

Exclusion of the application of bilateral investment treaties between EU Member States under international law and incompatibility of these agreements with EU law

Abstract

The thesis maps the genesis of the conflict between bilateral agreements on investment protection between EU member states and EU law since its beginning, outlining the historical development, the relationship between international law and EU law and the modifications brought by the Lisbon Treaty in the field of investment protection by including foreign direct investment into EU policy. It lays down the key reasons for the different underpinnings of international and EU law, underpinning both the CJEU judicial doctrines of autonomy and supremacy on which EU law is founded and relevant investment arbitration case law. From the point of view of incompatibility, it focuses on the most fundamental arbitration clause, the non-compliance with EU law of which is illustrated by the case law of the CJEU in the foreground with the Achmea decision and the opinions of the European Commission. It further evaluates the possibility of excluding the application of bilateral agreements on investment protection between EU member states by applying specific provisions of the VCLT (Articles 59, 30, 54), and while doing so it compares investment protections provided under international law and the régime provided by the parallel EU law mechanism. An analysis of the possible intention of the parties to replace previous treaties by founding treaties of the EU with the joining of other states is also included. This is inextricably linked to the agreement on the termination of BITs for investment protection between the 23 EU Member States, which introduces rules for ongoing arbitration, which pays attention to in the penultimate part of the work, together with the retroactive scope of this agreement and the procedural mechanisms offered to investors under the EU legal framework. It describes how the issue of ECT arbitration clauses in relation to investment disputes between EU Member States is resolved. It deduces the possible consequences of the agreement on the termination of bilateral investment agreements between EU Member States on the common market and provides an overview of investors' reactions.

Klíčová slova: [investment, tribunal, EU]