| Chapter 2 |

Acquirement of Land Rights by Foreign Investors: An International Investment Law Perspective[1]

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ABSTRACT

This chapter provides an insight into the world of international investment law and its intersection with cross-border acquirement/acquisition of land. Cross-border acquirements, in this context, can be viewed as foreign investments that may fall under the protection of one (or more) of the approximately 3,000 existing international investment agreements. International investment law, as a complex and autonomous system, provides protection to investors via substantive provisions and investment treaty arbitration. The unique situation of Central Europe within this particular international law framework is something which merits attention, which is why this chapter provides an introductory part for the reader to gain a general knowledge of the field and then dives into some of the regional specificities, in tune with the rest of the book.

KEYWORDS

international investment law, arbitration, land acquisition, land grabbing

1. Short introduction to international investment law

The international investment law (IIL) regime is an atomized system—as opposed to the multilateral trading system, with the World Trade Organization as its biggest component—mostly made up of bilateral investment treaties (BITs) and treaties with investment provisions (TIPs), collectively referred to as international investment agreements (or IIAs). IIAs are instruments for the facilitation and protection of foreign direct investment (FDI) and have been widely regarded as an important factor in attracting FDI. When two states conclude a bilateral investment treaty, they essentially grant the protections formulated therein to investments made on their territories by investors from the other contracting state. The country where the

1 Our paper draws upon the conclusions of a previous study by Szilágyi, 2018.

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investment is made is called a *host country,* while the country of origin of the investor is called a *home country.*

As more and more IIAs have been reached, the use of the dispute resolution mechanism attached to these agreements—called investor-state dispute settlement (ISDS)—started seeing activity. Like any system, due to its imperfections, it has received criticism from some and has also been praised by others. Some of the more important questions related to this topic will be presented briefly in this paper, with a focus on the general characteristics of the system as well as the specific case of the acquirement of land rights in selected Central European countries.[2]

The social, political, and economic implications of IIAs have often been overlooked by developing countries in their quest to maximize FDI inflows.[3] Widely recognized as essential for their development, the inflow of FDI was also encouraged by IIAs typically entered into by developing countries (investment importers) with developed countries (investment exporters). When it comes to development, oftentimes, states that are strapped for investment will focus on the narrower macroeconomic effects of FDI. Nevertheless, the social and political implications of FDI—protected by IIAs—are not to be disregarded. IIAs accord foreign investors protection against *expropriation,*[4] other substantive protection in the form of standards of treatment, as well as procedural remedies for their effective enforcement in the form of ISDS. Consequently, terms such as *fair and equitable treatment,*[5] the protection of *legitimate expectations,* the prohibition of discrimination, and other substantive provisions have become ubiquitous within IIAs. Recourse to investment treaty arbitration (ITA) as a means for ISDS has also grown ever more popular.[6] While FDI produces mixed results, with local communities sometimes negatively affected by the inflow of foreign capital, the development contribution of FDI has a front and center position with decision-makers in developing countries. International organizations such as the United Nations Conference on Trade and Development (UNCTAD) or the World Bank have encouraged granting increased protection to foreign investors as a way to ensure increased inflows of capital[7]; however, it has been noted that the protection of investments dominates these treaties, while the promotion aspect is often overlooked in them. This made IIAs—and investor access to investment arbitration—important components for attracting capital. Ultimately, the importance of these mechanisms stems from the fact that they insulate foreign investments, granting foreign investors

2 The selected Central European countries—as per the topic of this book—are the following: Croatia, Czechia, Hungary, Poland, Romania, Serbia, Slovakia, and Slovenia.

3 For a review of the main points on this topic, see Nagy, 2020, pp. 899–900.; also, Pohl, 2018.

4 Víg, 2019.

5 Paparinskis, 2014.

6 See the statistics of the United Nations Conference on Trade and Development (UNCTAD) on the number of ISDS cases: https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf (Accessed: July 12, 2022)

7 See, for UNCTAD, https://unctad.org/system/files/official-document/iteiit20077_en.pdf and for the World Bank, https://documents1.worldbank.org/curated/en/666341500008847215/pdf/117475-PUBLIC-WP-13-7-2017-12-8-30-SPIRAToolKitGuide.pdf (Accessed: July 12, 2022)

the right to take their grievances in front of international arbitral tribunals, thus circumventing domestic courts.

Traditionally, the field of international investment protection has its origins in the principles of state responsibility to aliens.[8] With its evolution over time, at one point, it was argued that IIAs and ITA are needed to protect foreign investment from political risk in the host states while also avoiding the need for the home states of investors to engage in diplomatic efforts (or even in the use of force) to protect the interests of their citizens abroad.[9] With the help of such a dispute settlement mechanism, investors can engage host states directly and hold them accountable for actions that violate their rights in accordance with the applicable IIA. In disputes arising from FDI, several overlapping legal regimes may be applicable. This is where IIAs will stand out; in cases where there is such a treaty between the investor's host state and home state, if the investor so chooses, ITA may be the way to resolve a dispute that has arisen between them. In cases where an arbitration is lodged, this effectively impedes the state from giving diplomatic protection or bringing an international claim on the same dispute, unless the host state will not comply with the arbitral tribunal's award. This system effectively establishes the capacity of private individuals and corporations to engage in proceedings directly against a state in an international forum, essentially recognizing the individual as a subject of international law.[10]

The protections granted by IIAs extend to all investments coming from and established in the countries party to them. What is more, the commitments made by host states by entering into investment contracts with foreign investors may also be covered by the protections granted by a BIT, in case it includes a so-called *umbrella clause*. Umbrella clauses included in many IIAs extend the treaty protections, transforming the obligations assumed by states in investment contracts agreed with investors into international obligations. The effects of these treaties are numerous, and combining these with investment contracts, foreign investors will benefit from a highly effective regime of protection that domestic investors do not enjoy. An example of such a protection is that of stabilization clauses, which are usually included into investment contracts and have the effect of essentially "freezing" the law applicable at the time the contract was entered into. Basically, this insulates the investment from any subsequent regulation which might affect it, effectively shielding investors from political risk and regulatory change in the host state.[11]

Due to the high costs involved in ISDS proceedings, they have anecdotally been linked to a phenomenon called *regulatory chill*,[12] whereby a state will avoid adopting regulation—which in many cases might be necessary to correct past regulatory

8 Miles, 2013, p. 47; Lim, Ho and Paparinskis, 2018, Chapter 1 on the origins of investment protection and the field of international investment law.

9 For a perspective on the evolution of the international law on foreign investment, see Sornarajah, 2015, starting with p. 31.

10 Broches, 1972, p. 349.

11 Schreuer et al., 2009, p. 588.

12 Víg and Hajdu, 2018, pp. 44–54.

mistakes and to protect human rights or the environment—fearing costly arbitral proceedings and potential awards for compensation against them.[13] This forms the basis for the critique that IIAs curb states' regulatory powers, an argument which has formed the basis of much debate. Arbitral practice, in principle, does recognize the state's regulatory authority, as stated in the case *Electrabel v Hungary*, framing it in the context of FDI protection.

While the investor is promised protection against unfair changes, it is well established that the host state is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest. Consequently, the requirement of fairness must not be understood as the immutability of the legal framework but as implying that subsequent changes should be made fairly, consistently, and predictably, taking into account the investment's circumstances.[14]

One might also consider the question of IIAs from the angle of government commitments and the fact that an IIA entered into at a particular moment in time, by the government in power at that time, having had a particular vision regarding development and foreign investment, will outlast said government and may be considered a burden by a new one. Changes to existing IIAs are not at all common, which suggests that a different government elected on a different platform might see its hands tied by the treaty policies of previous governments. It is also plain to see why an uncertain, everchanging regulatory environment, exposure to political risk, and issues of rule of law may represent a deterrent for foreign investors. Many developing countries have little to offer in the eyes of investors other than natural resources and a cheap labor force. To attract foreign investors, countries may engage in a regulatory *race to the bottom*,[15] whereby they will cut red tape for the benefit of foreign investors without considering factors such as environmental protection and human rights. The consequences of these political decisions are not fully considered as the lack of economic advancement is tied to the lack of foreign investments, which results in the prioritization of capital inflow above all.

It is thanks to this view of being the backbone of development that FDI has received the extra protection briefly outlined above. The granting of such specific protection is continually encouraged, together with other means of promoting investments. An important part of this system is investment arbitration, which appears to be an efficient method of dispute resolution due in part to the enforcement regime backing it up. Two international conventions stand out in this system: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention (1958) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, referred to as the ICSID Convention, which established the International Centre for Settlement of Investment

13 Miles, 2013, p. 178.

14 Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Award, para. 7.77.

15 An expression that refers to the efforts made by states to appear more competitive in front of investors, easing doing business and gaining their advantages by reducing regulatory standards on the protection of the environment, human rights, workers' rights, etc.

Disputes (ICSID), the principal institution for ISDS. These conventions contain provisions on enforcement that make them highly efficient and thus highly attractive to foreign investors.

The above brief introduction is necessary to understand the interplay between IIL and national regulation. While it is important to encourage investments, one of the most important incentives for investors will be the guarantee of safety from political risk and drastic measures, be they administrative, judicial, or legislative. As an *ultima ratio* alternative, investment arbitration gives foreign investors the possibility of obtaining compensation whenever their investment has been imperiled.

2. Sovereignty, regulation, and IIAs

International law is built upon the concept of the state. States are the primary subjects of international law and exist on the basis of the principle of sovereignty. Sovereignty as a concept has two main aspects: internal sovereignty, which is an expression of supreme authority within one's territory, and external sovereignty, which implies that in exercising its supreme authority, no outside legal power can force the state to take a certain position or act in a certain way. This essentially signifies independence,[16] also expressed through the maxim *par in parem non habet imperium*.[17] States thus enjoy an exclusive right to regulate within their own territory,[18] which necessarily and evidently extends to regulation on matters of ownership of real estate.

The United Nations General Assembly Resolution 2625 (XXV.) of 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, in accordance with the Charter of the United Nations, spells out some of the abovementioned principles. The Resolution provides that the principle of sovereign equality of states also includes the element that "[e]ach State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States."

In exercising their sovereignty, states may enter into international agreements, which they must then honor, as expressed through the well-known maxim of *pacta sunt servanda*. International law also requires that it gain primacy over national law, this hierarchy being of existential importance to international law.[19] Such a hierarchy is also needed so that states' participation in building international relations is credible and trustworthy. Exercising their sovereign rights to enter into international agreements does not preclude states from adopting different regulations; however, adopting regulation that goes counter to international commitments will have consequences

16 Island of Palmas Case, The Netherlands v. USA, 1928, http://legal.un.org/riaa/ cases/vol_II/829-871.pdf (last visited 06.30.2022).

17 Mádl and Vékás, 2018, pp. 223–227. The latin maxim also appears as *par in parem non habet iurisdictionem*, see Nagy, 2017a, p. 263.

18 Shaw, 2003, p. 409.

19 Fábián, 2018, pp. 9–10.

that will manifest themselves pursuant to the concrete mechanisms to which the state has adhered. As provided in the Vienna Convention on the Law of Treaties (1969), according to art. 27, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Some international agreements have a coercive mechanism attached to it, while others are toothless, which is why a distinction is made between *hard law* and *soft law*. In the case of IIAs, as shown above, states essentially enter into an agreement granting supplementary protection to foreign investors of another state, which is ensured by a dispute settlement procedure removed from the host state's judiciary, usually in the form of investment arbitration.

Adopting regulation pertaining to land investments may trigger the protective mechanisms contained in IIAs, as with any other investment. Investors will thus have the right to ask an international tribunal to decide whether a particular measure of the state is consistent with the standards of protection applicable under the IIA. These tribunals will also respect the power of the government to take private property—the *eminent domain* rule—and will only order monetary compensation, the granting of restitution in kind being excluded from their jurisdiction. In essence, IIAs ensure that any regulatory, administrative, or judicial measure of the host state, which adversely affects in an unjustifiable way a foreign investment falling under its protection, will not remain without consequence. Some view this as an excessively strong system threatening the sovereignty of states, which is why it has come under heavy criticism and is now in the midst of a legitimacy crisis.[20] It must be noted that the debate around international conventions and sovereignty has been addressed a century ago by the Permanent Court of International Justice, which noted the following in the now famous *Wimbledon case*:

> "The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty."[21]

It is the case, nevertheless, that regulatory efforts by host states might interfere with the investments made on its territory. The cost of interfering with a foreign investor's rights protected by the substantive provisions in IIAs might be one that is hard to afford by a developing country. The arbitral proceedings themselves are particularly costly; however, in case of the claimant's success, the compensation payable pursuant to the award will also be large.

The costs of investment arbitration are not to be ignored. A highly noteworthy empirical study of the matter puts it into figures, and they are objectively astronomical.

20 Emmert and Esenkulova, 2018, p. 14.

21 Case of the S.S. "Wimbledon"—United Kingdom, France, Italy & Japan v. Germany, Judgment, para. 35.

The mean costs for the parties taking part in such proceedings, which includes tribunal costs (the arbitration venue, institution, arbitrators, secretariat, etc.) and legal costs (mainly lawyers' fees), incurred by respondent states are around US$4.7 million, with the median figure at US$2.6 million, while for investors, the mean figure is US$6.4 million, and the median figure is US$3.8 million. This worsened by the fact that respondent states prevailing in arbitration will be less likely to benefit from cost shifting in their favor; basically, even if the states win, they end up with large costs for which they will most likely not be reimbursed. In addition, as previously noted, the compensation payable also tends to be massive.[22] By the standard established in customary international law as well as in many of the IIAs for the amount of compensation owed in case of expropriation and nationalization, what is thus regularly claimed as compensation is the *fair market value* of the investment, and it encompasses both *lucrum cessans* and *damnum emergens*. The measure of the compensation payable had been one of the major topics of debate stretching into the second half of the twentieth century; today, arbitral tribunals apply the standard of *fair market value*.

At the start of decolonization after the Second World War, concessions and other land rights gained in the colonial era experienced a massive backlash. In the post-war international legal system of the United Nations (UN), developing countries voiced their concerns and pushed what was dubbed as the New International Economic Order (NIEO), using the United Nations General Assembly (UNGA) as a platform to make their voices heard. This push for eliminating what was essentially the legacy of colonialism and imperialism through the pursuit of economic justice resulted in the adoption of a number of UNGA resolutions, such as the 1803 (XVII) UNGA Resolution of 1962 on permanent sovereignty over natural resources, 3281 (XXIX) UNGA Resolution of 1974 – the Charter on the Economic Rights and Duties of States, and the 1974 Declaration on the Establishment of a New International Economic Order.[23] The debates at that time all related to the topic of acquirement of land rights by foreign investors. As these resolutions had no teeth, they remained principles that were later adapted and used in different contexts, but they were never accepted by arbitral tribunals as customary international law. With the spread of IIAs overriding their content, the principles thusly established can now be found in national legal instruments, such as constitutions and statutes, as well as international codes and institutions.

The era of proliferation of IIAs started in the 1990s, with the fall of communism in Central Europe bringing more countries into the neoliberal paradigm.[24] The specificity of the Central European context will be addressed in the next chapter as recent developments regarding intra-EU investment arbitration[25] are rooted in this period.

22 For a detailed analysis on costs, see Hodgson, Kryvoi and Hrcka, 2021.

23 On this matter, see Lim, Ho and Paparinskis, 2018, starting with p. 10.

24 As shown by the statistics of UNCTAD, between 1990 and 2007, a number of 2663 new IIAs entered into force. For details, see World Investment Report 2015: Reforming International Investment Governance, Ch. IV, p. 121, Figure IV.1. – Evolution of the IIA regime.

25 Intra-EU investment arbitration refers to investment arbitration lodged based on a BIT entered into by two EU member states.

3. The particular case of Central Europe and IIAs

Central Europe (CE) experienced a massive increase in the number of IIAs, especially after the fall of communism,[26] which was prompted by these countries entering the global economic race for attracting capital in the form of FDI. CE countries account for many IIAs entered into in this "era of proliferation" of such international treaties, which later led to a large number of cases coming out of the same region.

Seeking integration into the political, economic, and military organizations of the West, such as the Council of Europe, the European Communities (European Union), the World Trade Organization, and the North Atlantic Treaty Organization, CE countries introduced a number of reforms after the regime change. This period was marked by constitutional and legal reform, transitioning to a market economy through the privatization of state-owned enterprises, commitments to guaranteeing the free flow of capital, and adherence to the values of democracy and rule of law. One part of these commitments came in the form of IIAs, which classically have a double purpose, namely that of promoting and of protecting foreign investment. CE countries, on the one hand, accepted the reality of the prevailing ideology at the end of the Cold War, having to implement the "Washington Consensus"; on the other hand, they faced the harsh reality of having to compete for FDI, in lieu of other sources to finance their economic growth, in their attempts of catching up to the West.[27] In this regard, it has been noted that state power within CE countries was reduced to a minimum, with IIAs impeding the much needed continual readjustment of the role of government.[28]

Most of the ISDS cases in the CE region concern matters regarding either public service regulation or regulatory decisions on dismantling state ownership.[29] As per the caseload statistics[30] of the most important dispute resolution institution in this field—the ICSID—Eastern Europe and Central Asia (a region that also includes the countries subjected to analysis herein) accounts for 26% of all cases registered under the ICSID Convention and Additional Facility Rules.[31] In addition, the non-ICSID cases, conducted as ad hoc arbitration under the UNCITRAL Rules, or at the Stockholm Chamber of Commerce, and other prominent institutions, as well as cases that are not known to the public show that this region accounts for a large number of cases. This comes as no surprise as many countries in this region underwent massive changes in the 1990s, requiring regulatory solutions that paved the ground for implementing

26 For a more nuanced analysis of the regional experience, see Nagy, 2016.
27 Sándor, 2019, pp. 470–471.
28 Sándor, 2019, p. 472.
29 Nagy, 2016; Sándor, 2019, p. 483.
30 For details and other figures, see The ICSID Caseload – Statistics (Issue 2022-1) https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf (Accessed: July 12, 2022)
31 The large number of cases is not matched by the arbitrators appointed to cases at ICSID. This region only accounts for around 3% of appointments.

democratic reform and adapting to the conditions of the market economy. In their quests to adhere to Western institutions, governments introduced regulatory measures, some of which ended up costing them in arbitration.

Membership in the European Union was a principal goal for all countries in the region, which constituted a catalyst for legislative progress and reform. CE countries had been encouraged to enter into BITs with EU member states prior to accession, which evidently resulted in these IIAs becoming intra-EU treaties after these countries' accession to the EU.[32] As has been noted in the legal literature, intra-EU BITs were not a problem specifically related to Central European member states; however, it was their accession that brought the issues to light as approximately two-thirds of the cases in the region have been intra-EU ones. After the European Economic Community was established, member states refrained from entering into BITs, and those that had previously (pre-accession) been concluded did not find application.[33] After accession some of the BITs had to be brought in line with EU regulation, effectively maintaining these treaties among EU member states.[34] The irony is that some of the cases lodged against new member states had as their root cause legislative reform implemented in the pre-accession phase. Such was the *Micula case*, where the European Commission intervened and forbade Romania to pay out the award, relying on EU state aid rules.[35] Soon after, the Commission made requests to member states to terminate all intra-EU BITs; however, it was the Court of Justice of the European Union (CJEU) that ultimately cleaned up the mess via three important judgments, causing much consternation in the professional community.[36] Pursuant to these developments, member states also entered into an agreement to terminate all intra-EU BITs.[37] While this did not end all intra-EU investment arbitration cases, and arbitration under the Energy Charter Treaty (ECT) continued, a shift can now be observed, with intra-EU ITA approaching its end.[38]

Important developments have also been made with regard to IIAs entered into by EU member states with third countries. Pursuant to the extension of exclusive EU competence to the field of FDI via the Treaty of Lisbon, existing BITs entered into by

32 Korom, 2020, pp. 56–59.
33 Nagy, 2019, p. 2.
34 As also shown by the following cases: CJ Case C-118/07 (Commission v Finland) [2009] ECR I-1301, I-1335 and I-10889; ECJ Case C-205/06 (Commission v Austria) [2009] ECR I-1301; ECJ Case C-249/06 (Commission v Sweden) [2009] ECR I-1335.
35 Commission Decision (EU) 2015/1470 of March 30, 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral award Micula v Romania of December 11, 2013.
36 Judgment of the Court (Grand Chamber) of March 6, 2018 (request for a preliminary ruling from the Bundesgerichtsh of — Germany) — Slowakische Republik v Achmea BV, Case C-284/16; Judgment in Case C-109/20, Republiken Polen v PL Holdings Sàrl; Judgment of the Court (Grand Chamber) of September 2, 2021. Republic of Moldova v Komstroy LLC – C-741/19.
37 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union – SN/4656/2019/INIT.
38 Most recently, we have witnessed the first investment treaty arbitration case where the tribunal admitted the intra-EU objection of the host state. See Green Power Partners K/S SCE Solar Don Benito APS v. The Kingdom of Spain. SCC Arbitration V (2016/135), Award (June 16, 2022).

EU member states with third countries will gradually be replaced by treaties negotiated by the EU with those states. As long as there is no treaty between such third states and the EU, member states' treaties will remain in force.[39]

To conclude, it must be noted that investments coming from EU member states will now be subjected to the law of the host state and also EU law, while investments coming from third countries will be subjected to the IIAs in force.

4. Land investments and IIAs

As any other foreign investment, land investments may also come under the protection of IIAs, and they have seen an uptick in the last couple of decades. Due to the economic and geopolitical turmoil, interest in acquiring farmland has been growing. Without entering deep into the recent history of land acquirements, we must mention a few key moments that have prompted massive investments into this sector.[40]

In the aftermath of the sub-prime mortgage crisis, which resulted in the global financial crisis—the Great Recession—there was a massive uptick in investments in farmland.[41] Around this period, two major food crises occurred: the 2007–2008 world food price crisis[42] and the 2010–2012 world food price crisis.[43] The SARS-CoV-2 pandemic has shown the fragility of value chains, and consequently, food insecurity has become a major concern. With a new crisis on our hands, resulting from the Russian military aggression against Ukraine, the matter of food insecurity is once again front and center,[44] and it was also a focus at the most recent World Trade Organization Ministerial Conference, where a Declaration was adopted on the matter[45] and the

39 See Regulation (EU) No 1219/2012 of the European Parliament and of the Council of December 12, 2012 establishing transitional arrangements for bilateral investment agreements between member states and third countries -- https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32012R1219 (Accessed: July 12, 2022)

40 See also The Economist: Buying Farmland Abroad: Outsourcing's Third Wave. May 21, 2009.

41 HighQuest Partners, United States (2010-08-10), "Private Financial Sector Investment in Farmland and Agricultural Infrastructure", OECD Food, Agriculture and Fisheries Papers, No. 33, OECD Publishing, Paris. http://dx.doi.org/10.1787/5km7nzpjlr8v-e (Accessed: July 12, 2022)

42 For more details, see 2007–2008 world food price crisis, Wikipedia: https://en.wikipedia.org/wiki/2007%E2%80%932008_world_food_price_crisis (accessed July 12, 2022)

43 For more details, see 2012 world food price crisis, Wikipedia: https://en.wikipedia.org/wiki/2010%E2%80%932012_world_food_price_crisis (accessed July 12, 2022) and also GRAIN – The Global Farmland Grab 2016; GRAIN – Seized: The 2008 Landgrab for Good and Financial Security.

44 For more details, see 2022 food crises, Wikipedia:
https://en.wikipedia.org/wiki/2022_food_crises (Accessed: July 12, 2022)

45 See Ministerial Declaration on the Emergency Response to Food Insecurity, Ministerial Conference, Twelfth Session, Geneva 12—15 June 2022.
https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/28.pdf&Open=True (accessed July 12, 2022)

NATO Strategic Concept for 2022 was mentioned.[46] The growing inflation experienced in 2022 as a result of these crises has also contributed to making farmland a focus for investment.[47]

The cross-border acquirement of land rights has consequently seen a sensible increase in both the number and the volume of transactions since the beginning of the new millennium. This increase has happened mainly because well-capitalized, developed countries have become more interested in increasing their food security, which also prompted more activity from the part of transnational corporations (TNCs) in this direction. TNCs have been paying more attention to avoiding commercial issues related to agricultural products, shifting their focus toward maintaining appropriate capacities to ensure their customers with the provision of agricultural products in the long run. This means fortifying their means of production with adequate agricultural fields and the connected water resources.[48]

One of the main critiques against IIAs—especially BITs—is that they often contain the same provisions and follow the same template.[49] The IIAs entered into will resemble US or European models, which have been deemed as highly investor-protective.[50] Of course, these treaties are entered into with the purpose of promoting a trustworthy, investor-friendly environment. It is also the case that there is a lack of expertise in many developing countries, as well as a lack of negotiating power[51]; thus, the provisions contained in these templates are now ubiquitous. The lack of innovation in this field means that the cross-border acquirement of land rights will have the same regime as any other investment, the same standards of protection, and the same exceptions applying to land investments as well.

The IIL regime, underpinned by the multitude of IIAs, has also been faulted for raising the price tag on land reform and on policies concerning the redistribution of land.[52] The acquirement of land rights by foreign investors carries multiple effects, depending, of course, on the way the land is utilized. In addition to issues around land redistribution, such investments may affect local values, in many cases affecting the rights of local residents as well as those of indigenous peoples, who might have competing rights over the land.[53]

The renewed interest of investors in acquiring farmland appears as a natural reaction to the challenges faced by the agricultural sector and in the supply of food, in light of the above. Governments, foreign governments, sovereign wealth funds, and international investment funds have all shown a massive interest in acquiring land for the purposes of food production, but also that of biofuel. In this context, IIAs

46 Which can be found here: https://www.nato.int/strategic-concept/ (Accessed: July 12, 2022).
47 Rastello, 2021.
48 De Schutter, 2011, pp. 511–513; Cotula et. al., 2009, pp. 4–5.; Dooly, 2014, pp. 306–307.
49 See Sándor, 2017, p. 473.
50 Alvarez, 2009, p. 50.
51 As argued by Sándor, 2017, pp. 473–474.
52 Cotula, 2015. p. 43.
53 Cotula and Schröder, 2017, p. 1.

will grant extra protection to investors seeking to acquire land. IIAs have been faulted by critics for contributing to the maintenance of bad deals and the phenomenon of *land grabbing*—a term that has been used by critics to describe the phenomenon of large-scale land deals in low and middle-income countries.[54]

Where a land-related dispute arises and is taken to arbitration, states' carveouts in IIAs regarding the right to regulate might constitute important provisions for avoiding supplementary responsibility. IIAs contain security exceptions and emergency provisions that could be linked to regulatory moves that might infringe upon investors' rights. Thus, regulation of land in the public interest might not in all cases result in the host state having to pay massive damages pursuant to arbitration. Such provisions are also contained in the US Model BIT, which has been used extensively as a model throughout the world. According to Annex B on expropriation, in para. 4(b), it is provided that "except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

Treaty policy becomes an important factor, as provisions in IIAs may assist countries with their regulatory priorities. Security exceptions may be used to limit investors' access to arbitration, examples of which are contained in the US Model BIT, the Canadian Model BIT, and the ASEAN Regional Investment Treaty. Some have also excluded particular industry sectors, reserving the jurisdiction of domestic courts. Such is the example of article 9(4) of the Turkey Model BIT (2009) in relation to disputes concerning real estate:

> "The disputes, related to the property and real rights upon the real estates are totally under the jurisdiction of the Turkish courts and therefore shall not be submitted to jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism."

While the issues faced in Africa, Southeast Asia, and South America are different that those of Central European countries, large-scale land deals have been made in this region as well. In this international context, where the acquirement of rights upon land—be it in the form of property, long-, and short-term leases, concessions, or other rights—to establish investments is growing, the number of related disputes is also expected to increase. At this point, we consider it important to make a few observations regarding the scope of IIAs, what these treaties cover, and how they can be activated.

54 Cotula, 2015, pp. 1–2.

5. What constitutes an investment?

As their name suggests, IIAs have to do with the protection of foreign investment. The question arises if whether or not only FDI or also foreign portfolio investments (FPI) are covered. In this context, the difference between these two types of foreign investment has to do mainly with

> "control of the assets or company: establishing a manufacturing plant or acquiring a firm abroad are two examples of direct investment; purchasing shares bringing little control over the firm's decisions is an example of portfolio investment."[55]

Most IIAs cover both types of investment; however, it is in the interest of countries to focus more on attracting FDI as these bring a more substantial contribution to the economy, while FPI less so. Jurisdiction pursuant to an IIA will only be recognized in case the dispute is related to an investment as defined by the applicable treaty.[56]

The requirement that a dispute arise directly out of an investment is also included in the ICSID Convention at Article 25(1). The term "investment" is not defined within the Convention, and the omission was intentional, with a majority of the drafters agreeing that a definition might cause jurisdictional issues.[57] Attempts were also made by arbitral tribunals to define what investment means for the purposes of Article 25(1) of the ICSID Convention. One of the more widely cited attempts to circumscribe the conditions a business activity needs to be recognized as an investment was done in the case Salini v Morocco and is popularly called the Salini test.[58] On this basis, a four-prong test has been developed, whereby an investment needs to have the following characteristics: it should consist of a material contribution; it must have a certain duration of performance; there must be a participation in the risks of the transaction; and it must make a contribution to the economic development of the investment's host state. The last condition, referred to as the development prong, has sparked somewhat of a controversy in legal literature, which will not be addressed in detail herein. However, we must note that the contribution to development can be a highly subjective issue and might constitute a condition for the jurisdiction of

55 European Parliament Briefing: EU International Investment Policy: Looking Ahead. European Parliamentary Research Service, 2022, p. 3. Available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729276/EPRS_BRI(2022)729276_EN.pdf (Accessed: July 12, 2022)

56 See, for example, The Netherlands Model BIT (2019), the US Model BIT (2012), or the South African Development Community's (SADC) Model BIT (2012) (the last one also expressly excludes portfolio investments).

57 Schreuer et. al., 2009, pp. 114–115.

58 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 52.

arbitral tribunals, which smaller investors might not be able to fulfill.[59] It would also be difficult to recognize that the acquisition of land with the purpose of speculation on the real estate market genuinely contributes to the economic development of the host state.

It must also be noted that IIAs, in many cases, use broad definitions that usually include "every asset" in the term "investment" and have been interpreted as including not only contractual rights but also the different incentives that states might have granted for the investment to be established as well as the licenses and permits that the investment might require. The aforementioned umbrella clauses widen the jurisdiction of investment arbitration tribunals to also include contractual matters that would normally be dealt with in the framework of commercial arbitration.[60] Investments may also be structured in such a way as to gain access to and benefit from the protection of a particular IIA.[61] In addition, in some cases, the *most favored nation clause* extended jurisdiction.[62] This being the situation, investors are right in feeling confident that their investment will fall under the protection of an IIA.

6. Land acquirement and related issues

In the last two decades, economic actors have been showing a massive interest in investment in agricultural lands, as previously shown.[63] It must also be noted that many investments outside the agricultural sector will also include the acquirement of land-related rights, and legal issues may also arise from such arrangements. For the purposes of this study, we will not be excluding either of these.

What in the critical professional literature has been called *land grabbing* is a phenomenon found all around the world, in both developed and developing countries.[64] Extensive legal and other professional literature has focused on the matter of land grabbing, especially pertaining to Africa, Southeast Asia, and South America. These regions have experienced the acquirement of land in bulk—either as property, in the form of long-term leases, or as other contractual arrangements affecting the lives of local communities and of indigenous peoples by violating their human rights and the

59 Such a condition is also contained in art. 2 of the SADC Model BIT. For details on the matter, see Kovács, 2019, pp. 86–100.

60 Dolzer and Schreuer, 2008, p. 155.

61 Chaisse, 2015, pp. 225–305.

62 Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction.

63 For an in-depth look at the phenomenon also see: Szilágyi and Andréka, 2020.

64 European Coordination Via Campesina defined land grabbing as "the control – whether through ownership, lease, concession, contracts, quotas, or general power – of larger than locally-typical amounts of land by any persons or entities – public or private, foreign or domestic – via any means – 'legal' or 'illegal' – for purposes of speculation, extraction, resource control or commodification at the expense of peasant farmers, agroecology, land stewardship, food sovereignty and human rights."

environment. UNCTAD has observed a link between massive agricultural investments and issues related to food security, environmental destruction, forced evictions of existing users of land, conflicts over land rights, forced labor, child labor, and illegal expropriation of national resources.[65] Several other international organizations have dealt with this question and provided tools to assist both governments in developing countries and investors to make better, more responsible investments.[66] It must also be mentioned that well-thought-out investments which take into consideration the specific local needs are also quite advantageous and have such positive effects as job creation, contribution to rural, industrial and infrastructural development, technology transfer, contribution to food and energy security, and many other positive contributions to development.

It is evident that the challenges faced by some of these countries are different from those faced by CE countries; however, the framework of our study does not permit an in-depth look at these issues, which is why the next section will focus on matters specific to the Central European region in the context of IIL.[67]

According to the previous section, land-related cases can undoubtedly fall under the jurisdiction of an arbitral tribunal via an IIA. In many of the investment arbitration cases, investors rely on many provisions that have been quite popular, such as non-discrimination, fair and equitable treatment, or protection against expropriation. Fair and equitable treatment (FET) is one of the main treatment standards upon which investors rely when lodging arbitral proceedings against a host state. This standard of treatment ensures that a state will not be able to unilaterally adopt regulation in violation of the rights that the investor enjoys or can legitimately expect to enjoy. In case such rights are violated, the investor may trigger arbitration. Depending on the applicable IIA, clauses containing FET may be broader or narrower.[68] A broader application

65 UNCTAD, World Investment Report 2009: Transnational Corporations, Agricultural Production and Development, p. 94.

66 In this context, we must mention the World Bank Report titled The Practice of Responsible Investment Principles in Larger-scale Agricultural Investments – Implications for Corporate Performance and Impact on Local Communities, 2014; Investment Contract for Agriculture: Maximizing Gains and Minimizing Risks, World Bank, 2015; UNCTAD, FAO, IFAD, World Bank: Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources, 2010; Committee on World Food Security: 2014 Principles for Responsible Investment in Agriculture and Food Systems; UN Declaration on the Rights of Peasants, 2018; The IISD Guide to Negotiating Investment Contracts for Farmland and Water; Legal Guide on Contract Farming. UNIDROIT, FAO, IFAD, Rome, 2015; Legal Guide on Agricultural Land Investment Contracts, UNIDROIT, IFAO, Rome, 2021; Bali Declaration on Human Rights and Agribusiness in Southeast Asia (2011); Your Land, My Land, Our Land: Grassroots Strategies to Preserve Farmland and Access to land for Peasant Farming and Agroecology. Nyéléni – Europe & Central Asia, April 2020.

67 Several civil society initiatives have appeared in European countries shedding a light on issues related to land grabbing and land-use rights; see the members of the *Access to Land* organization: https://www.accesstoland.eu/-Members- (Accessed: July 12, 2022); see also a map of large-scale land acquisitions in several regions of the world created by *Land Matrix*: https://landmatrix.org/map/ (Accessed: July 12, 2022)

68 There are several ways in which FET clauses have been formulated, with many states attempting to narrow its applicability. See The Netherlands Model BIT, art. 9.

will result in more protection granted to the investor, with an adverse effect on the side of the state and its regulatory mobility. What is noteworthy about the legitimate expectations of the investor is that these do not stem from specific laws or contractual rights but from relations between the investor and the host state. These expectations stem from the reasonable reliance of the investor in its decision making on representations and inducements made by the host state.[69] The requirement to accord fair, prompt, and adequate compensation in case of expropriation is also important to mention in this context, both for cases of direct and indirect expropriation.

Without attempting to exhaust the treatment standards included in IIAs in the context of this paper, the above have been highlighted due to their importance in the cases concerning land rights acquirements in CE. In the case of agricultural land, it is usually the state schemes of privatization and redistribution in violation of the rights of early investors that have prompted investors to seek compensation. Not all such cases ended up in investment arbitration as this is a highly complex procedure that is realistically less accessible to smaller investors. Some of the cases that ended up in arbitration are presented in the section below.

In the Central European region, the intensity of the inflow of foreign investment was related to the privatization of state assets beginning in the 1990s. Investment came mainly from Western countries as markets opened up, and the process of privatization was not without its hiccups.[70] The communist regimes were replaced by democratic governments that committed themselves to building up market economies and implemented, in this transitional period, several reform measures. The reform packages usually included measures such as the liberalization of the markets, the privatization of state enterprises, and the removal of trade and investment restrictions. Property rights were reformed, and a new legal framework was established for business entities, as well as a business-friendly regulatory environment sustained by an institutional network aspiring to guarantee it.

69 As deduced from the case International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award of January 26, 2006, para. 147. Similarly in Merrill and Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award of March 31, 2010, para. 150. For more on the FET and what it includes, see Dolzer and Schreuer, 2008, pp. 119–149.

70 Examples of privatization-related investment arbitration cases can be found all throughout the larger CEE region: Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24; EVN AG v. Republic of Bulgaria, ICSID Case No. ARB/13/17; MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia, ICSID Case No. ARB/13/32; Saluka Investments B.V. v. The Czech Republic, UNCITRAL; Rail World Estonia LLC, Railroad Development Corporation and EEIF Rail BV v. Republic of Estonia, ICSID Case No. ARB/06/6; ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16; Luigiterzo Bosca v. Lithuania, UNCITRAL; EVN AG v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/10; Eureko B.V. v. Republic of Poland; Nordzucker v. Poland, UNCITRAL; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11; Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1; UAB ARVI ir ko and UAB SANITEX v. Republic of Serbia, ICSID Case No. ARB0921; MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8; Československá Obchodní Banka a.s. v. the Slovak Republic, ICSID Case No. ARB/97/4. Short analysis of these cases and more can be found in Nagy, 2019.

Following the fall of communism, many CE countries saw complications regarding ownership rights, which added to a relatively cheap price for acquiring rights over agricultural land. Some of the restorative efforts of these new democratic governments had brought about massive fragmentation of lands to the point that profitable farming was not sustainable, with many people engaging only in subsistence farming. Such lands were than easily acquired by investors. Despite the efforts made by countries in the region, with an eye on accession to international organizations established by the West, acquiring a clear title over land in CE countries proved to be difficult. The efforts for re-privatization and the restitution of property were not as smooth as one might have expected. Communal ownership, the fragmentation of lands, and the expectation that the population would be able to navigate the new legal environment had proven to be too much. Political risk and corruption had also discouraged investors, and some of those who had stuck around subsequently had disputes with the state.

IIAs had been entered into by these states to encourage the inflow of capital, despite the existing issues. Investors, it may be argued, were rightly reluctant to commit investments to these states lacking insurance, fearing that they would not receive the treatment they were promised or that they deserved. IIAs constituted one of the tools that sought to win investors' trust, and it also ended up being one of the more efficient tools in recovering the losses from investments that became *collateral victims* of the transitional period. Focusing exclusively on cases where the acquirement of land rights constituted one of the major factors, it must be noted that despite the similarities, each case is quite different and has its own complexities.

In the tumultuous transitional period in Croatia, the complex case of Gavrilović v. Croatia unfolded.[71] The issue was that of a private company that had been nationalized by the communist regime and then partially reacquired during privatization by the former owner and heirs. It was a case where the murky proceedings of privatization mixed with bankruptcy in a war-torn area of the country. The Croatian State alleged corrupt schemes in the proceedings for the company's privatization, essentially stripping the Gavrilović family from part of its investment, which consisted of a meat processing factory and agricultural and grazing land. In this highly complex case, the issue of expropriation and that of the legitimate expectations of the claimants were the main substantive matters analyzed during the proceedings. The Tribunal ultimately found that Croatia had breached its obligations under the applicable Croatia–Austria BIT as regards direct expropriation. The Tribunal also noted that the legitimate expectation under the FET standard could not be recognized with respect to real estate to which the claimants had neither property nor any other contractual rights.[72]

In Hungary, in the case of Magyar Farming v. Hungary, the investors had their lease contract cancelled by the state in a scheme for the redistribution of agricultural

71 Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39.

72 For a summary of the case, see Hough, 2018.

land to local farmers. The investor entered into a lease contract gaining usufructuary rights, making its investment in reliance of a prelease right provided by the law which was subsequently modified. The arbitral tribunal found that due to the lack of compensation from the state to the investors for the expropriation of their statutory prelease right, the expropriation was unlawful.[73]

In another case, arbitration was lodged against the Hungarian state, the claimant investor accusing the respondent of not acting in good faith while terminating a concession contract. A land swap deal done in dubious circumstances by the investor concerning state-owned land ultimately led to the withdrawal of a concession granted by the Hungarian government. The arbitral tribunal did not find any abuse of rights by the respondent state and established that there had been no expropriation in the case.[74]

Foreign investors in Poland also brought their dispute to investment arbitration in a case concerning the termination of the lease agreement for a farmland in North-Western Poland.[75] The investors argued that the decision of the lessor was unlawful and politically motivated, while Poland asserted that the termination was conducted in an ordinary fashion, pursuant to the terms and conditions of the lease, due to repeated and material breaches of the contract by the lessee. The investment's deterioration and subsequent governmental notice to remedy the situation finally prompted the government to terminate the lease. The claimants asserted that the grounds for the termination of the lease agreement were nonexistent or immaterial and that the real purpose for the termination was the intent to lease the farm to Polish farmers. The arbitral tribunal found that the lease agreement had been legally terminated and did not find bad faith in the conduct of the host state.

In Romania, complications arising from the privatization of previously nationalized agricultural land also resulted in a case.[76] The Romanian Constitutional Court's Decision striking down as unconstitutional a law on privatization that guaranteed the claimant's investment was ultimately found by the arbitral tribunal to be the cause of failure to honor the lease in the case, prompting the payment of compensation.

While the above cases have not been presented in detail, they are sufficient to illustrate how land-related cases are treated in the context of IIAs and international investment arbitration. The standards of international customary law and principles of international law underpinning the system will, in some cases, produce results that are different from those of domestic courts. It must also be noted that success is not guaranteed for investors in all cases, which is why both investors and states must seek out further ways to ensure that investments remain balanced.

73 Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary, ICSID Case No. ARB/17/27. See also, *supra* Chapter 1, footnote 63, as well as Szilágyi, 2018.
74 Vigotop Limited v. Hungary, ICSID Case No. ARB/11/22. For a more detailed summary of this and other cases concerning Hungary, see also Nagy, 2017b.
75 Mr. Kristian Almås and Mr. Geir Almås v. The Republic of Poland, PCA Case No 2015-13. As presented in Treder and Sadowski, 2019, pp. 345—348.
76 Mr. Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania, ICSID Case No. ARB/10/13.

7. Beyond IIAs – Concluding remarks

While IIAs have become quite popular, and their provision of a dispute resolution mechanism in the form of investment arbitration is seen as an important tool for the protection of FDI, many investments are still made on a contractual basis between the investor and the host state. These contracts represent a critical instrument where both the investor and the host state can include their expectations. Making sure that both parties are on the same page is important to avoid disputes.

A well-prepared contract may include provisions for the protection of the investor while also providing requirements regarding a contribution to development, the protection of the environment and that of human rights, and any other question a state might consider important. Moreover, host states may include more precise provisions as to their right to regulate in the public interest, while also guaranteeing the investor's rights. A well-drafted contract can go a long way in avoiding costly arbitration. In this sense, the instruments presented herein, elaborated with the purpose of ensuring more equitable and balanced land investments, must be reiterated.[77] For investors, it is also important that they engage in proper due diligence before establishing an investment. Making an effort in this regard will most certainly help them avoid blocking assets in risky investments.[78]

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77 See footnote 57.

78 See Investment Contracts for Agriculture: Maximizing Gains and Minimizing Risk. Agriculture Global Practice Discussion Paper 03. World Bank, 2015. p. 25. https://www.iisd.org/system/files/publications/world-bank-agri-investment-contracts-web.pdf (Accessed: July 12, 2022)

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