FAO issued the Voluntary Guidelines on the 'Responsible Governance of Tenure of land, fisheries and forests in the context of national food security' (VGGT), which is the first comprehensive, global instrument on this topic elaborated in the framework of intergovernmental negotiations. (iv) Several legal documents, which can be regarded as soft law, concerning the acquisition of agricultural lands have been issued by certain institutions of the EU; these soft law documents at EU level are as rare as the VGGT at international level. (v) The EU initiated numerous international investment treaties, regulations of which also affect numerous aspects of the cross-border acquisition of agricultural lands. (vi) The Brexit and its effect on the cross-border acquisition of agricultural lands is also an open issue. Taking the above-mentioned development into consideration, the Inícia case may have a significant role in the future of the cross-border transaction among EU Member States and beyond.

Keywords: ICSID, investment law, free movement of capital, land tenure, land law.

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1. Introduction

Hungarian agricultural and forestry lands represent 26 percent of Hungarian domestic assets.[1] It follows that the ownership over these assets is an essential issue for Hungary; therefore, the importance of the different forms of the cross-border acquisition of agricultural lands cannot be overestimated in Hungarian jurisprudence. Until now, the Hungarian jurisprudence has sharply distinguished between two types of cross-border acquisition of agricultural lands, namely between the cross-border acquisition of agricultural lands initiated from somewhere within the EU[2] (intra-EU cross-border acquisition) and the cross-border acquisition launched from outside of the EU (outsider cross-border acquisition). This meant that, as far as EU cross-border acquisition is concerned, the transaction was exclusively interpreted on the basis of EU law and the national law of the Member State concerned, typically before the CJEU. By contrast, when it comes to outsider cross-border acquisition, the international investment treaty among countries concerned and the related dispute settlement body's jurisdiction was relevant. The instant topic of the present article, *i.e.* the *Inícia* case, draws attention to the fact that the distinction between these types of cross-border acquisition is not so exact, and an international investment treaty between two Member States of the EU might be applied in an intra-EU cross-border acquisition case, and, furthermore, an international arbitration institution[3] may resolve such a dispute. It is worth stressing that there were numerous disputes before numerous fora connected to the *Inícia* transaction, however, the present article primarily concentrates on the case[4] concluded before of the Tribunal of the International Centre for Settlement of Investment Disputes (ICSID).

In the present article, first, we define a potential approach of the phenomenon of the cross-border acquisition of agricultural lands, and we also draw attention to some interesting aspects of the development of this field over the last decade. In the second part of the article, we concentrate on the EU law concerning the cross-border acquisition of agricultural lands, because, in a typical case, the cross-border transaction and the related dispute among EU Member States should be resolved solely on the basis of the relevant EU law. Third, the *Inícia* case is assessed with particular focus on the ICSID's award.

1 Data of the Hungarian Ministry of Agriculture on 18 September 2014, cited by János Ede Szilágyi, 'Az agrár- és vidékfejlesztési jog elmélete', *in* Ede János Szilágyi (ed.), *Agrárjog*, Miskolci Egyetemi Kiadó, Miskolc, 2017, p. 17.

2 The situation is similar among the states of the European Economic Area as well.

3 *Cf.* Bálint Kovács, 'Access of SMEs to Investment Arbitration', *in* Csongor István Nagy (ed.), *Investment Arbitration and National Interest*, Council on International Law and Politics, Indianapolis, 2018, pp. 89-102.

4 *Magyar Farming Company Ltd, Kintyre Kft and Inícia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award, 13 November 2019.

2. The Phenomenon of the 'Cross-Border Acquisition of Agricultural Lands' and Its Development Before the Inícia Case

When defining the cross-border acquisition of agricultural lands we first have to mention that this definition largely depends on the national law of the country in question, and, in case of the EU, on EU law and the practice of the courts (*e.g.* the CJEU) applying it. Thus, this is conceptually an extremely diverse category encompassing the national, EU and international level. Therefore, we apply a broad approach to make the full-case assessment of the concept possible. János Ede Szilágyi made a similar proposal 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 accepted his recommendation. On this basis, the cross-border acquisition of agricultural lands in the conclusions of the Commission was defined as follows.

> "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."[5]

> "Besides inland land transfer, cross-border acquisition also plays an increasingly 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 acquire the lands of the target country may be regarded as cross-border acquisition as well. In EU law, this interpretation of cross-border acquisition could become quite difficult due to the forms of the European Cooperative Society (SCE) and the European Company (SE); [*i.e.* which Member State is the target country and which one is the investor country within an SCE or an SE form.] Otherwise, it is worth mentioning that under EU law, the 'cross-border' element with regard to land acquisitions has typically been assessed in the framework of preliminary rulings"[6] of the CJEU.

5 János Ede Szilágyi, 'Conclusions', *Journal of Agricultural and Environmental Law*, Vol. 10, Issue 19, 2015, p. 91.

6 Szilágyi 2015, pp. 91-92.

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> "As regards legal entities, there are two elementary issues. First, the traceability of the real ownership (investor) background of the legal entities is always complicated (*e.g.* difficulties in connection with offshore companies). Second, the number of legal entities might easily be multiplied. The solution for both issues is tightly connected to the proper registration of the affected legal entities and their investors (ownership background)."[7]

The unique feature of Hungarian land law is that it includes a general prohibition against the acquisition of the ownership of agricultural lands by legal persons and entities. Among others, the European Commission questioned the conformity of the said general ban on the acquisition of land by domestic and foreign legal entities with EU law in an infringement procedure.[8]

Taking the regulation concerning cross-border acquisition into consideration, the last decade was extremely eventful in the region.

(i) The Accession Treaties of new Member States that joined the EU in 2004 granted transitional periods[9] for maintaining their existing national legislations restricting the acquisition of agricultural land and forest, by derogation from the free movement of capital rules. In 2014 and afterwards, the transitional periods granted to new Member States, including Hungary, expired. Following the expiration of the transitional periods, the new Member States were obliged to adopt new, EU law-conform national rules concerning the cross-border acquisition of agricultural lands. With this reform and amendment of the

7 János Ede Szilágyi, 'General Report of Commission II', *in* Roland Norer (ed.), *CAP Reform: Market Organisation and Rural Areas*, Nomos, Baden-Baden, 2017, p. 232.

8 Tamás Andréka & István Olajos, 'A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése', *Magyar Jog*, Vol. 64, Issue 7-8, 2017, pp. 420-424; Anikó Raisz, 'Topical Issues of the Hungarian Land-Transfer Law', *CEDR Journal of Rural Law*, Vol. 3, Issue 1, 2017, pp. 73-74.

9 János Ede Szilágyi, 'The Accession Treaties of the New Member States and the National Legislations, Particularly the Hungarian Law, Concerning the Ownership of Agricultural Land', *Journal of Agricultural and Environmental Law*, Vol. 5, Issue 9, 2010, pp. 48-61; Csilla Csák, 'Die ungarische Regulierung der Eigentums- und Nutzungsverhältnisse des Ackerbodens nach dem Beitritt zur Europäischen Union', *Journal of Agricultural and Environmental Law*, Vol. 5, Issue 9, 2010, pp. 20-31; István Olajos & Anikó Raisz, 'The Hungarian National Report on Scientific and Practical Development of Rural Law in the EU', *Journal of Agricultural and Environmental Law*, Vol. 5, Issue 8, 2010, pp. 44-45; Csilla Csák & Zoltán Nagy, 'Regulation of Obligation of Use Regarding the Agricultural Land in Hungary', *Zbornik radova Pravnog fakulteta u Novom Sadu,* Vol. 45, Issue 2, 2011, pp. 541-549.

national land laws of the new Member States,[10] EU law-conform national land law has become dominant in the Eastern part of Europe by now.

(ii) Following the expiration of the transitional periods, the European Commission began generally and comprehensively assessing the national land law of exclusively the new Member States, as a result of which, in the opinion of Ágoston Korom,[11] the European Commission fell under suspicion of a double standard. Later, the European Commission launched infringement procedures against numerous new Member States in connection with their land transfer regime; these infringement procedures are still underway.

(iii) In 2012, the FAO issued Voluntary Guidelines on the 'Responsible Governance of Tenure of land, fisheries and forests in the context of national food security' (VGGT). "These international voluntary guidelines are rare in this field [...]. According to its own self-determination, VGGT is the first

10 *See* Christina Yancheva *et al.*, 'Agri-Land Management in Bulgaria – Current Legal State of Play Regarding Tenure', *CEDR Journal of Rural Law*, Vol. 3, Issue 1, 2017, pp. 26-32; Milan Damohorsky & Tereza Snopková, 'Acquiring and Use of Agricultural Land in the Czech Republic', *CEDR Journal of Rural Law*, Vol. 3, Issue 1, 2017, pp. 38-42; Roman Budzinowski & Aneta Suchon, 'Purchasing and Renting Agricultural Land in Poland', *CEDR Journal of Rural Law*, Vol. 3, Issue 1, 2017, pp. 94-97; Jarmila Laziková *et al.*, 'The Ownership and the Right of Use of Agricultural Land in Slovakia', *CEDR Journal of Rural Law*, Vol. 3, Issue 1, 2017, pp. 98-103; Minko Georgiev, 'CAP in the Efficiency Trap. Agricultural Land in Bulgaria', *CEDR Journal of Rural Law*, Vol. 5, Issue 1, 2019, pp. 20-21, 23-24, 26-27; Attila Szinay & Tamás Andréka, 'Hungarian Landmarket in the Light of the New Law', *CEDR Journal of Rural Law*, Vol. 5, Issue 1, 2019, pp. 28-36; Victor Marcusohn, 'The Topical Position of Agricultural Land in the Central Eastern European Countries', *CEDR Journal of Rural Law*, Vol. 5, Issue 1, 2019, pp. 51-62; Lucia Palsova, 'The Sublease Contract as a Tool for Solution of the Land Ownership Fragmentation in Slovakia', *CEDR Journal of Rural Law*, Vol. 5, Issue 1, 2019, pp. 72-76; Franci Avsec, 'The Preemption Right on Agricultural Land is Slovenia: Past Development and Future Challenges', *Journal of Agricultural and Environmental Law*, Vol. 15, Issue 28, 2020, forthcoming; István Olajos, 'The Acquisition and the Right of Use of Agricultural Lands, in Particular the Developing Hungarian Court Practice,' *Journal of Agricultural and Environmental Law*, Vol. 12, Issue 23, 2017, pp. 91-116; Csilla Csák, 'Constitutional Issues of Land Transactions Regulation', *Journal of Agricultural and Environmental Law*, Vol. 13, Issue 24, 2018, pp. 5-32; Zsófia Hornyák, 'Die Regeln bezüglich des landwirtschaftlichen Gewerbes in einer Rechtsvergleichsanalyse', *Journal of Agricultural and Environmental Law*, Vol. 13, Issue 24, 2018, pp. 33-60; György Marinkás, 'Certain Aspects of the Agricultural Land Related Case Law of the European Court of Human Rights', *Journal of Agricultural and Environmental Law*, Vol. 13, Issue 24, 2018, pp. 99-134; István Olajos & Ágnes Juhász, 'The Relation Between the Land Use Register and the Real Estate Registration Proceeding, With Regard to the Justification of the Lawful Land Use', *Journal of Agricultural and Environmental Law*, Vol. 13, Issue 24, 2018, pp. 164-193. About the land tenure of some non-EU Member Eastern European states, *see* Sibilla Buletsa *et al.*, 'Non-Residents as Participants in Land Legal Relations in Ukraine', *CEDR Journal of Rural Law*, Vol. 5, Issue 1, 2019, pp. 89-93; Luka Baturan & Attila Dudás, 'Legal Regime of Agricultural Land in Serbia with Special Regard to the Right of Foreigners to Acquire Ownership', *CEDR Journal of Rural Law*, Vol. 5, Issue 1, 2019, pp. 63-71; Sibilla Buletsa & Roman Oliynyk, 'Non-Residents as Subject of Land Relations in Ukraine', *Journal of Agricultural and Environmental Law*, Vol. 15, Issue 28, 2020, forthcoming.

11 Ágoston Korom & Réka Bokor, 'Gondolatok az új tagállamok birtokpolitikájával kapcsolatban: transzparencia és egyenlő elbánás', *in* Klára Gellén (ed.), *Honori et Virtuti*, Szeged, 2017, pp. 262-265.

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comprehensive, global instrument on this topic prepared through intergovernmental negotiations."[12]

(iv) Several legal documents, which can be regarded as soft law, concerning the acquisition of agricultural lands have been issued by certain institutions and bodies of the EU in rapid succession; thus, the European Economic and Social Committee (EESC) has issued an opinion,[13] the European Parliament (EP) has issued a resolution[14] and the European Commission (EC) has issued an interpretative communication.[15] These soft law documents on land law at the EU level are as rare as the VGGT at the international level.

(v) After the Lisbon Treaty,[16] the EU started to renew its international investment system[17] with third countries:

> "In December 2009, the EU gained exclusive competence on foreign direct investment as part of the common commercial policy. Nevertheless, in connection with foreign investments some competence anomalies have still remained which the Court of Justice of European Union (CJEU) attempted to solve – just in connection with the pending Singapore-EU FTA. Earlier, the EU member states have concluded 1400 or so bilateral foreign investment treaties, which continue to exist until they are replaced by EU agreements. 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 (the important elements of this have already appeared in the finalized international investment treaties concluded with Vietnam and Canada)."[18]

Owing to this development, several new international investment treaties have been adopted and there are numerous others under negotiation. The cross-border

12 János Ede Szilágyi, 'Agricultural Land Law', *Hungarian Yearbook of International and European Law,* Vol. 6 (2018), pp. 190-191.

13 Opinion of the European Economic and Social Committee (EESC) on 'Land grabbing – a warning for Europe and a threat to family farming', NAT/632 – EESC-2014-00926-00-00-AC-TRA (EN), Brussels, 21 January 2015

14 European Parliament (EP) Resolution of 27 April 2017 on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers, P8 TA(2017)0197.

15 European Commission (EC), *Commission Interpretative Communication on the Acquisition of Farmland and European Union Law,* 18 October 2017, pp. 5-20.

16 *See* Marcel Szabó, 'Az Európai Unió közös kereskedelempolitikája a Lisszaboni Szerződés hatályba lépését követően', *in* Marcel Szabó *et al.* (eds.), *Bevezetés az Európai Unió egyes politikáiba*, Szent István Társulat, Budapest, 2011, pp. 62-73.

17 *Cf.* Csongor István Nagy, 'Free Trade, Public Interest and Reality: New Generation Free Trade Agreements and National Regulatory Sovereignty', *Czech Yearbook of International Law*, Vol. 9, 2018, pp. 197-216; Balázs Horváthy, 'A közös kereskedelempolitika alapelvei és célkitűzései az integrált uniós külkapcsolatrendszer tükrében', *Iustum Aequum Salutare*, Vol. 10, Issue 1, 2014, pp. 51-69.

18 János Ede Szilágyi, 'The International Investment Treaties and the Hungarian Land Transfer Law', *Journal of Agricultural and Environmental Law*, Vol. 13, Issue 24, 2018, p. 195; *cf.* Tamás Szabados, 'Az Európai Bíróság CETA-véleménye és a beruházásvédelmi bíráskodás jövője', *Külgazdaság*, Vol. 63, Issue 9-10, 2019, pp. 89-101.

acquisition of agricultural lands makes up a significant part of these treaties, typically, in connection with investments or the liberalization of services or establishment. However, it is worth mentioning that Hungary has typically made reservations in order to protect its land market.

(vi) Finally, it is worth mentioning Brexit and, among others, a related question; namely, what will be the effect of Brexit on the relationship between the UK and the Member States of the EU regarding the cross-border acquisition of agricultural lands?

3. The Conventional Legal Situation Concerning Cross-Border Acquisition Between Two Member States

The typical legal position concerning cross-border acquisition between two Member States of the EU is based on the EU law.

From the point of view of the regulation of land transfer,[19] both primary and secondary sources of EU law have relevance. On the other hand, from the point of view of the rules and regulations concerning the acquisition of the ownership of land in a Member State, the primary law sources are important[20] – even if not exclusively – such as *(i)* TFEU, *(ii)* the Charter of Fundamental Rights of the EU with regard to the human rights (notably the right to property), *(iii)* and the above-mentioned Accession Treaties. Apparently, it is difficult for the national lawmaker to interpret these primary sources of law. Therefore, the interpretation power of CJEU is so elementary in connection with this part of law. Namely, we have to keep in mind that even when applying primary law sources for the land transfer regime, one has to rely on the jurisdiction of the CJEU; namely, we can formulate the followings just through an interpretation filter, or in a better case: by the help of it. It is worth noting that EU law restricts the margin of appreciation of Member States only in shaping their land transfer law and regulation with regard to the Member States or State Parties of the EU and the European Economic Area and any other state enjoying similar treatment under an international agreement. Meanwhile, there are no such restrictions applying to citizens or legal persons of countries outside these areas. This means that the Member States' land transfer norms may freely prescribe strong restrictions concerning the latter group of persons. The CJEU jurisprudence concerning the norms on the acquisition of land ownership covers principally the following sources of primary law: the general prohibition of discrimination (Article 18 TFEU), the freedom of establishment, which is part of the free movement of persons (Article 49 TFEU), the free movement of capital (Article 63 TFEU), aims

19 János Ede Szilágyi, 'European Legislation and Hungarian Law Regime of Transfer of Agricultural and Forestry Lands', *Journal of Agricultural and Environmental Law*, Vol. 12, Issue 23, 2017, pp. 148-181.

20 *Cf.* László Kecskés & László Szécsényi, 'A termőföldről szóló 1994. évi LV. törvény 6. §-a a nemzetközi jog és az EK-jog fényében', *Magyar Jog*, Vol. 44, Issue 12, 1997, p. 724; Ágoston Korom, 'A termőföldek külföldiek általi vásárlására vonatkozó 'moratórium' lejártát követően milyen birtokpolitikát tesz lehetővé a közösségi jog', *Európai Jog*, Vol. 9, Issue 6, 2009, pp. 7-16.

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of the Common Agricultural Policy (Article 39 TFEU), the rules and regulations relating to the system of property.[21] As far as the latter is concerned, the provisions of the TFEU and the EU Treaty are not to infringe the system of property ownership. Yet the respective jurisprudence of the CJEU complemented this by declaring that although the Member States are entitled shape their system of property ownership independently, when determining these regulations they cannot impede the economic freedoms provided for under EU law, in our case the free movement of capital and persons.[22] Therefore, at the CJEU the Member States cannot refer to Article 345 TFEU in order to derogate from the restrictions of EU law on the regulation of land property.

Assessing these TFEU regulations,[23] Korom concluded that EU law determines the margin of appreciation of the Member States to shape their own rules and regulations concerning land transfer at the point of intersection of the positive and the negative integration rules.[24] Explaining the previous statement, Korom refers to the free movement of persons and capital a negative integration rule. In his opinion these and the other two freedoms – the free movement of goods and services – (Korom refers to the four freedoms together as 'economic constitutionality of the EU') are the basis of EU law even today, and "focus on the elimination of obstacles to the movement of production factors, in particular, the obstacles set up by the Member States".[25] It implies as a main rule that European institutions, including the CJEU consider every act of the Member States thought to be an obstacle of these freedoms an infringement of EU law[26] to begin with. By contrast, positive integration means the creation of an earlier non-existant supranational institution, a typical example of which is the creation of the Common Agricultural Policy (CAP) and its institutions.[27] In the jurisprudence of the CJEU one of the objectives of the CAP, the 'fair standard of living for the agricultural community' was treated as a legitimate basis for the national

21 *See e.g.* Judgment of 6 November 1984, *Case C-182/83, Fearon,* ECLI:EU:C:1984:335; Judgment of 30 May 1989, *Case C-305/87, Commission v. Greece,* ECLI:EU:C:1989:218; Judgment of 1 June 1999, *Case C-302/97, Konle,* ECLI:EU:C:1999:271; Judgment of 22 October 1998, *Joined Cases C-9/97 and C-118/97, Jokela and Pitkäranta,* ECLI:EU:C:1998:497; Judgment of 5 March 2002, *Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, Reisch and others,* ECLI:EU:C:2002:135; Judgment of 15 May 2003, *Case C-300/01, Salzmann,* ECLI:EU:C:2003:283; Judgment of 23 September 2003, *Case C-452/01, Ospelt and Schlössle Weissenberg,* ECLI:EU:C:2003:493; Judgment of 1 December 2005, *Case C-213/04, Burtscher,* ECLI:EU:C:2005:731; Judgment of 25 January 2007, *Case C-370/05, Festersen,* ECLI:EU:C:2007:59; Judgment of 8 May 2013, *Joined Cases C-197/11 and C-203/11, Libert and others,* ECLI:EU:C:2013:288.

22 *See Case C-182/83*, *Fearon*, para. 7; *Case C-302/97, Konle*, paras. 37-38.

23 On the EU law relevances, *see* Ildikó Bartha, 'Földindulás. A földforgalmi szabályozás tagállami és uniós joga', *Jogtudományi Közlöny*, Vol. 72, Issue 9, 2017, pp. 409-413.

24 Ágoston Korom, 'Az új földtörvény az uniós jog tükrében', *in* Ágoston Korom (ed.), '*Az új magyar földforgalmi szabályozás az uniós jogban*', Nemzeti Közszolgálati Egyetem, Budapest, 2013, p. 14. *Cf.* Mihály Kurucz, 'Gondolatok a magyar földforgalmi törvény uniós feszültségpontjainak kérdéseiről', *in* József Szalma (ed.), *A Magyar Tudomány Napja a Délvidéken 2014*, VMTT, Újvidék, 2015, pp. 120-173.

25 Korom 2013, p. 12.

26 Id. p. 14.

27 Id.

regulation of land law by the Member States. This positive integration norm (Article 39 TFEU) serves as a basis for the Member States to invoke a derogation from negative integration regulations (Articles 49 and 63 TFEU), when introducing restrictions on land transfer.[28]

In connection with the aforementioned situation, it is important to note that the CJEU's interpretation that agricultural land belongs under the free movement of capital is also[29] reinforced by a secondary law source, namely Council Directive 88/361/EEC.[30] On the basis of the CJEU jurisprudence,[31] the nomenclature of the free movement of capital in Supplement 1 of the same directive implies that investments in real estate by nationals of another Member State not living in the host state fall under the category called movement of capital. The directive classifies the "Purchase of buildings and land and the construction of buildings by private persons for gain or personal use" as an investment in real estate. This category also involves rights of usufruct, usufruct, easements and building rights.

4. The Inícia Case

In this part of the article, we first introduce the background of the dispute and present the case before the Hungarian national courts and before the ICSID[32] in a chronological order. In this part, we also briefly refer to *Achmea*[33] which represents the position of the CJEU, *i.e.* how the CJEU interprets the competence of the international arbitration institution in a case pending between two Member States of the EU.[34]

Hungary's state-owned Asset Management Agency (Asset Management Agency) as lessor and *'INÍCIA Mezőgazdasági, Termelő, Szolgáltató és Kereskedelmi Zártkörűen Működő Részvénytársaság'* (Inícia) as lessee, concluded a land lease

28 Korom draws this conclusion especially assessing cases *Ospelt and Schlössle Weissenberg* and *Festersen*; Korom 2013, p. 14.

29 *Cf.* Articles 63-64 TFEU.

30 Council Directive 88/361 24 June 1988 for the implementation of Article 67 of the Treaty. This directive overruled the former Council Directive 60/921/EEC.

31 Judgment of 14 September 2006, *Case C-386/04*, *Centro di Musicologia Walter Stauffer*, ECLI:EU:C:2006:568, para. 22.

32 *See* Csongor István Nagy, 'Hungarian Cases Before ICSID Tribunals: the Hungarian Experience With Investment Arbitration', *Hungarian Journal of Legal Studies*, Vol. 58, Issue 3, 2017, pp. 291-310. In connection with the nature of the alternative dispute settlement systems, *see* Erika Csemáné Váradi, 'Gondolatok az alternatív vitarendezés körében', *Miskolci Jogi Szemle*, Vol. 13, Issue special edition 1, 2018, pp. 16-17; Erika Csemáné Váradi, 'Az alternatív vitarendezés létjogosultsága a gazdaságban', *Miskolci Jogi Szemle*, Vol. 14, Issue special edition 1, 2019, pp. 7-8.

33 Judgment of 6 March 2018, *Case C-284/16, Achmea*, ECLI:EU:C:2018:158.

34 On *Achmea* in other aspects, *see* Csongor István Nagy, 'Intra-EU Bilateral Investment Treaties and EU Law After Achmea', *German Law Journal*, Vol. 19, Issue 4, 2018, pp. 981-1016; Tamás Szabados, 'Az Európai Unió Bíróságának Achmea döntése', *Jogesetek Magyarázata*, Vol. 10, Issue 1, 2019, pp. 29-36; Kornélia Kozák & Miklós Szirbik, 'Fenntartható befektetővédelmi jogalkotás az intra-EU megállapodások területén, figyelemmel az Európai Unió Bíróságának Achmea-ügyben hozott ítéletére', *in* László Szegedi & Krisztina Strihó (eds.), *Európai szabályozáspolitikai kihívások*, 2020, forthcoming.

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agreement on 25 July 1994 for a fixed period of ten years.[35] Based on this land lease agreement and its amendments, Inícia had a right of land lease until 25 July 2014 concerning parcels of land of 669,2387 hectares owned by the Hungarian State.[36]

With regard to the content of the agreement in force between the parties, it is important to point out that the agreement provided Inícia with a pre-lease right, which ensured that the lease was renewable after the expiry of the contract, allowing for the long-term use of the land. In addition, the lessee of the agricultural land was also entitled to a statutory pre-lease right.[37] Magyar Farming Company Ltd. (Magyar Farming), registered in the UK, acquired Inícia through its fully-owned Kintyre Kft. in 1997. At that time, Inícia had a valid lease agreement in force for 3 years.

When Magyar Farming acquired Inícia in 1997, the lease agreement contained a provision according to which any subsequent changes in the legal regulations regarding Hungarian arable land will apply to the already concluded agreement. Furthermore, under the contract, the rules on arable land in force at any given time become part of the contract.

The parties (at that time the Hungarian State was represented by the State Privatisation and Property Plc.) amended the lease agreement on 1 November 1999 in respect of the duration of the lease and the leased land. On 16 November 2006 they extended the agreement until 25 July 2014, and with other amendments they consolidated it. In connection with the latter, the National Land Fund Management Organization (NFA) acted on behalf of the Hungarian State.[38] Starting with the date of the amendment and consolidation of the agreement in 2006, Inícia had no a contractual pre-lease right, only a pre-lease right based on law.

In July 2011, Act LXXXVII of 2010 on the National Land Fund (NFA Act) was amended in the interest of successful procedures of subsequent land lease tenders. The new provision of NFA Act [Section 18(1a)] declared that in case of a leasehold of state-owned rural land or farm, a pre-lease right arising from legal regulations may not be exercised. This statutory provision was based on the simple consideration that if the state selects the users of the state-owned land in the framework of a tender procedure with a specific system of preferences, a third party with a pre-lease right who does not meet the criteria, does not participate in the tender and does not win the tender should not be able to hinder the application of state land use policy.[39]

On 14 June 2013, Inícia addressed a request to NFA, who represented the Hungarian State, to extend the duration of the contract based on Section 18(1c) of NFA Act. However, NFA, acting as the owner, no longer wished to extend the

35 Budapest-Capital Regional Court, 44.Pf.633.704/2017/14.

36 The affected real estates are the following (by their real estate register numbers): Enese 0144, 0146, 0150, 0153, 0157, 0162/3, 0164, 0183/5; Győrsövényháza 062, 065, 082/4, 077/1, 077/2, 089, 091; Ikrény 05/49, 05/50, 05/27, 0135/4, 015; Töltéstava 027/3, 044/3, 044/5.

37 Budapest-Capital Regional Court, 44.Pf.633.704/2017/14.

38 Id.

39 Id.

land lease, intending that the properties in question be utilized through a public tender.[40]

Ínícia participated unsuccessfully in the lease tender announced in July 2013. At that time it no longer had a contractual pre-lease, and owing to the above-mentioned provisions of NFA Act it couldn't exercise its statutory pre-lease right either. The tenders in question were won by 12 local farmers.[41] The fixed term of Ínícia's lease agreement expired on 25 July 2014, and its lease agreement was not renewed because of the public tenders.

Ínícia has filed several lawsuits[42] against the state and its representative, the NFA. The most important lawsuit between Ínícia and NFA ended with the NFA prevailing in the extraordinary review of the second instance court decision by the Curia of Hungary.[43] Ínícia sued NFA because – according to their claim – they had a pre-lease right on the basis of their earlier (already expired) lease agreement, so the state lands previously leased by them could not have been leased to other persons by NFA.

Article 5.1 of the lease agreement of Ínícia stated that the lessee has the right to pre-lease in accordance with the legal provisions in force at any time. The legislation in force at the time of the conclusion of the new lease agreements precluded (and has precluded since then) the exercise of all pre-lease rights on public land. Finally, recognizing the above-mentioned argument of NFA and the actual substance of the contract, the Curia of Hungary dismissed the action of Ínícia in a binding decision, and NFA won the lawsuit.[44]

On 4 July 2017, Magyar Farming, Kintyre Kft. and Ínícia submitted a dispute to the ICSID. On 1 August 2017, the Secretary-General of ICSID lodged the request. The demands of the claimants were based on Article 6 on expropriation of the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments, dated 9 March 1987 (BIT). The claimants demanded damages to be paid in the sum of EUR 15,000,000 plus interests. On 27 April 2018, the claimants filed their Memorial on the Merits, in which the amount of damages was increased to EUR 18,300,000 and they claimed interest compounded semi-annually at the rate of 7.87 percent until the date of payment. In addition to this amount, Ínícia demanded that the respondent bear the costs and expenses of the local court proceedings in Hungary in the sum of HUF 62,512,904 and the full costs and expenses of the ICSID proceedings.[45]

In the meantime, on 6 March 2018 the CJEU ruled in *Achmea*[46] which is critically important for the assessment of the case. In its decision, the CJEU ruled

40 Id.
41 Id.
42 *See e.g.* in connection with the second instance court: Budapest-Capital Regional Court, 37.P.21.325/2014/6; Budapest-Capital Regional Court, 44.Pf.637.043/2015/9; Budapest-Capital Regional Court, 44.Pf.633.704/2017/14.
43 Curia of Hungary, Pfv.V.20.733/2018/18.
44 Id.
45 ICSID Case No. ARB/17/27, paras. 12, 29-30, 54.
46 *Case C-284/16, Achmea*.

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that dispute settlement clauses in investment protection agreements concluded between EU Member States based on which an investor of one Member State may request an arbitration proceeding concerning a legal dispute in connection with its investment in another Member State, are incompatible with EU Treaties.[47]

In view of *Achmea*, Hungary sent a letter to the ICSID Tribunal on 30 March 2018. Referring to the decision in *Achmea*, Hungary indicated its objection to the Tribunal's jurisdiction and requested that the Tribunal issue a decision to bifurcate the proceedings and hear this jurisdictional objection in a preliminary phase. On 10 April 2018, the Tribunal rejected Hungary's request for reasons of efficiency,[48] and presumably also in view of the ongoing theoretical debate on the effects of the *Achmea* decision on ICSID cases.

In its final award delivered on 13 November 2019, the Tribunal decided the following: *(i)* Hungary shall pay to the claimants compensation for the expropriation in the amount of EUR 7,148,824; *(ii)* plus interest at the rate of 6-month EURIBOR+2% compounded semi-annually, from 1 August 2015 until payment; further, *(iii)* Hungary shall reimburse the claimants for the ICSID and Tribunal costs in the amount of USD 282,224.40, for the ICSID lodging fee in the amount of USD 25,000 and for the claimants' legal costs in the amount of GBP 296,456, EUR 19,473 and HUF 26,495,585.5; *(iv)* including interest at the rate of 6-month EURIBOR+2% compounded semi-annually, from the date of this Award until payment.[49]

In the award,[50] the Tribunal did not accept Hungary's standpoint on the lack of jurisdiction of the Tribunal based on *Achmea*. In the Tribunal's view, even if it is true that the CJEU has exclusive jurisdiction to interpret EU law, the dispute concerns not only the interpretation of EU law but also the necessary interpretation of the conflict-of-laws rules of the BIT and the 1969 Vienna Convention on the Law of Treaties. The interpretation of the latter sources of law in relation to the jurisdiction of the Tribunal is the sole responsibility of the Tribunal and not of the CJEU. The Tribunal then concluded that, in its interpretation, there was no conflict between the BIT's subordination clause and the EU Treaties. The Tribunal added that this is confirmed by the fact that the subject of the subordination statement in the BIT is the investor in question and not the UK.

As to the merits of the case,[51] the Tribunal found that Hungary had expropriated the claimants' investment in Hungary by eliminating the exercise of the statutory pre-lease right for state-owned arable land under the 2011 amendment of the NFA Act. In this context, the Tribunal rejected Hungary's argument that the statutory pre-lease right was a right provided under general legislation, which the State could modify for policy reasons. The Tribunal also

47 In connection with other cases of the CJEU concerning the BITs in the EU law, *see* Tamás Szabados, 'A tagállamok közötti beruházásvédelmi egyezmények az uniós jogban', *Állam- és Jogtudomány*, Vol. 58, Issue 3, 2017, pp. 18-44.

48 ICSID Case No. ARB/17/27, paras. 50-53.

49 Id. para. 441.

50 Id. paras. 79, 172-176, 187, 190, 196-198, 205-211, 216-217, 231.

51 Id. paras. 338-372.

rejected Hungary's argument that the statutory pre-lease right could not be considered as a BIT-protected 'acquired right' in a constitutional or civil law sense. The Tribunal, on the other hand, stated in para. 349 of the award that, as soon as an investor enters into a lease in accordance with the wording of the law, he also 'acquires' the 'abstract' pre-lease right ensured by the law. The Tribunal was of the opinion that since foreign natural and legal persons could not acquire the ownership of arable land in Hungary at the time of the investment, the protection against expropriation under the BIT (in a holistic approach) jointly covers the right of lease and the statutory pre-lease right (as a *quasi*-ownership right[52]).

Finally, the Tribunal found that since Hungary had violated Article 6 of the BIT on expropriation by depriving the claimants of their statutory pre-lease right (in the absence of adequate compensation), it was not necessary to further examine whether Hungary had also violated the claimants' alleged contractual pre-lease right. The Tribunal did not, therefore, deal with the substance of the final judgment of the Hungarian courts, which held that the claimants did not have a contractual pre-lease right. The difference between the two decisions related to the statutory pre-lease right is that while the Hungarian ordinary courts manage and treat Hungarian laws and its changes as a given and apply them, the essence of the ICSID's examination was whether the relevant legislative changes caused an infringement to the investor under the BIT. Thus, in the framework of assessing the legality of legislation, the arbitral tribunal is also called upon to examine the compliance of the legislation with the BIT, to which the Hungarian ordinary courts are, of course, not entitled.

On 4 March 2020, the claimants submitted a petition to confirm the Foreign Arbitral Award at the US District for the District of Columbia. This suggests that the claimants' move was influenced by the fact that the arbitral award may not be enforceable on European soil, hence, enforcement in the US was launched. However, it is worth referring to *Micula brothers*[53] which was also declared enforceable in the US and recently Romania paid the compensation for fear of enforcement measures against Romanian public enterprises.

5. Conclusion

In our opinion, *(i)* the ICSID award is full of misinterpretation of the Hungarian legal situation, *e.g.* in connection with the nature of the pre-lease right. *(ii)* Additionally, taking *Achmea* into consideration, Hungary is not obliged to (or,

52 *Cf.* Pál Sonnevend, 'A tulajdonhoz való jog az Európai Unió jogában és egyes külföldi alkotmányokban', *in* Borbála Molnár *et al.* (eds.), *Gazdasági alapjogok és az új magyar Alkotmány*, Országgyűlés Emberi Jogi, Kisebbségi, Civil- és Vallásügyi Bizottsága, Budapest, 2011, pp. 150-156; András Téglási, 'How Is Property Ownership Guaranteed Constitutionally in the Field of Agriculture?', *Journal of Agricultural and Environmental Law*, Vol. 4, Issue 7, 2009, pp. 18-29; András Téglási, 'The Constitutional Aspects of Ownership', *in* István Sándor (ed.), *Business Law in Hungary*, Patrocínium, Budapest, 2016, pp. 168-184.

53 *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013.

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rather, is obliged *not to*) recognize the award of the ICSID. *(iii)* Besides, in a general sense, the ICSID's *Inícia* case drew attention to the importance of the review of the bilateral investment treaties among the Member States of the EU regarding the correct implementation of *Achmea*. Failing to settle the situation by a multilateral treaty terminating the bilateral investment treaties among the Member States of the EU means that other awards similar to *Inícia* or lodged before parallel international arbitration institutions may arise. *(iv)* As to the international investment treaties of the EU under negotiation, the cross-border acquisition of agricultural lands should be stipulated carefully.[54] In these international investment treaties, it is quite important that the EU be able to establish a new investment court for the interpretation of the new international investment treaties in a way that respects EU law and is capable of interpreting the Member States' legal order correctly in similar situations.

54 Szilágyi 2018, pp. 204-207.