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The Settlement of International Investment Disputes, Focusing on EU Trends

doctoral thesis

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I. Summary

International investment law is currently the subject of intense criticism. The focus is on reviewing procedural regulations at the global level, as critics argue that the Investor-State Dispute Settlement (ISDS) clauses – which serve as a specific dispute resolution mechanism for these legal relationships – largely favor foreign investors, often conflicting with significant public policy measures, leading an increasing number of states to decide to terminate their investment protection agreements. As a result, an increasing number of States have opted to terminate their investment protection agreements. This legal crisis is well-documented: statistics from the past five years show a steady decline in the number of valid and effective treaties.[1]

In order to restore confidence in the field of investment protection, the overarching aim is to reform the current system, a process strongly supported by the European Union (EU). Its ultimate objective is the establishment of a permanent multilateral investment court, a judicial body operating with impartiality, fairness, and an appellate mechanism. The contemporary system therefore reflects a transitional state in which ISDS reform does not signify the end of the mechanism, but rather its flexible adaptation. Achieving this, however, requires prompt legal development based on solid dogmatic foundations at multiple levels, demanding continued proactive engagement from the EU as well.

Consequently, even if global reform efforts for resolving investment disputes succeed, they will not address all existing challenges. The collision between EU law and investment protection law – as a conflict between international legal norms – constitutes a key issue for the Union. In brief, this conflict creates difficulties:

- On the part of the investors: Legal uncertainty arises from the consequences of the *Achmea* and *Komstroy* judgments, as EU law requires the termination of pending cases and the refusal to enforce awards rendered by international arbitral tribunals.

[1] UNCTAD database:
According to 2020 data, out of 2,901 valid bilateral investment treaties, 2,342 were in force.
According to 2025 data, out of 2,853 valid bilateral investment treaties, 2,227 were in force.
https://investmentpolicy.unctad.org/international-investment-agreements

- On the part of the State: in investment protection policy, particularly with regard to the obligation of arbitral tribunals to provide information concerning any ongoing or new arbitration proceedings, as well as in determining the substantive elements of the agreements.

In general, investment treaties contain so-called *sunset clauses*, granting continued protection for investments made prior to a treaty's termination, typically for an additional 5–10–20 years. However, pursuant to the Termination Agreement of 2020,[2] such protection ceased retroactively, and the Court of Justice of the European Union (CJEU) subsequently held, by analogy with *Achmea*,[3] that the arbitration clause under the Energy Charter Treaty (ECT) is likewise inapplicable within the EU, as ISDS clauses in such agreements violate EU law. Following the implementation of the *Komstroy* judgment,[4] the circle is thus nearly complete: all intra-EU investment protection instruments have become affected. Investors, however, remain in a state of persistent legal uncertainty.

Most jurisdictional objections raised against investment arbitral tribunals fail, yet the recognition and enforcement of awards rendered against respondent Member States within the EU has become increasingly doubtful, due to the strengthening influence of EU law. Referring to the fact that tribunals seated within the EU may decide to discontinue ongoing proceedings or annul awards on the basis of EU law. In this uncertain landscape, it must be examined whether law and justice are capable of prevailing over competing interests, or whether, in light of the EU's expansionist tendencies in investment dispute settlement, Lady Justice's scales may tilt.

This research therefore examines the evolving international legal framework of investment protection, illustrating the conflict through the shift of regulatory emphasis toward EU law. Starting from the legal foundations of international dispute resolution, the dissertation focuses on intra-EU investment protection measures, the awards rendered by arbitral tribunals, their

[2] *Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union* (OJ L 169/1, 29 May 2020) – promulgated in Hungary by Act LXI of 2020.
[3] Case C-284/16, *Slowakische Republik v Achmea BV*, Judgment of the Court of Justice of the European Union (Grand Chamber), 6 March 2018 (ECLI:EU:C:2018:158)
[4] Case C-741/19, *Republic of Moldova v Komstroy LLC*, Judgment of the Court of Justice of the European Union (Grand Chamber), 2 September 2021 (ECLI:EU:C:2021:655)

recognition and enforcement, and the EU-law context responding to them, as well as potential pathways toward resolving these international conflicts.

Accordingly, the research examines the topic along the following hypotheses:

- The general criticism surrounding international arbitration, despite the mechanism having been initially grounded in principles of fairness and sound institutional design, is essentially based on the shift from the original purpose of ISDS, which brought about its reform.
- The EU's active role in the global reform of investment dispute settlement precedes the consolidation of its own internal legal framework. Beyond undermining normative credibility and coherence, this may also create systemic issues that have not received sufficient attention:
    - The CJEU's decisions in *Achmea*, *Komstroy* and *PL Holdings*[5] have not only affected specific aspects of intra-EU investment protection but have prompted a comprehensive, systemic reinterpretation of the field. As a consequence, the EU's regulatory and interpretative focus has become selective – if not explicitly prioritized – despite other, currently marginalised areas requiring urgent reconsideration.
    - The EU's multilayered and coordinated measures aimed at retroactively terminating intra-EU investment protection rest on questionable legal foundations and have contributed to the fragmentation of legal interpretation. This process goes beyond the classical conflict between EU law and international law: the geopolitical fault line emerging in legal interpretation has disrupted the unity of investment protection, and – contrary to the EU's emphasis on EU law autonomy – it is ultimately the general autonomy of investment protection law that has been impaired by the EU's actions.

[5] Case C-109/20 Republiken Polen vs. PL Holdings Sàrl, CJEU (Grand Chamber) Judgment of 26 October 2021 (ECLI:EU:C:2021:875)

II. Methodology

The fields of EU investment protection and international arbitration constitute a highly complex and multifaceted domain, encompassing numerous sub-issues that could individually warrant separate scholarly analysis. This research, however, deliberately refrains from examining each subfield in exhaustive detail. Instead, it focuses on a critical assessment of the EU's current directions in legal development, elucidating the consequences arising from these developments by analysing the process as a whole. Accordingly, the study seeks to identify, in light of ongoing reform processes, those areas in which regulatory and strategic approaches require timely correction in order to avoid the further deterioration of this area of law.

Thus, the research concentrates on the present EU-related context and trajectory of international investment protection law, drawing conclusions from the exposition and comparison of existing positions in order to determine an appropriate legal-policy direction. The necessity of such an inquiry is evidenced by the reform processes currently underway.

Given the above-mentioned characteristics of the topic, the methodological framework applied includes not only (legal) dogmatic analysis and descriptive methods, but also (legal) comparative methodology and jurisprudential examination. At the preparatory stage, and in order to demarcate the scope of the issues under examination, emphasis was placed on surveying and presenting the theoretical background.

To gain a comprehensive understanding of the theoretical foundations, the research seminars led by my supervisor, Associate Professor Dr. Katalin Edit Raffai, provided an excellent basis for exploring the broader academic literature. Moreover, by becoming deeply acquainted with the specificities of international investment protection law, I was able to identify unresolved questions and existing research gaps. As a result, during the material-gathering phase, my scientific inquiries expanded to encompass issues not initially contemplated in the formulation of the primary hypotheses—for instance, the status of the relevant legal frameworks in EU candidate countries or the international legal implications of the EU's obligations under the ECT.

The primary focus of this research, which examines trends in investment protection law, is the European Union. The existing body of academic literature provides a solid basis for defining the research framework, which continues to evolve owing to the topical nature of the subject.

This literature is supplemented by the arbitral awards examined,[6] as well as the jurisprudence of the CJEU. Furthermore, communications issued by the European Commission hold particular importance. The research primarily employs descriptive-analytical and comparative approaches. Nevertheless, to fully understand the characteristics of the international investment law regime, particularly from an EU perspective, it would be insufficient to rely exclusively on international economic law and positive law. It is essential to recognise the underlying values and objectives of legal regulation. Accordingly, the research also applies complementary disciplines (political science) and auxiliary sciences (legal history, legal hermeneutics, statistics). Determining an appropriate legal-policy orientation, as well as understanding the judicial application of legal rules in investment disputes, requires a nuanced approach to legal interpretation. Through this multidisciplinary analytical framework, the research aims to provide a comprehensive assessment of the topic.

A significant asset to the research has been my professional experience at the Trade Policy Department of the Ministry of Foreign Affairs and Trade, which granted me direct insight into ongoing reform efforts in international investment protection law. Particularly relevant is the fact that my duties included negotiating investment protection agreements, inherently linked to the international investment disputes arising from such agreements. Additionally, the direction of my research has been considerably shaped by my role in representing Hungary's interests within EU, multilateral, and international fora (notably UNCTAD, UNCITRAL, and ICSID), which has become especially significant in the context of the ongoing series of international reforms. These firsthand experiences grounded my academic inquiry in practical realities,

[6] E.g. Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Republic of Cyprus, ICSID Case No ARB/13/27, Award, 26 July 2018; Vattenfall AB and Others v. Federal Republic of Germany, ICSID Case No ARB/12/12, Decision on the Achmea issue, 31 August 2018; UP and C.D Holding Internationale v. Hungary, ICSID Case No ARB/13/35, Award, 9 October 2018; Foresight Luxembourg Solar 1 S.A.R.L. and Others v. Kingdom of Spain, SCC Arbitration V (2015/150), Final Award, 14 November 2018; Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italian Republic, SCC Arbitration V (2015/095), Final Award, 23 December 2018; CEF Energia B.V. v Italian Republic, SCC Arbitration V (2015/158), Award, 16 January 2019; Cube Infrastructure Fund SICAV and Others v. Kingdom of Spain, ICSID Case No ARB/15/20, Decision on jurisdiction, liability and partial decision on quantum, 19 February 2019; Landesbank Baden-Württemberg and Others v. Kingdom of Spain, ICSID Case No ARB/15/45, Decision on jurisdiction, 23 February 2019; NextEra energy Global Holdings B.V. and NextEra energy Spain Holdings B.V. v. Spain, ICSID Case No ARB/14/11, Decision on jurisdiction, liability and quantum principles, 12 March 2019; Eskosol S.P.A. In Liquidazione v. Italian Republic, ICSID Case No ARB/15/50, Decision on Italy's request for immediate termination and Italy's jurisdictional objection based on inapplicability of the Energy Charter Treaty to intra-EU disputes, 7 May 2019; I.C.W. Europe Investments Limited v. Czech Republic, PCA Case No 2014-22, Award, 15 May 2019; Photovoltaik Knopf Betriebs-GmbH v. Czech Republic, PCA Case No. 2014-21, Award, 15 May 2019

enabling the research to maintain its orientation and ensuring its potential for practical applicability.

III. Research Findings and Practical Applications

The analysis provides detailed insights into the relationship between international law and EU law, the methods and potential alternatives for enforcing arbitral awards, and – through its critical assessment of the EU's current legal-development trajectory – highlights the consequences of the CJEU's recent judgments.

The research concludes that concerns surrounding ISDS are multifaceted, and thus heterogeneous in nature. At the international level, efforts to address these challenges primarily take the form of institutional and structural reforms, whereas in the EU context the core difficulties stem from normative and interpretative tensions between EU law and the international investment protection regime. Consequently, while the global focus lies on institutional reconfiguration, the EU's challenges relate primarily to resolving legal-system collisions and interpretative divergences.

Nonetheless, it is important to emphasise that, despite criticism, the ISDS mechanism—one of the most disputed aspects of investment treaties – was initially designed as a regulatory construct grounded in principles of fairness. Although the contemporary system does not maintain a perfect balance between the parties, ISDS may still be applied in a fair manner if it serves the attainment of a perceived just equilibrium: namely, offering enhanced protection for foreign investors, thereby incentivising investment and fostering economic growth. However, as investment protection operates at the intersection of law, politics, and economics, the BIT-based regime cannot remain immune to external pressures. Thus, in practice, the original objectives have been overridden: the regime today exhibits structural and functional deficiencies as a result of the challenges discussed above.

The roots of these challenges lie in the broad arbitral interpretation of the substantive provisions of investment treaties, particularly their arbitration clauses. Before international arbitral tribunals, supranational interests and capital-intensive corporate actors may exert influence over states structured along national principles, potentially even affecting domestic policy choices. States have voluntarily curtailed their regulatory space in pursuit of benefits, yet the extent of such limitations remains within their sovereign discretion – hence, they retain the key to renewal.

The global responses to these challenges are driven by reform processes aimed at mitigating systemic imbalances. Although several reform initiatives have been launched to revise the procedural dimension of investment protection, none have (yet) entered into force.[7]

Addressing the remaining shortcomings of ISDS is essential and may justify further refinement of judicial appointment rules and the establishment of a permanent appellate body – an indispensable step for restoring the functionality of the currently stalled ISDS system. Additionally, revising first-generation BITs is crucial.

The EU is not only an advocate of reforms but also a key institutional and policy-shaping actor. Nonetheless, the consolidation of its internal legal and institutional framework for investment protection has been sidelined. This is evidenced, inter alia, by the fact that, following *Achmea*, no comprehensive EU investment protection framework was ultimately adopted. Instead, the emphasis shifted toward the complete and retroactive elimination of intra-EU ISDS, without developing a corresponding strategy to address all resulting legal concerns. As a result, the EU's credibility and coherence in global reform processes may be questioned.

The crisis within the EU's reform trajectory is compounded by the absence of a unified Member State position. The implementation of both *Achmea* and *Komstroy* reveals significant divergence among Member States. Moreover, every investment treaty negotiated by the EU with third countries remains pending due to the lack of Member State ratifications – even though these agreements contain procedural provisions referencing the future application of a permanent judicial mechanism, the stated goal of global reform efforts.

Furthermore, through the CJEU's jurisprudence (particularly *Achmea* and *Komstroy*) and subsequent legislative measures, the EU has initiated a deliberate, multi-layered strategy aimed at excluding arbitration from intra-EU investment disputes, thereby reinforcing the autonomy and primacy of EU law. Yet describing these judgments solely as autonomy-protective undervalues their wider significance – most clearly demonstrated by *Komstroy*. The EU's expansionist trajectory may raise systemic concerns for the future.

[7] Except e.g. the UNCITRAL Transparency Rules intended to enhance transparency.

Beyond EU judicial practice, legislative developments in this area are also problematic. The arbitral and national case law examined reveals a lack of coherence in attempts to resolve the legal conflict.

Regarding the 2020 Termination Agreement on intra-EU BITs, the following detailed observations may be made:

1. *Sunset clauses*: If arbitral practice refuses to accept the termination of *sunset clauses*, more EU investors may be encouraged to initiate arbitration under already-terminated intra-EU BITs.

2. Closed cases: Payment of arbitral awards may qualify as State aid, potentially conflicting with EU law, which could affect the actual enforcement of such awards.

3. New cases: Arbitration proceedings initiated on or after the day of the *Achmea* judgment are considered void, fundamentally undermining investor confidence, as procedural guarantees were retroactively withdrawn without transitional or compensatory mechanisms. National courts within the EU, however – bound by EU law – approach such disputes from an EU rather than an international perspective, consistently favouring Member States and effectively extinguishing international investment protection within the EU.

4. Arbitral awards rendered under BITs: ICSID awards must be automatically recognised and enforced among parties to the Washington Convention without substantive review, and only limited internal ICSID remedies are available. Yet Member State courts may attempt to treat such awards as conflicting with EU law, thereby invoking domestic judicial control. Under the New York Convention[8] – unlike the ICSID framework – public policy remains a ground for refusal. Courts outside the EU are not bound by EU law, and it is therefore difficult to argue that the EU's ex tunc reasoning overrides internationally acquired rights.

Regarding the EU's legislative measures concerning investment protection arising from the legal basis of the ECT, the following detailed observations may be made:

[8] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) – promulgated by Decree-Law No. 25 of 1962

1. Approximately half of the EU Member States, together with the EU itself, have terminated the pre-modernisation version of the ECT, while the remaining Member States opted in favour of modernisation. The modernised ECT explicitly records the prohibition of applying the *arbitration clause* in intra-EU relations, in contrast to the former Article 26. Should the EU's attempt to neutralise the *sunset clause* fail before international arbitral tribunals, the entry into force of the modernised ECT would effectively result in investors from those Member States that terminated the pre-modernised ECT enjoying additional rights compared to others.

2. The external legal effects of the modernised agreement generate uncertainty, as it remains unclear whether courts and arbitral tribunals outside the EU will consider this agreement in pending or future proceedings. Even the most recent cases suggest growing legal uncertainty and an emerging trend comparable to post-Achmea developments.

3. Another challenge concerns the issue of State aid in the context of the recognition and enforcement of ECT-based arbitral awards.

4. If an arbitral tribunal determines that intra-EU arbitration remains possible under the non-modernised ECT text, it may lead to the paradoxical outcome whereby those Member States that most strongly opposed the protection of fossil fuel investments under the ECT – and withdrew for that very reason – may nevertheless remain subject to the more investor-favourable protection of the unamended ECT (by virtue of the *sunset clause*), while the protection applicable to Member States that remain parties to the modernised ECT would gradually diminish.

A geopolitical dividing line has thus emerged in the field of legal interpretation, impacting legal relationships, judicial proceedings, and claims for damages that were originally established in accordance with international law. The European Convention on Human Rights (ECHR)[9], considered as a potential alternative legal remedy, cannot guarantee a successful outcome either; moreover, this avenue remains largely untested.

From a regulatory perspective, the future of intra-EU investment protection must be interpreted strictly within the framework of EU law. EU law expressly acknowledges that investor rights

[9] European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950 – promulgated by Act XXXI of 1993

are not absolute and may be limited to ensure the pursuit and balancing of public policy objectives. In my view, these limitations create an equilibrium between the rights of EU investors and the obligations of host Member States – limitations that modernised BITs are likewise intended to reflect. For EU investors, however, this offers little reassurance: the abolition of the right to resort to international arbitration fundamentally undermines the very aims and purposes of investment protection. This contradiction is highlighted by the Court of Justice itself in Opinion 2/15,[10] where it held that such a right cannot be considered merely ancillary.

Turning to currently valid first-generation agreements concluded between EU Member States and third countries, it may be inferred that forum shopping could, in certain circumstances, still allow for indirect intra-EU investment protection, owing to the broad definitional scope of "investor" and "investment" in many treaties. This systemic risk may encourage Member States to modernise their existing investment treaties with third countries more swiftly to avoid such outcomes.

Additional regulatory attention – and potentially treaty amendment – may be required regarding references to EU law in BITs with third countries. Given that the interpretation and application of EU law fall within the exclusive jurisdiction of the CJEU, any such reference should be unequivocally excluded from investment treaties. Similarly, for candidate countries, a safeguard clause addressing the consequences of future EU membership is necessary.

The concerns and potential deficiencies identified during the analysis have also revealed several additional issues – such as discrepancies in the EU's approach to investment versus commercial arbitration, or challenges relating to State immunity and public policy in the enforcement of arbitral awards – which could only be addressed in a limited manner within the scope of this discussion. A comprehensive examination of these issues would have exceeded both the scope and methodological limits of this research and could constitute the subject of a separate one.

What is certain, however, is that the legitimacy deficit permeates all aspects of EU investment protection. The EU, driven largely by the interests of its quasi-state entity structure and its Member States, is actively reshaping its investment policy, thus contributing to uncertainty in investment disputes. Although the underlying cause of the present situation is linked to

[10] Opinion 2/15 of the CJEU, May 16, 2017 (ECLI:EU:C:2017:376)

safeguarding the autonomy of EU law, today's geopolitical fault lines in the interpretation of EU investment law have, in fact, compromised the general autonomy of the law itself. Many of the EU's corrective measures were necessary to address long-standing inconsistencies between EU law and international law; however, the extent of these measures has exceeded the boundary of legal proportionality. The current EU landscape cannot be viewed as final – at least not until all pending proceedings have been concluded.

Even the resolution of the conflict between EU law and international law through alternative legal avenues – particularly recourse to the European Court of Human Rights (ECtHR) or enforcement in third States – cannot guarantee a legally secure outcome. Nonetheless, it would be appropriate for the EU to focus more on the systemic management and resolution of the discrepancies it has created. In the absence of adequate solutions, these problems may re-emerge cyclically (e.g., in the case of candidate countries) or repeatedly (e.g., in BITs with third countries where no exception for the interpretation and application of EU law exists).

In light of the above, the findings of this research – beyond their relevance to judicial practice and legal interpretation – may hold value for the development of EU legal policy.

IV. List of Publications[11]

SZALAI Ildikó: Érdekek harca? – A beruházásvédelmi jog labilis egyensúlyi helyzete. Pázmány Law Working Papers, 2021/8.

SZALAI Ildikó: A nemzetközi beruházási konfliktusok vitarendezésének sajátos útja: az Achmea- ügy és hatása. Külgazdaság, Jogi-Melléklet, 5-6. pp. 106-121. 2021.

BALÁZS Gergő – SZALAI Ildikó: Az Európai Unió Bíróságának Komstroy-döntése. Jema Jogesetek Magyarázata, 2-3. pp. 59-69. 2022.

SZALAI Ildikó: Közép- és Kelet-Európa beruházás- és exportösztönzési stratégiája, különös tekintettel annak változékony jogi környezetére. Külgazdaság, Jogi-Melléklet, 7-8 pp. 124-139. 2023.

SZALAI Ildikó: Uniós tendenciák a nemzetközi beruházásvédelmi jogban – Vitarendező joghatósági kérdések. In: Bándi Gyula - Pogácsás Anett (szerk.): Law in Times of Crisis – Jog válság idején: Selected doctoral studies - Válogatott doktorandusz tanulmányok. Pázmány Press 534 pp. 297-308. 2023.

SZALAI Ildikó: Nemzetközi beruházásvédelem a magyar tendenciák tükrében. In: Prof. Dr. Jakab Éva – Prof. Dr. Miskolczi-Bodnár Péter (szerk.): XXV. Jogász Doktoranduszok Országos Konferenciája. Patrocinium Kiadó 46 pp. 383-390. 2023.

[11] Research related to publication:
Within the framework of a research project concluded between the Ministry of Justice of Hungary and Széchenyi István University, and involving researchers from several Hungarian law faculties (in connection with PPKE-JÁK, led by Dr. Katalin Edit Raffai), research activities were carried out for the implementation of the project "Harmonising Case-Law Approaches in the Teaching of European Law" (including the analysis of judgments and the preparation of theoretical case studies).
The aim of the research was to prepare a comprehensive volume based on judgments of the Court of Justice of the European Union in the fields of the fundamental freedoms and competition law, and to utilise this work in legal higher education:
Glavanits, Judit (ed.): The Internal Market of the European Union – Case Studies on Fundamental Freedoms and Competition Law. Universitas-Győr Nonprofit Kft. (2022).