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The Settlement of International Investment Disputes, Focusing on EU Trends

doctoral thesis

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THESIS BOOKLET

Budapest

2026

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I. Summary

The international investment law (IIL) regime is facing a multidimensional crisis. The main objective of this dissertation is to examine one of the dimensions of this crisis, namely the conflict between the international law and the European Union law: beyond assessing the current state of play, the dissertation seeks to identify and analyse emerging developments. At the same time, I think that drawing comprehensive and well-founded conclusions requires an understanding of the broader picture as a whole. Only such a holistic approach makes it possible to identify the relevant points of connection and interrelationships, thereby enabling the approach of the EU to be examined within its wider context and allowing its significance and impact on the broader IIL regime to be adequate assessed. Consequently, my dissertation also addresses – with a limited extent – the institutional challenges.

At the global level, the reform of the procedural framework governing investor-state dispute settlement (ISDS) has become a central area, because critics argue that this type of clauses, which constitute the special dispute resolution mechanism, have evolved into instrument affording excessively broad protection to foreign investors, in the meantime operating in direct opposition to significant public policy measures adopted by host states. Therefore certain states have chosen to terminate their bilateral investment treaties, while others have sought to reduce their exposure to liability by introducing investor obligations or narrowing the scope of substantive provisions of the agreements.

In response to this type of loss of confidence in the investment protection regime, the objective has become the reform of the existing system, a process strongly supported by the EU. The ambition is the establishment of a permanent multilateral investment court that would provide an impartial and equitable adjudicatory framework incorporating an appellate mechanism. Achieving this aim, however, requires prompt and multilevel legal development based on coherent doctrinal principles and extending beyond procedural reforms to encompass substantive provisions of the investment protection treaties. Such progress requests continued proactive engagement, including on the part of the EU.

Consequently, even if global reform efforts for resolving investment disputes succeed, they will not address all existing challenges. The collision between EU law and IIL – as a conflict

between international legal norms – constitutes a key issue in the EU. In brief, this conflict creates difficulties:

- On the part of the investors: legal uncertainty arises from the consequences of the *Achmea*[1] and *Komstroy* judgments,[2] as EU law requires the termination of pending cases and the refusal to enforce awards rendered by international arbitral tribunals.

- On the part of the state: 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 determining the substantive provisions of the treaties.

In general, investment protection treaties contain so-called *sunset clauses*, providing continued protection for investments made prior to a termination of treaties, typically for an additional 5-10-20 years. However, pursuant to the Termination Agreement of 2020,[3] such protection was retroactively revoked, and the Court of Justice of the European Union (CJEU) subsequently held, by analogy with *Achmea*, 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, the circle is thus nearly complete: all intra-EU investment protection instruments have become affected. Investors, however, remain in a state of legal uncertainty.

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

[1] 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)
[2] 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)
[3] *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.

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

Chapter I of the dissertation focuses on the historical development of IIL, while also presenting the key scholarly perspectives and doctrinal views that have shaped its evolution. Particular attention is on the causes of the current critical situation of the investment protection regime. In this context, I examine the subject with the following hypothesis, the relevance of which derives from the unique nature of the field, where economic and political considerations play a significant role with the legal developments:

> *H1: The need to reform international investment protection, in which the EU is also involved, has resulted from changes in the economic, social and political environment.*

Main research questions:

- How has investment protection developed? What major historical events and ideas have influenced it?
- What impact did colonialism and later decolonization have on investment protection?
- When did modern IIL emerge?
- How has the field evolved over recent decades? What are the main trends in investment protection from the perspectives of capital-exporting and capital-importing countries?
- What are the reasons for the current crisis in the investment protection regime?

Chapter II examines responses to the crisis described in Chapter I, focusing on dispute settlement reform and its role in addressing contemporary global challenges. Special attention is given to developments within the EU as well as their practical application and future prospects. Then Chapter III outlines the main directions of EU investment protection policy, while Chapters IV-VIII analyse the development and application of EU law in this area. These chapters also discuss the existing conflict and the different views related to it. Based on this, the following hypotheses are formulated:

> *H2.1: The participation of the EU in international investment dispute settlement reforms preceded the consolidation of its internal legal framework for investment protection.*

Main research questions:

- What is the basis of international dispute settlement reform in investment protection? What factors have driven it?

- What role does the EU play in international dispute settlement reform? How is this connected to EU investment protection policy?
- Are there any risks associated with the EU's involvement in these reforms?
- What are the main elements of the EU's internal investment protection framework? What impact have the judgments of the CJEU (Achmea, Komstroy and PL Holdings)[4] had on it?
- What are the main regulatory and interpretative priorities of the EU? Does this focus cover all areas relevant to investment protection policy?

  H2.2: The coordinated measures of the EU at different levels aimed at the retroactive termination of intra-EU investment protection are based on legally debatable grounds. This process goes beyond the traditional collision between EU law and international law.

Main research questions:

- What impact have the EU's measures to eliminate the intra-EU investment protection system had on the unity and autonomy of international investment law?
- How have Member States, the international arbitration community and legal scholars responded to these measures?
- What alternatives exist for investment protection within the EU?
- What conclusions can be drawn regarding the conflict between EU law and international law in the area of investment protection?

[4] Case C-109/20, Republic of Poland v PL Holdings Sàrl, Judgment of the Court of Justice of the European Union (Grand Chamber), 26 October 2021 (ECLI:EU:C:2021:875)

II. Methodology

The fields of EU investment protection and international arbitration constitute a complex and multifaceted domain, encompassing numerous sub-issues that could individually warrant separate scholarly analysis. This research, however, refrains from examining each subfield in exhaustive detail. Instead, it focuses on a critical assessment of the current directions of the EU with the aim of showing 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 further issues of this area of law.

Thus, the research concentrates on the present EU-related context and tendency of IIL, 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 dogmatic analysis and descriptive methods, but also comparative methodology and jurisprudential examination. At the preparatory stage, and in order to define the scope of the issues, 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 IIL, 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 IIL, is the EU. The 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,[5] as well as the jurisprudence of the CJEU. Furthermore, communications issued by the European Commission hold particular importance. The research primarily uses descriptive-analytical and comparative approaches. Nevertheless, to fully understand the characteristics of the IIL 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 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 IIL. 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, enabling the research to maintain its orientation and ensuring its potential for practical applicability.

[5] 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

III. Research Findings and Practical Applications

By examining the subject, the research provides a comprehensive analysis of the relationship between IIL and EU law, while also offering an overview of the enforcement of arbitral awards and their potential alternatives. Furthermore, through a critical assessment of the EU's current legal developments in the field, it highlights the consequences arising from the judgments of the CJEU.

The resolution of international investment disputes currently faces significant challenges. At the global level, however, reform processes are already underway to address these difficulties, with the EU acting as a constructive participant in these efforts. In contrast, within the EU context, the conflict between the international investment protection regime and the EU legal order has given rise to a structurally problematic situation carrying systemic risks, one that would require a comprehensive and timely resolution.

At the same time, it can be observed that the contemporary global system of investment protection is currently in a transitional phase. The transformation of the legal regime is not yet complete, nevertheless, new institutional and normative directions have already begun to emerge. Consequently, it is of particular importance that current reform processes and developments in the law are built upon sound doctrinal foundations, as this transitional period may already be regarded as the gateway to the investment protection mechanisms of the future.

Should these developments evolve within inadequately founded legal frameworks, there is a risk that the fragmentation of IIL may persist. This could lead to further erosion of value of the system, a continued decline in the number of bilateral investment treaties, and, ultimately, a weakening of the protection afforded to foreign investments. Beyond its implications for legal certainty, such an outcome could also undermine the future legitimacy of the system, particularly in a field where balancing state regulatory autonomy with the protection of investments is inherently delicate.

The concerns surrounding IIL are multifaceted and therefore cannot be regarded as uniform in nature. At the international level, efforts to address these challenges primarily focus on institutional and normative reforms aimed at strengthening the coherence, predictability, and legitimacy of the system, while also mitigating its asymmetrical features. By contrast, within the EU context, the main source of difficulty lies in the normative and interpretative tensions between EU law and the international investment protection regime. As a result, while the global focus is on the institutional and normative reconfiguration of the system, the EU's challenges are linked to resolving conflicts between legal orders and reconciling divergent approaches to legal interpretation.

> *H1: The need to reform international investment protection, in which the EU is also involved, has resulted from changes in the economic, social and political environment.*

The contemporary institutional and closely related political challenges of IIL are currently being addressed through ongoing law-making processes. In my view, the treaties that form the foundation of the current investment protection regime were originally intended to create a predictable and legally secure environment for investors, primarily against risks such as arbitrary state interference. This explains the asymmetric nature of the system, as investment protection agreements were designed to guarantee the protection of foreign investors, particularly in politically unstable but economically significant countries. Consequently, the resulting imbalance of power in favour of investors from economically stronger states was almost inevitable. The basis of this imbalance lies in the ISDS mechanism, which serves as the primary means of enforcing investors' rights. From the perspective of the historical development of investment protection, the demand for reform of international investment arbitration stems from shortcomings in the original institutional design and, therefore, from an inherently unbalanced framework in which the asymmetrical character of investor protection was considerably stronger than it is today. However, the emergence of reform efforts also required changes in the economic, social, and political environment, which strengthened, among other things, the interests of capital-importing states, the desire to reduce investors' influence over public policy measures, and ambitions related to sustainable development. These developments could moderate the original asymmetrical nature of IIL and may eliminate the legitimacy crisis identified by many critics of the system. All of these factors play a key role in reducing the regime's inherent imbalance. At the same time, it is important to emphasise that the key to renewal remains in the hands of states. In pursuit of the benefits associated with investment protection, states voluntarily limited their regulatory freedom, however, they continue to determine the extent of those limitations themselves.

According to statistical data, the number of investment agreements currently in force has been increasing again since 2022. The preceding stagnation was influenced in part by the termination of intra-EU investment agreements. Nevertheless, according to UNCTAD analyses, the focus of contemporary investment agreements has gradually shifted towards investment facilitation and market access rather than investment protection and ISDS, which continues to contribute to a certain level of distrust in the system.

Responses to the global challenges facing the field are primarily reflected in ongoing transformation processes aimed at reducing existing imbalances. Although, several reform initiatives have been launched with regard to the procedural aspects of investment protection, most of them have not yet entered into force.[6] At the same time, addressing the remaining shortcomings of ISDS is essential. This may justify further clarification of the rules governing adjudicators, as well as the development of a more consistent system of precedent. The establishment of a permanent adjudicatory body with an appellate mechanism is still pending, however, its creation is of considerable importance for ensuring the effective functioning of the currently criticised ISDS system.

Furthermore, it should be emphasised that the review of first-generation bilateral investment treaties is also essential. Where the termination of such agreements is not envisaged, their modernisation should be pursued without delay through the incorporation of safeguard provisions that provide stronger protection for regulatory autonomy and public policy interests of states. Reforms in this direction could also make a significant contribution to creating a more balanced ISDS framework.

> *H2.1: The EU's participation in international investment dispute settlement reforms preceded the consolidation of its internal legal framework for investment protection.*

The EU acts not only as a promoter of investment law reforms but also as one of their key institutional and policy makers. Nevertheless, a similar level of progress, or even a clear tendency towards renewal, cannot be observed in the consolidation of the internal legal and institutional framework of the EU for investment protection, particularly with regard to

[6] Except, for example, the UNCITRAL Transparency Rules and the related Mauritius Convention on Transparency, both of which were adopted to enhance transparency in investor-state dispute settlement proceedings.

addressing the risks that have emerged within the Union. This is illustrated, for example, by the fact that no comprehensive EU investment protection framework was established following the *Achmea* judgment. Furthermore, investment agreements that may give rise to legal and policy concerns remain in force. Within the EU, the focus has instead shifted towards the complete and retroactive elimination of the intra-EU ISDS system. However, no comprehensive policy strategy or decision-making process has been developed to address all of the concerns arising from the consequences of this approach. As a result, while the credibility and consistency of the EU in its role within global investment law reform efforts may be questioned from a theoretical perspective, there is no evidence in practice that these concerns have undermined its position. Therefore, the involvement of the EU in the global reform of international investment arbitration has preceded the consolidation of its own internal legal framework. However, this has not, thus far, caused any significant impairment to the normative credibility or consistency of its role in the global reform process. At the same time, there is still no common EU position regarding the international dimensions of EU investment policy, particularly with respect to the entry into force of EU investment agreements, which refer not only to the Investment Court System (ICS) but also to a permanent judicial mechanism. Consequently, the further consolidation of the EU's internal investment protection policy framework and the elimination of existing legal uncertainties could also facilitate the timely entry into force of these agreements and mechanisms.

> *H2.2: The coordinated measures of the EU at different levels aimed at the retroactive termination of intra-EU investment protection are based on legally debatable grounds. This process goes beyond the traditional collision between EU law and international law.*

It could be concluded that the crisis underlying the EU reform process is further strengthened by the fact that the EU approach to intra-EU investment protection fails to ensure a unifrom Member States position in several areas.

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 jurisprudence (particularly *Achmea* and *Komstroy*) and subsequent legislative measures, the EU has initiated a deliberate, multi-level 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 expansionist of the EU may raise systemic concerns for the future.

In the Achmea judgment, the contrast between the short length of the decision and its importance raises concerns about arbitrariness or political influence. The CJEU appears to have examined the issue only from a limited perspective rather than considering all relevant aspects, resulting in a decision that may be seen as outcome-oriented. In contrast, in the Komstroy case, the jurisdiction of the CJEU itself became controversial. The procedural background of the case was also questionable, as the court addressed the issue not in an intra-EU arbitration case but in proceedings only indirectly related to the matter. Nevertheless, the CJEU confirmed its jurisdiction by emphasising the need for a uniform interpretation of EU law. This interpretation may have consequences under international law in the future. In addition, compliance with the *ne ultra petita* principle is also debatable, since according to this principle courts should not rule on issues beyond those raised by the parties.

The key CJEU judgments had far-reaching consequences. The 2020 Termination Agreement and the 2025 *inter se* agreement concerning the ECT placed the conflict between EU law and international law into an international legal framework. Their retroactive effect further strengthened concerns about the arbitrary use of the EU judicial system and encouraged parties to seek alternative solutions in order to protect and enforce the rights of foreign investors. Although, CJEU judgments generally have retroactive effect, it would be possible to limit their effects in time. Based on the principle of legal certainty, EU institutions could have been expected to provide a predictable and foreseeable legal environment. The arbitration proceedings, the awards rendered, the difficulties surrounding enforcement, and the analysis of ongoing cases all highlight the clear division that has emerged around the EU.

During my research, the examination of these two international agreements and the related case law provided important evidence supporting this conclusion. This view is further confirmed by academic literature, much of which takes a critical approach. After comparing these different sources and perspectives, I find it necessary to provide a brief summary of the main findings.

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[7] – 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:

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

[7] 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

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.

Although, the EU did launch a coordinated series of measures on several levels, the coherence of this approach was challenged by international arbitration based on international law. In the field of legal interpretation, a geopolitical dividing line has effectively emerged, affecting legal relationships, judicial proceedings, and compensation claims that were lawfully established under international law. The European Convention on Human Rights (ECHR),[8] considered as a potential alternative legal remedy, cannot guarantee a successful outcome either, however, this way remains untested. Although, the European Court of Human Rights may indeed provide a forum for investors to pursue new intra-EU claims, this is not necessarily an attractive option

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

for those seeking full and prompt compensation. Furthermore, in proceedings before this court, the *Bosphorus* doctrine may potentially weaken investors' position to a significant extent.

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 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,[9] 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 bilateral investment treaties 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 approach of the EU 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

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

both the scope and methodological limits of this research and could constitute the subject of a separate one.

However, it is clear, that this further supports the view that the “legitimacy deficit affects all aspects of EU investment protection. The EU, which has itself contributed to the uncertainty surrounding investment disputes, actively shapes its investment policy largely from the perspective of the Union as a state-like entity and of the interests of its Member States. It does so despite the fact that the EU Treaties[10] establish respect for international law as a fundamental principle.”[11] The EU’s coordinated efforts at several levels to retroactively eliminate intra-EU investment protection rest on legal foundations that are questionable from an international law perspective. Although the EU has consistently opposed dispute settlement mechanisms under intra-EU BITs, the rejection of the legal basis of its most recent policy approach by international forums weakens the authority of EU law. In this context, it also calls into question the EU’s role as a protector of its own legal autonomy, since its efforts to enforce these claims have so far remained largely within the intra-EU sphere. This development goes beyond the traditional conflict between EU law and international law. In practice, a geopolitical dividing line, or even a fault line, has emerged in the field of investment protection. This has undermined the uniform enforcement of investment protection rules and, contrary to the EU’s emphasis on the autonomy of EU law, has led EU law to challenge the broader autonomy of international investment law itself.

Many of the EU 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.”[12]

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

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[10] Treaty on European Union HL C/326 2012.10.26. 21 (1)
[11] SZALAI Ildikó: Uniós tendenciák a nemzetközi beruházásvédelmi jogban. In: BÁNDI Gyula – POGÁCSÁS Anett (szerk.): *Law in Times of Crisis – Jog válság idején. Selected doctoral studies – Válogatott doktorandusz tanulmányok.* Budapest, Pázmány Press 2023. 308.
[12] Uo.

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[13]

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.

SZALAI, Ildikó: Practical Challenges Arising from EU Investment Protection Policy. *Pázmány Law Working Papers*, 2026. *(under editorial consideration)*

[13] 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).