DOCTORAL (PhD) DISSERTATION SYNOPSIS

The Investor-State Dispute Settlement (ISDS) system and its current criticisms

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Introduction

The system known as Investor-State Dispute Settlement (ISDS) has gained a great deal of popularity in recent decades on the field of international investment. This is because during the 20th Century, but especially after the Second World War, the importance of foreign investment significantly grew and with it, the number of disputes increased as well. This is mostly because foreign investors operating in developing countries were often sceptical of local courts, and thus attempted to introduce an independent method of dispute resolution to solve disputes. This was the ISDS system, which in essence simply means that the host state agrees to bring its dispute with a foreign investor concerning an investment to an independent international arbitration tribunal. The legal foundation of this being the so-called Bilateral Investment Treaties (BITs), as well as other multilateral treaties with investment content or even singular contracts containing ISDS provisions, signed by the host state and the foreign investor.

As such, the essence of the ISDS system is that the dispute between the foreign investor and the host state is resolved by an international arbitration tribunal, which is presumed to be capable of making more independent judgements than the host state's domestic courts. If we take into account the waves of expropriation and nationalization following the Second World War, the propaganda surrounding it, the fear of foreign investors concerning the bias of host state apparatuses might not have been necessarily unfounded. The ISDS system is characterized by a dispositive nature, the rules of procedure are most often determined by the parties, and the foreign investor in particular can often choose between multiple different procedural rules, depending on the legal basis of the ISDS proceedings. One of the chief characteristics of ISDS is its asymmetry (only foreign investors may initiate claims, and the host state cannot present substantial counter-claims), as well as its finality (the exclusion of ordinary remedies). As a result of ISDS proceedings, arbitration tribunals often order the host state to restore the original state of affairs, or if that is not possible, pay for the damages inflicted to the foreign investor.

Despite its popularity, significant criticism has been levelled against ISDS in the past two decades, both by western experts and activists as well as those from developing countries. These criticisms, among others, include the asymmetry of the system, the alleged favouritism towards foreign investors by arbitrators, the lack of unified interpretation, transparency, and the exclusion of affected local communities. According to the opinion of critics, these anomalies within the ISDS system have a negative impact on the host state, they freeze

certain aspects of public interest-based regulation, or at least make it more difficult to implement and execute regulations and policy decisions negatively impacting foreign investments. This is the so-called regulatory chill phenomenon, which also appears as a sort of criticism levelled against the ISDS system.

Reasons for the research, the goals of the thesis, the collection of materials, and the applied methods

The subjects of the present doctoral thesis were the ISDS system, the criticisms surrounding it, especially the phenomenon of regulatory chill. The importance of the subject is justified by how widespread ISDS cases have become, even Hungary had sixteen ISDS cases so far. And not only the number of cases justify the subject's importance, but also the amount of damages being awarded to foreign investors. These awarded damages can amount to tens of millions of USD, and the procedural costs themselves can reach several million USD. The ISDS system does not, as a rule of thumb, use the „loser pays" principle, excluding certain cases. As a consequence, these procedural costs are usually borne independently by the disputing parties. As such, we can surmise that ISDS cases not only affect host states by alleged regulatory chill, but also through monetary effects. These sums are especially significant for developing countries. This is important, as these countries will often be eager to compromise with the foreign investors as a result, thus potentially damaging the public interest in the process.

The thesis studied two important questions (research questions):

(1) how well-founded are the criticisms levelled against the ISDS system (especially with regards to regulatory chill)

(A) from a theoretical perspective,

(B) from a practical perspective,

(2) what alternatives exist alongside the ISDS system, and can these remedy the problems facing ISDS?

As a result of the disputes surrounding the ISDS system, it has become evident that it is necessary to examine whether these alleged failings of the system can be proved from a theoretical perspective (studying the treaties and procedural rules forming the legal basis for ISDS), and from a practical perspective (meaning the examination of available ISDS case law). If it can be proved that the criticisms have merit, then it is necessary to examine other

alternate avenues of dispute resolution, and determine if another system (beyond the domestic judicial method) is capable of replacing ISDS and remedying its failings.

During the research, the collection of materials was realized in a number of different ways. First, the available literature was collected. It is important to emphasize that due to its strong international character, research in ISDS was mainly done in English, and thus most treatises and other sources also use English as their language. As such, this thesis mainly relies on English-language literature. However, the author also attempted to incorporate Hungarian research and literature as much as possible, within the contextual limits imposed by the thesis' subject matter. It is also important to note that due to the controversy and disputes surrounding ISDS, the author paid great attention to only refer to objective, sufficiently scientific works in an authoritive manner, and use more obviously biased, evidently activist or lobby sources, only as demonstrative sources. After the literature, the author collected and selected different BITs for the research. One of the primary factors for selection were geographical diversity, due to the global nature of the research. Another important factor was the selection of treaties suitable for establishing trends. Selection was impossible to avoid in this case, due to there being thousands of BITs. Beyond BITs, the author also collected and selected (based on their perceived relevance to the research) non-BIT international agreements and other legal sources, as well as rules of procedure released by various international organizations. Finally, seventeen ISDS cases were collected, based on their likely utility for achieving the research goals of the thesis.

When it comes to applied methods, qualitative research was prioritized, quantitative methods were only used in the chapter concerning the statistical analysis of certain criticisms. This approach was justified by the nature of the subject matter. As in order to answer the research questions of the thesis, it was necessary to place the ISDS system in a historical and theoretical context, it was necessary to identify its chief characteristics, and it was necessary to define exactly the criticisms levelled against it. As such, within the qualitative approach, a number of different methods were employed: historical analysis, legal dogmatic analysis, comparative analysis and interpretation of case law being the most defining methods of the research. The exact application of each method will be demonstrated later on, when presenting the contents of the thesis.

The thesis attempts to contribute to answering the significant question that has been tormenting the ISDS system like the sword of Damocles: how much are its alleged failings grounded in truth? The thesis thus attempts to answer this question, and determine whether, with regards to certain questions surrounding the ISDS system, its detractors or proponents

are closer to the truth, in light of the theoretical and practical analysis. Beyond this, the thesis also attempts to illuminate other alternatives that might be possible, and how these alternatives measure up against ISDS.

Presenting the thesis

The first element in the structure of the thesis was a historical overview of the ISDS system. ISDS fundamentally developed alongside investment protection law, and is nearly impossible to divest it from that. As such, the thesis started with the general and moved towards the specific: it first reviewed briefly the history of investment protection law, before closing in on the historical development of the ISDS system. The subject was divided into three sub-chapters, combining the previously mentioned method with a chronological division: the period before the Second World War, the events after the Second World War, and the appearance of BIT and the ICSID. At the end of the last sub-chapter, we also briefly delve into the statistics of BITs. Through this historical analysis, the thesis puts the ISDS system into context, illuminates its origins, the reasons for its creation, and what interests motivated states and foreign investors during the 20th Century that ultimately led to the creation and spread of the ISDS system. Knowledge of these motivations played a critical role in the interpretation of the characteristics and criticisms of the ISDS system.

Afterwards, the thesis turned to the examination of the ISDS system, divided into seven sub-chapters. First, the thesis determined the chief characteristics that could be considered essential for the ISDS system. This was necessary because a large amount of criticisms arise from these characteristics, and thus identifying them was necessary in turn for realizing the research. Much like with the historical chapter, the thesis started from the general and headed towards the specific. As such, after the chief characteristics had been identified, the thesis moved onto examining the ISDS provisions found in various treaties, such as the BITs and multilateral agreements. In both cases, the thesis carefully selects agreements that could be placed into a developmental trend. As such, the thesis is not merely a timeless overview of the ISDS system, but ties it to specific agreements and specific eras. Here, it was possible to observe certain trends, which helped put the ISDS system into a better context for the research. The thesis also studied some of Hungary's agreements and their ISDS provisions. And if the ISDS system is examined in specific, then it would in turn be also necessary to discuss the various rules of procedure by which an ISDS arbitration tribunal may operate. The thesis selected the two most important of these for detailed research (the procedural

rules provided by the ICSID and the UNCITRAL), but also briefly discussed less crucially important procedural rules. Knowledge of these procedural rules is absolutely necessary for the purposes of the research, as it is not possible to discuss criticisms without sufficient theoretical knowledge, it is necessary to understand what exactly are the opponents of ISDS criticizing. Furthermore, as discussed with regards to research questions, understanding the theoretical background of ISDS is one of the ways for uncovering the truth behind the allegations facing it. As a conclusion to the chapter, the thesis discussed here the statistical data concerning the ISDS case law.

With the fundamentals of ISDS theory laid down, the thesis turned to examining the criticisms in more detail. In a similar fashion to the previous chapter's general characteristics, the thesis attempted to identify, define and categorize the criticisms facing ISDS. In essence, the thesis used a threefold category system, separating from each other criticisms relating to the arbitrators, criticisms relating to the nature of ISDS proceedings, and criticism relating to the costs and outcome of ISDS proceedings. The importance of this is not necessary to emphasize, as it was a manifestly necessary step for answering research questions. However, the subject of regulatory chill was examined in its own chapter, as it is a more complex issue, with several different possible definitions and categories, the latter of which received its own sub-chapter as a result.

The examination of the selected case law followed next. Selection was necessary in this case, choosing ISDS cases which were held by the professional literature to be most impactful or were most scientifically relevant for the purposes of the research. During this examination, the thesis attempted to not only offer a simple analysis, but also interpret the case law from a critical view, applying the previous chapter's results to identify specific instances of criticism that could be attributed to a given case. In a similar vein, strong counter-examples to a given criticism were also highlighted. In total, seventeen ISDS cases were examined in such a manner: *Abengoa v. Mexico, Occidental Petroleum v. Ecuador (II), Copper Mesa v. Ecuador, Pac Rim v. El Salvador, Renco v. Peru (I) és (II), AbitibiBowater v. Canada, Veolia v. Egypt, Ethyl Corporation v. Canada, Dow v. Canada, Vattenfall v. Germany (I) és (II), Energía Solar v. Spain, Blusun v. Italy, Philip Morris v. Australia, Philip Morris v. Uruguay*. With this chapter, the thesis realized the second part of the first question, the practical analysis.

However, there were criticisms that could not be safely answered with reliance only on theory and case law, as it was possible to quantify them and thus evaluate them from a statistical perspective. In this case, the utilization of quantitative research was warranted,

and determine whether these criticisms could be proved statistically. As such, the thesis accomplished this analysis in the chapter following the examination of case law. Furthermore, the thesis also devoted special attention to Hungary here, with an emphasis on determining the impact ISDS has on Hungary from a numbers' perspective, which gives the thesis a national element alongside its chiefly international character.

With the theoretical, practical and statistical analysis, the thesis accomplished its research concerning the first research question, and thus turned to the examination of the second research question. This was accomplished in the final chapter, which dealt with the so-called Investment Court System. This is a new system of investment dispute resolution, developed mainly by the EU, which intends to supplant ISDS. Beyond the analysis, the chapter also discussed which failings of ISDS the Investment Court System managed to solve or not solve, and how much it is of a realistic replacement for the ISDS system.

Research output

Over the course of the research, the identified criticisms were examined from a theoretical and practical perspective. The output of the research will be presented for each identified criticism:

The first examined criticism was the allegedly expansive interpretation of substantive law by ISDS arbitrators. According to this theory, the arbitrators abuse their large margin of appreciation provided by the ISDS system either in favour of the foreign investor, or at least in favour of prolonging ISDS cases (such as through establishing jurisdiction in a particularly roundabout manner). Based on the findings of the research, thesis reached the conclusion that this criticism is partially well-founded. As it is possible to identify several cases where the arbitrators relied on expansive interpretation either directly in favour of the foreign investor, or to prolong the proceedings (by say, establishing jurisdiction). For the latter, *Pac Rim v. El Salvador* was an excellent example, where the arbitration tribunal determined its own lack of jurisdiction based on the treaty invoked by the foreign investor claimant, but otherwise established its jurisdiction based on El Salvador's domestic law, thus allowing the ISDS proceedings to continue. Furthermore, the thesis presented in its statistical chapter a survey by the researcher Gus van Harten, which also seemed to justify this allegation. However, as noted, the thesis found this to be only partially well-founded as it could identify several counter-examples (such as *Blusun v. Italy*), where the arbitration tribunal used a restrictive interpretation, and by van Harten's own admission, the survey was not fully

comprehensive. Furthermore, other statistical data also failed to prove a noticeable impact on the outcome of ISDS cases. As such, the thesis concluded that while this criticism definitely has a foundation in actual examples, it cannot be considered a universal failing of the ISDS system, due to the existence of several counter-examples, and the lack of apparent effect on the outcome of ISDS cases.

Evaluating the criticism concerning arbitrators

Moving onto the criticism concerning arbitrators, the second examined criticism in the thesis was the alleged lack of arbitral independence and unbiasedness. Based on this criticism, arbitrators are allegedly biased in favour of foreign investors. The examined theoretical material did not support this notion, as all the examined procedural rule systems strongly attempt to ensure that both parties have an equal say in the appointment of arbitrators. However, as cases such as *Energía Solar v. Spain* showed, these rules do not necessarily ensure the independence of arbitrators in practice. However, logically speaking, if a majority of arbitrators were biased in favour of foreign investors, then certainly a greater ratio of ISDS would be won by foreign investors. But the thesis' statistical analysis proved this to be not the case. Furthermore, there are procedural guarantees regarding arbitral independence, and the judgment of biased arbitrators can be annulled afterwards in some procedural rulesets, such as in ICSID's (as it also happened in the aforementioned ISDS case). As such, the thesis did not find this failing to be particularly widespread, though certain procedural rulesets contain mechanisms for addressing this issue post-arbitration. Thus, the thesis' final conclusion on the matter was though this failing may occasionally manifest, it cannot be considered a particularly well-founded one, it cannot be regarded as a universal, systemic failing of ISDS, and even if it occurs, the host state will most likely have the means to address the issue.

The third notable criticism examined by the thesis was the „elite group" concept, that arbitrators for ISDS cases are mostly selected from a small and exclusive pool. The fundamental issue with this criticism in the thesis' view is that as parties freely choose arbitrators in most cases, both parties have the opportunity to appoint an outsider arbitrator unaffiliated with this „elite." Furthermore, the creation of this elite pool of arbitrators can be considered to be as result of how the legal knowledge and experience necessary to act as an arbitrator in an ISDS case is not exactly widespread, and thus it is often more advantageous for both parties to appoint arbitrators already experienced with the system. In the end, this phenomenon is easily explicable in the thesis' view, and the legal materials examined by the thesis manifestly preclude any kind of mandatory exclusivity for arbitral selections for the

most part, and in actual practice, it does not seem to have a demonstrable effect on the outcome of ISDS cases.

Evaluating the criticism concerning the character of ISDS proceedings

Moving onto the criticism concerning the character of ISDS proceedings, the fourth relevant criticism examined by the thesis was the question of asymmetrical proceedings. This criticism focused on how the ISDS system is a one-way proceeding, only foreign investors can initiate it, and the host state is limited in its ability to present a substantial counter-claim against the foreign investor. Although this can be considered an inalienable part of the ISDS system, the thesis was able to find examples where the host state had legitimate grievances against the foreign investor (such as in *Copper Mesa v. Ecuador*). Thus, although it is not possible to have a non-asymmetric proceeding due to the fundamental nature of ISDS system as well as the treaties it is legally based on, it can still cause problems to a certain extent in actual practice, as only one side of the dispute is capable of effectuating their grievances against the other. However, the thesis highlighted that as the host state is a sovereign entity, it has other means to enforce its rights against the foreign investor, such as through domestic court proceedings or some other governmental means. As such, it can be stated that this aspect of ISDS cannot be altered without overhauling not only the ISDS system, but also the entire field of international investment law.

The next relevant criticism examined by the thesis was from the identity of the claimant investor. According to this allegation, the fact that only a foreign investor may initiate ISDS proceedings, while a domestic investor cannot, may give the former a competitive advantage against the latter. The thesis primarily answered this issue through looking at the case law. Although the definition of foreign investor can vary, the thesis found several cases such as *Pac Rim v. El Salvador* or *Philip Morris v. Australia,* where the foreign investor manipulated its nationality in order to utilize a more advantageous BIT as the basis of the claim. And similarly, case law showed that this tactic can occasionally be successful. From the criticism's perspective, this means that the domestic investor also theoretically has this opportunity to manipulate its nationality in order to access the ISDS system. On the other hand, this „solution" is ultimately a result of a failing of the ISDS system (foreign investor being defined too loosely in treaties, and expansive interpretations of such by arbitration tribunals), and as such, the thesis held the opinion that it is highly questionable that this issue is not significant, due to the above-described anomaly. Of course, the domestic investor can potentially access advantages unavailable to the foreign investor, such as greater experience with the local legal pracitces and means of effectuating claims, lack of anti-foreign bias by

domestic courts, etc. In conclusion, the thesis held the view that although this criticism describes an existing problem, it is mostly counter-balanced by both how the domestic investor possesses a certain positional advantage compared to foreign investors (though effectuating claims against one's own state is not necessarily simple either), and how the domestic investor might be able to access ISDS proceedings anyway, by manipulating its own nationality.

One of the most well-founded criticisms examined by the thesis was the exclusion of affected local communities from ISDS proceedings. Through its examination of the legal framework of ISDS proceedings, the thesis demonstrated that the treaties and procedural rules defining ISDS do not usually pay much attention to the participation of affected local communities, if any attention at all. This can be tied to the well-demonstrable and recurring occurrence where a foreign investor gets into a dispute with a local community or municipal government (such as *Vatenfall v. Germany (I)*, or *Abengoa v. Mexico*), or directly causes harm to a local community with its investment activity (such as *Renco v. Peru (I)-(II)*). Despite these demonstrable problems, the arbitration tribunals rarely seem to consider the needs and opinions of these local communities, and as such, their participation in ISDS proceedings is solely up to the will of the host state's central governing apparatus. This can still mean their participation in the case of countries strongly following the rule of law and similar principles (Canada being one such state based on the case law examined by the thesis), but it is not guaranteed by any means. As such, the thesis could conclude that this failing of the ISDS system is a significant and recurring problem, well-justifiable with examples from case law.

A related criticism was the similar exclusion of civil organizations from the proceedings. As it was noted with regards to for example *Pac Rim v. El Salvador* by the thesis, civil groups usually can only appear in the form of *amicus curiae* in an ISDS proceeding, and might not have access to the full details of the case at hand, and arbitration tribunals do not seem to pay much attention to them in general. This is despite the fact that the human rights and environmental protection work of many civil organizations could be greatly relevant to the evaluation of the dispute at hand, especially for determining whether the host state truly acted in legitimate public interest with its disputed measures. The reason for their virtual exclusion seems to be varied, but the general angle taken by arbitrators seems to be that they consider their primary function to be interpreting the treaty serving as the basis of the dispute, and thus seem to shy away from overly involving third parties or overly relying on other international agreements for evaluating the case. Regardless, much like with the previous

criticism concerning the exclusion of local communities, the thesis found this failing to be demonstrable and present in the ISDS system.

One of the most often and strongly reiterated criticism facing the ISDS system was the lack of transparency, which was also examined by the thesis. On the one hand, the question of transparency seems to be mostly the purview of the parties as per the various investment treaties and procedural rules serving as the basis for the ISDS system, typically, only a minimal mandatory recording of the basic facets of the dispute is present. On the other hand, the case law seems to indicate that most cases are knowable for the public, but for certain high-profile cases such as *Veolia v. Egypt*, only secondary sources are available, due to the parties' decision to not make the award public. This latter decision seems to be especially common with proceedings ending in a settlement, though the arbitral award containing this settlement might still occasionally become public. Furthermore, the thesis found that transparency is mostly retroactive: materials and details of the case are often not knowable by the public while it is still pending. As such, it was possible for the thesis to conclude that the lack of transparency is a partially valid criticism of the ISDS system, though not as much as the two previous failings that was discussed above. Still, it can be considered a significant problem. Further aggravating this issue is that from a logical perspective, it is often neither in the interest of the host state (to mask potential corruption) nor in the interest of the foreign investor (to reduce business information available to competition or to avoid negative PR) to make the details of the case too public. Especially with regards to settlements, it seems to be a convenient tool for the disputing parties to avoid publicity. Thus, both can quietly close down the dispute without losing face to the public.

The lack of unified interpretation of the same legal source can also be a source of problems for the ISDS system. The arbitrators are not bound by precedent, they interpret provisions based on their own views, and there is no particular institution in place to provide unified interpretations. Although both disputing parties and arbitration tribunals frequently refer to previous case law, the latter is not at all bound to follow the same interpretation, as already noted. The basis of this criticism is well-demonstrated by the thesis' examination of legal materials and case law. The analysed legal materials do not really contain mechanisms for ensuring a unified interpretation of their provisions. As such, it can be difficult to predict an arbitration tribunal's decision solely based upon the treaty the dispute is founded upon. The case law mostly demonstrated this as well, with similar cases having similar provisions interpreted in significantly differing manners by the arbitration tribunals. The lack of a unified interpretation in turn leads to uncertainty, especially if connected to the previously

mentioned failing of expansive arbitral interpretations. As such, this criticism can be ruled as valid by the thesis. Of course, this problem originates from the very essence of the ISDS system (it being an international system of arbitration with independent arbitrators), and as such, cannot be resolved without a significant overhaul of the whole system.

Evaluating the criticism concerning the costs and outcome of ISDS proceedings

Finally, moving onto the criticism concerning the costs and outcome of ISDS proceedings, the thesis can definitely state that the criticism concerning the costs and damages awarded by arbitration tribunals is well-justified based on the thesis' research. Specifically, based on the chapter concerning statistical analysis, it is possible to determine that ISDS procedural costs are rather high, especially for developing countries. In a similar fashion, while awarded damages range from relatively low to significant for the host state, they can still be problematic especially for developing countries. This cost issue is tied to the prolonging of ISDS proceedings, as demonstrated by cases such as *Renco v. Peru (I-II).* It can take years to determine the existence or lack of arbitral jurisdiction, and reaching a decision on merits can take several more years. Based on the statistical data and the case law, it thus seems to be a well-founded criticism, especially from the perspective of developing countries. Of course, costs can be a two-pronged issue, as foreign investor with less resources might have equal trouble with paying for procedural costs as the host states.

Evaluating regulatory chill

The final important criticism examined by the thesis was the concept of regulatory chill. The thesis delved into the origins, definitions and types of this phenomenon. Furthermore, the thesis created a definition dominantly used by it in its further examinations: the host state will avoid measures contrary to the interests of foreign investors due to a previously lost ISDS case, and this chilling effect may also affect other host states, especially ones with similar economic circumstances to the original host state. The question is thus whether the theoretical and the practical justify this definition of regulatory chill? With regards to procedural rules, the thesis mainly establishes parity between the two disputing parties, though the rules ultimately slightly favour the foreign investor more, but not to any significant degree. As the definition itself suggests, the answer to this question more lies in case law. In the examined cases, it was possible to occasionally observe that the host state refrained from regulating in the relevant legal field after an ISDS dispute, or beforehand (if the possibility of cross-border chill was in play). The thesis found cases where the parties settled their dispute, as a result of which the host state retracted their disputed measures and

refrained from further regulating the subject (at least for a time), such as in the cases concerning Canada, or in the *Vattenfall v. Germany (I)* case. As such, precedent-based regulatory chill does not seem fully correct: it seems to occur not necessarily due to the independent reluctance of the host state afterwards, but a chill sets in due to the settlement reached by both disputing parties. Of course, it is questionable how willingly a host state entered into such an agreement. Still, excluding cases ending in settlements, regulatory chill of this type does not seem to occur particularly often. The other part of definition is comprised of the so-called cross-border chill. With regards to the examined case law, the thesis reached the conclusion here that the logic of cross-border definitely appears on the side of the foreign investor, it was possible to find several cases (such as *Dow v. Canada,* and the two *Philip Morris* cases), where it appeared the foreign investor claimants attempted to ensure that other governments and states do not implement the same or similar regulations on the disputed subject. As for the efficacy of this tactic, the thesis found that it is rather varied. To use some example: with regards to *Philip Morris v. Australia,* the foreign investor only managed to achieve a temporary delaying effect on the introduction of the disputed tobacco regulations in other countries considering similar regulations (this was especially apparent in the case of New Zealand), but seemingly failed to achieve a lasting chill of the subject. On the other hand, the *Philip Morris v. Uruguay* apparently achieved more lasting results for the foreign investor, despite technically losing the case: the alleged target countries (Latin American countries with similar tobacco-related public health issues) failed in their efforts to get through similar legislation as Uruguay during the duration of the proceedings, and they evidently stalled out after its conclusion indefinitely. Of course, this result certainly came about due to a complex set of factors, it is not feasible to point out ISDS as the sole culprit for this (lack of) development. Nevertheless, some degree of causation can perhaps still be established. As such, the final conclusion of the thesis on the topic of regulatory chill is that it seems justified on a theoretical level, but its practical occurrence is questionable at best. Cross-border chill at least seems to be an existing and somewhat effective tactic against developing countries in particular. Regardless, it is certain that ISDS cases do have the capability of affecting the regulatory practices of host states and neighbouring states to at least some extent.

Before moving onto the examination of the second research question, it is prudent to discuss Hungary's situation as well briefly. As it was possible for the thesis to demonstrate based on its statistical chapter, Hungary has been facing an increasing amount of ISDS proceedings, and is obliged to pay ever greater procedural costs and damages awards. As such, it can be

asked whether participating in the ISDS system is a burden for Hungary? The answer to this seems to be yes, at least based on the statistical chapter's findings. Of course, it is not possible to avoid mentioning that participating in the ISDS system is seemingly essential for gaining access to foreign capital, which Hungary also definitely needs. As such, while it may not be directly beneficial to Hungary to participate in ISDS proceedings, it is nevertheless vindicated by economic needs.

Alternatives of ISDS

This above notion also leads to the second research question: what other alternatives exist and can they avoid the pitfalls of the ISDS system? There are non-binding dispute resolution systems such as mediation and conciliation, but these mainly serve in the role of supplementing ISDS, and are not outright replacements for it. Without a binding nature, these systems do not possess the means to decisively solve disputes like ISDS arbitration tribunals can. Thus, the only possible alternative of ISDS in the thesis' opinon is a system with a binding nature. One such example is the domestic court system of the host state. However, while this system does not have the failings of the ISDS system, the latter was created specifically as an alternative to the former, as foreign investors faced issues with domestic courts and ISDS was created as a way to avoid relying on them. As such, if ISDS was replaced by the domestic court system wholesale, we would simply be returning to the pre-ISDS set of problems. Although, it has to be noted, that as the aftermath of the *Achmea v. Slovakia* case shows, there is increasing pressure within the EU to eliminate ISDS in intra-EU investment disputes and return to domestic courts completely. Although the context of this particular case is more tightly linked to EU law than the criticisms presented in the thesis, and thus not necessarily very useful for drawing more general conclusions, its effect on ISDS within the EU is still undoubtable. Furthermore, this development is rational even from a critical perspective, as judicial independence and rule of law are characteristics of EU member states (especially in comparison to developing countries). Furthermore, domestic court judgments can be significantly unified within the EU due to legal harmonization, and these judgments can be easily enforced throughout the EU. Of course, this alternative is only feasible within the EU. In the thesis' opinion, the *Achmea v. Slovakia* case ultimately had a positive outcome, as due to the above-described circumstances, there is no real need for ISDS within the EU itself. The high degree of rule of law and the legal harmonization undergoing between member states ensure that foreign investors do not face significantly more complications compared to domestic investors.

Another alternative that can also be tied to the EU is the Investment Court System, or ICS. The thesis went into significant detail over the origins, development and characteristics of this alternative system, first appearing in the CETA agreement, and also evaluated how much of the ISDS criticism has been avoided by it. Based on this, it was evident that this alternative could potentially fix numerous failings of the ISDS system. This system of a permanent international investment court is rather attractive from multiple angles, such as ensuring unified interpretations and judicial independence. It is also capable of addressing other failings of ISDS. However, this alternative facest rwo great hurdles: first, it has not yet proven itself in practice, and thus we cannot state with absolute certainty what kind of problems it could avoid compared to ISDS or what kind of new problems would arise instead. Secondly, the ICS is innately tied to the European Union, and it is only the EU that is apparently making significant effort to spead this alternative system of dispute resolution. Although the EU had a certain level of international success in this regard, it cannot be conclusively stated that ICS could replace ISDS within a realistic timeframe, at least until the EU somehow manages to convince more third countries to adopt this system as well.

In the end, the thesis successfully answered both research questions. It evaluated what criticisms of the ISDS systems were justified, based on legal materials and case law. Furthermore, in response to the second question, it also successfully identified the only feasible alternative to ISDS, the ICS. The future of ISDS is still in progress, as even though it managed to cement its position of being one of the most important avenues of dispute resolution for investment disputes, the last few years increasingly put its status in question. And with regards to the European Union, we can definitely state that the *Achmea v. Slovakia* case and the appearance of ICS definitely put the community on the path of eliminating ISDS within the EU, though for different reasons (EU law and addressing ISDS criticism respectively). Of course, even for the EU, the ISDS system still plays a role in disputes involving third countries or their investors, assuming said country did not also accept the use of ICS. Still, it can be predicted that we will likely see a gradual decline of intra-EU ISDS cases, assuming the current trends hold.

Publication list

1. Hajdu, Gábor. *The Future of International Investment Arbitration: an EU Perspective*. In: Andrea, Čajková; Daniel, Klimovský; Natália, Brovina Mulinová.

SOCIÁLNE VEDY Z PERSPEKTÍVY MLADÝCH VEDECKÝCH PRACOVNÍKOV V. Trnava, Szlovákia : FSV UCM v Trnave (2021) p. 192.

2. Hajdu, Gábor. *Investment Arbitration and the Public Interest*. HUNGARIAN YEARBOOK OF INTERNATIONAL LAW AND EUROPEAN LAW 8 p. 75 (2020).
3. Hajdu, Gábor. *Recent Investment Cases Against EU Member States: Europe's Green Energy Policies Under Threat?* In: Kristína, Hoghová; Daniel, Klimovský; Boris, Kolman (szerk.) Sociálne vedy z perspektívy mladých vedeckých pracovníkov IV. : Zborník príspevkov z medzinárodnej vedeckej konferencie doktorandov a mladých vedeckých pracovníkov Trnava, Szlovákia : Fakulta sociálnych vied Univerzita sv. Cyrila a Metoda v Trnave, (2020) pp. 124-128.
4. Hajdu, Gábor. *A szabályozási befagyasztás fejlődése és jövője*. KÜLÜGYI MŰHELY 2 : 1 pp. 146-160. , 15 p. (2020).
5. Hajdu, Gábor. *Értékdilemmák befektetésvédelmi szerződésekben: gazdasági fejlődés kontra közérdek.* In: Fejes, Zsuzsanna; Lichtenstein, András; Márki, Dávid (szerk.) Jog, erkölcs, kultúra : Értékdilemmák és identitások a jogrendszerekben. Szeged, Magyarország : Szegedi Tudományegyetem Állam- és Jogtudományi Doktori Iskola (2020) 132 p. pp. 51-60. , 10 p.
6. Víg, Zoltán ; Hajdu, Gábor. *New Model of Investment Protection under CETA*. In: Nagy, Csongor István (szerk.) World Trade and Local Public Interest : Trade Liberalization and National Regulatory Sovereignty Heidelberg, Németország : Springer International Publishing (2020) 269 p. pp. 243-252. , 10 p.
7. Víg, Zoltán ; Hajdu, Gábor. *Investment Arbitration at the Crossroads of Public and Private International. Current Issues with ISDS*. In: Rozehnalová, Naděžda (szerk.) Universal, Regional, National – Ways of the Development of Private International Law in 21st Century Brno, Csehország : Masaryk University Press (2019) pp. 366-389. , 24 p.
8. Víg, Zoltán ; Hajdu, Gábor. *Serbia and Montenegro*. In: Nagy, Csongor István (szerk.) Investment Arbitration in Central and Eastern Europe: Law and Practice. Cheltenham, Egyesült Királyság / Anglia : Edward Elgar (2019) 602 p. Paper: 12.
9. Hajdu, Gábor. *Regulatory Chill: The Hidden Dangers of Investment Arbitration for EU Countries*. In: Renáta, Kocúrová; Róbert, Frimmel (szerk.) Sociálne vedy z perspektívy mladých vedeckých pracovníkov II. : Zborník príspevkov z konferencie

mladých vedeckých pracovníkov (7. – 8. november 2017). Trnava, Szlovákia : Univerzita sv. Cyrila a Metoda v Trnave, (2018) pp. 37-40. , 4 p.

10. Hajdu, Gábor. *Investment Court System: a CETA új befektetésvédelmi mechanizmusa*. In: Erdős, Csaba (szerk.) Doktori Műhelytanulmányok 2018 - Doctoral Working Papers 2018 Budapest, Magyarország : Gondolat Kiadó (2018) 447 p. pp. 300-309. , 10 p.
11. Víg, Zoltán ; Hajdu, Gábor. *Investment Protection under CETA: a New Paradigm?* In: Nagy, Csongor István (szerk.) Investment Arbitration and National Interest. Indianapolis (IN), Amerikai Egyesült Államok : Council on International Law and Policy (2018) 233 p. pp. 209-223. , 15 p.
12. Víg, Zoltán ; Hajdu, Gábor. *Ceta and Regulatory Chill*. In: Görög, Márta; Mezei, Péter (szerk.) A szellemi tulajdonvédelem és a szabadkereskedelem aktuális kérdései. Szeged, Magyarország : Iurisperitus Bt. (2018) 144 p. pp. 44-54. , 11 p.