Nico Basener, *Investment Protection in the European Union*. Baden-Baden: Nomos, 2017. 548 pages. ISBN: 9783848743476. EUR 132.

Investment protection in the EU is currently subject to different standards, deriving from two overlapping frameworks, the EU legal system and that of international investment agreements (IIAs). Various conflicts between the two frameworks arise in the context of international investment protection disputes. Basener analyses such conflicts, making a comprehensive approach in his book of how arbitral tribunals should address this situation, both regarding intra-EU IIAs as well as extra-EU IIAs.

In order to determine the extent of the conflicts, Basener addresses the substantive and procedural norms providing for investment protection under both legal frameworks, focusing first on particular fields, such as State aid provisions, public procurement and competition law under EU Law, as well as limitations to the fundamental freedoms and the principle of non-discrimination. Second, he examines conflicts regarding jurisdiction, mainly related to the compatibility of the dispute settlement mechanism set out in IIAs with Article 344 TFEU, and the "setting-aside" and the annulment proceedings which could be followed in a host State once an arbitral award has been rendered, as well as its inapplicability by virtue of conflicting EU Law. Since the *Achmea* ruling (Case C-284/16), these questions are even more topical. Basener's approach to the issues at stake is very similar to the European Commission's evaluation of the compatibility between the provisions of an IIA and Union law (e.g. EC Decision on State Aid SA. 40171 (2015/NN) – Czech Republic, points 143–145, and EC Decision on State Aid SA. 40348 (2015/NN) – Spain, points 160–162).

Given the different kind of situations and actors at stake, the author separates the analysis of the conflicts providing different solutions to intra-EU and extra-EU disputes.

Basener then looks at intra-EU conflicts as a conflict of international laws, concluding that the principle of primacy in EU Law is the applicable rule of conflict which determines that this legal framework should prevail. According to the author's analysis, arbitration clauses contained in intra-EU IIAs are incompatible with the autonomy of the EU's legal order, and also violate the principle of non-discrimination in terms of Article 18 TFEU (this view is supported by the *Achmea* ruling). Thus, by virtue of the principle of primacy as the relevant conflict rule, the arbitral tribunals lack jurisdiction regarding intra-EU investment arbitration proceedings. Concerning conflicts arising on the merits stage, the author admits the impossibility to allow arbitral tribunals, whose major problem here is the full and effective implementation of the principle of primacy of EU Law, to refer questions to the ECJ, through the preliminary ruling procedure provided by the Article 267 TFEU.

A different approach is taken for conflicts in the extra-EU setting, where the fundamental difference regarding intra-EU IIAs, is that only the host State is bound by the two conflicting legal orders. Hence, within this context, EU Law may only be taken into consideration as part of EU Member States' domestic law. Moreover, the author underlines that the host State's domestic law shall not interfere to the same extent at each stage of the arbitration proceedings, because the jurisdictional stage is governed by the law applicable to the IIA, and the applicable law to the merits is determined by the choice of the parties or by reference to the procedural framework the arbitration takes place in. Against this background, the author justifies

transposing the approach adopted in the *Bosphorus* Decision by the ECtHR to extra-EU conflicts. Thus, although the IIA remains fully in force, as long as EU law would guarantee an equivalent level of substantial and procedural protection, an act being mandatory under EU law is presumed being in conformity with the IIA as well.

As a general assessment of this book it should be stressed that it is a didactic work; the analysis is solid, rigorous and systematic. Nevertheless, some observations can be made in relation to its form and content. Although it is not possible to be really brief in analysing the subject of the book, it could have been made shorter by eliminating some chapters on general issues of international law and EU law – which are well known to the addressees, who are mostly specialists in the field.

On the other hand, in relation to its content, we provide some observations regarding the enforcement of awards in third States, the relevance of the FET ("Fair and Equitable Treatment") clause, and the very basis of the conclusions of this investigation. The author does not analyse the important issue of the enforcement of the awards in a third State, at the demand of the investor. At this point there is currently great uncertainty on aspects such as the consequences of the recognition and enforcement of an award contrary to EU law by a competent judicial body, as well as to the viability of the arguments of international law used by the European Commission when it acts as *amicus curiae,* demanding judicial restraint, such as the doctrine of international comity, the act of State doctrine and the foreign sovereign compulsion doctrine.

In regard to the guarantees provided by the FET clause, there are references to conflicts arising in the context of implementing mandatory EU rules in the field of State aid, competition and public procurement, in several sectors such as the energy or banking sector, by the host Member State. According to the author, when addressing this question, especially in cases of conflicts of mandatory provisions of EU law with extra-EU IIAs, the investor's expectations must meet the requirements of due diligence and duty to anticipate. Given that the reason most frequently invoked by investors is the violation of the FET clause by the host State, the author should have based his position more broadly. In this sense, it would have been appropriate to analyse the aforementioned decisions of the Commission explicitly addressing this question (i.e. Point 164 of the EC Decision State Aid SA 40348 (2015/NN), and Point 149 of the EC Decision State Aid SA 40171 (2015/NN)). Moreover, a comparative analysis of several arbitration awards, recently adopted, and the case law of the ECJ on the principle of legitimate expectations, would have shown that there is some convergence on the criteria applied to determine the legality of the situations at stake.

The author is to be applauded for clearly establishing what his conclusions are on the subject at hand; he could have gone even further in exploring other alternatives with a more exhaustive legal analysis.

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