

If you play with fire, you get burned: EU law vs. investment arbitration law

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Court of Justice of the European Union

- EU law as “autonomous legal order”
- Primacy....not only over national law of the MS
- ✓ Opinion 1/09, creation of a unified patent litigation system - European and Community Patents Court
- ✓ Opinion 2/13 on ECHR accession
- ✓ Kadi I / II

Court of Justice of the European Union

CJEU Opinion 1/09, para 66: *“The guardians of that (EU) legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States.”*

- WTO law: fine but because it has no direct effect within the EU legal order
- Clash with ICSID (lack of judicial review)
- FTAs clauses: fine if there is no direct effect
- Preservation of the role of the CJEU

A further small problem....the counter-limits doctrine

- Developed by the German and Italian Constitutional Courts
- ✓ Most scholarly work claimed it would have never been applied in practice as against EU or public international law.....I argued in GTCJ it was just a matter of time before the Guardians wake up.....
- Italian Constitutional Court Judgment of 22 October 2014 no. 238 disapplying the ICJ judgment in “Jurisdictional Immunities of the State (Germany vs Italy)”

Conclusion

- All arbitral systems (...ICSID) which do not foresee a proper judicial review or setting aside procedure before a judge which can refer the matter to the CJEU for a preliminary ruling are against EU law.....unless their awards have no direct effect in the EU legal order (exequatur proceedings needed)
- Some Constitutional Courts of the Member States may none the less decide to step in....
- Litigation concerning enforcement will allow the General Court of the EU and the CJEU to clarify things!

THANK YOU!!!

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