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Gaspar-Szilagyi, Szilard

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ARTICLES

OPINION 1/17: BETWEEN EUROPEAN AND INTERNATIONAL PERSPECTIVES

edited by Mads Andenas, Cristina Contartese, Luca Pantaleo *and* Tarjei Bekkedal

BETWEEN FICTION AND REALITY: THE EXTERNAL AUTONOMY OF EU LAW AS A "SHAPESHIFTER" AFTER OPINION 1/17

SZILÁRD GÁSPÁR-SZILÁGYI*

ABSTRACT: Academics often get caught up in analysing every minute legal technicality in the Court of Justice's assessment of a foreign dispute settlement mechanism (DSM)'s compatibility with EU law and its autonomy. This is not surprising as the compatibility assessment in essence is a constitutionality check with great ramifications. Instead of this formalistic approach, this article invites academics and practitioners alike to view autonomy as a "shapeshifter". Just like the "direct effect" of international law in the EU legal order, "external autonomy" will morph into a shield that protects EU law from international law or it will become an embracer of international law and international DSMs. The shapeshifting might in part depend on the extent to which non-legal considerations inform the Court's strict or narrow approaches to the compatibility assessment. The Court achieves this with the help of different techniques, such as the reliance on various hypotheses and fictions, and the summary treatment of certain issues that might be crucial to the assessment.

KEYWORDS: autonomy – CETA – Opinion 1/17 – Opinion 2/13 – direct effect – Investment Court System.

* Lecturer, Keele University School of Law, s.gaspar-szilagyi@keele.ac.uk. I would like to thank Tommaso Pavone, Cristina Contartese, and Luca Pantaleo for their valuable comments.

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I. *EUREKA* MOMENTS

The external autonomy ("autonomy") of EU law in cases that concern the relationship between the EU legal order and various international dispute settlement mechanisms ("foreign DSMs") is at the centre-point of a growing number of academic publications,[1] including this Special Section on Opinion 1/17. This is not surprising as the assessment of whether a foreign DSM is compatible with EU law and its autonomy is in essence an *ex ante* (e.g. Opinion 1/17) or an *ex post* (e.g., *Achmea*) constitutionality check with great ramifications.

Many academics (myself included) get trapped in traditional doctrinal analyses in which we pick apart every minute legal argument of the Court, as one does when trying to understand a question of constitutionality. We look at the various constitutional criteria the foreign DSM must meet and whether in the specific case the foreign DSM meets those criteria. Then we try to make sense of the Court's arguments and compare them with previous cases. When discrepancies are found, one is often left with a sense of frustration, asking how one foreign DSM could meet the Court's criteria when a similar one could not. However, we often forget that the Court is aware of the broader policy implications of its decisions. Because of this, the Court can shape and bend legal concepts in order to (tacitly) address such policy considerations.

In the recent Opinion 1/17[2] the Court held that the Investment Court System (ICS) under the agreement with Canada (CETA) is compatible with EU law and does not adversely affect the autonomy of the EU legal order. How could this be? Four years ago – even before Belgium requested the CETA Opinion – I had written about this exact scenario, albeit back then I used the Transatlantic Trade and Investment Partnership's (TTIP) ICS (the model for the CETA ICS) as an example.[3] In that *Article* I relied on the numerous conditions set out by the Court in its previous cases – crystallized in Opinion 2/13[4] – and assessed the ICS against those conditions. However, in that *Article* I came to the opposite conclusion to the one the Court did in Opinion 1/17. Relying on prior cases, I concluded that some aspects of the ICS were *incompatible* with the EU legal order. In the present *Article* I aim to revisit the earlier starting points and share two insights.

[1] Just to name a few of the recent publications: C Contartese and M Andenas, 'EU Autonomy and Investor-State Dispute Settlement Under Inter Se Agreements Between EU Member States: Achmea' (2019) CMLRev 157; JH Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' (2018) European Constitutional Law Review 767; Sz Gáspár-Szilágyi, 'It is Not Just About Investor-State Arbitration. A Look at Case C-284/16, Achmea BV' European Papers (European Forum Insight of 30 May 2018) www.europeanpapers.eu 357; C Contartese, 'EU law as Applicable Law in International Disputes and its Procedural Implications' in M Andenas, L Pantaleo, M Happold and C Contartese (eds), *The EU External Action in International Economic Law. Recent Trends and Developments* (Springer 2020) 173; NN Shuibhne, 'What Is the Autonomy of EU Law, and Why Does that Matter?' (2019) Nordic Journal of International Law 9.

[2] Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.

[3] Sz Gáspár-Szilágyi, 'A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union' (2016) Journal of World Investment and Trade 204.

[4] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

The first insight (Part II) is that it is not the conditions of compatibility with the EU legal order and its autonomy that really matter but the ways in which the Court applies them to a specific foreign DSM. Does the Court take an overly *formal, strict* approach (like in Opinion 2/13) or does it take a more *lenient* understanding of a potential constitutional "conflict" with EU law and its autonomy (like in Opinion 1/17)? The two approaches materialize in the Court's usage of certain *techniques*, including the reliance on hypotheticals, the usage of various legal fictions, and the cursory analyses of certain issues, all of which end up influencing the compatibility assessment.

This led to the second insight (part III): external autonomy is a *shapeshifter*. It is one of those concepts – just like the *direct effect* of international law in the EU legal order, on which we have also spilled a lot of ink[5] – that acts both as a shield and an embracer of international law. One could argue that this is a natural conclusion if one looks at the conditions set out by the Court for a foreign DSM to be compatible with the EU legal order and its autonomy, conditions carefully crafted since Opinion 1/76.[6] The conditions result either in compatibility or in incompatibility. However, as mentioned, I argue that it is not just the conditions that matter but also the approach the Court takes when it applies them to a specific DSM. These approaches – strengthened with the help of the aforementioned techniques – can mask various *non-legal* considerations, including how the Court's decision might affect an EU policy field, the strength of the foreign DSM, and the parties to the international agreement.

Therefore, I invite academics and practitioners alike to use a more "law in context" approach when assessing the EU's external autonomy. Autonomy is more than the sum of the legal conditions for compatibility and as Contartese puts it, its limits are still "nebulous".[7] A proper understanding of it cannot be made without taking into account various non-legal considerations that can inform the Court's decisions.

[5] Just to mention a few: Sz Gáspár-Szilágyi, 'EU International Agreements through a US Lens: Different Methods of Interpretation, Tests and the Issue of 'Rights' (2014) European Law Review 601 609-615; M Mendez, 'The Legal Effects of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques' (2010) European Journal of International Law 83; A Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements' (2014) CMLRev 1125; H Jackson, 'Direct Effect of Treaties in the US and the EU, the Case of the WTO: Some Perceptions and Proposals' in A Arnull, P Eeckhout and T Tridimas (eds), *Continuity and Change in EU Law. Essays in Honour of Sir Francis Jacobs* (Oxford University Press 2008) 365.

[6] Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* ECLI:EU:C:1977:63.

[7] C Contartese, 'The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: from the "Essential" to the "Specific Characteristics" of the Union and Back Again' (2017) CMLRev 1627.

II. A strict *versus* a lenient approach: hypotheticals, fictions, and cursory analyses

In the following, the *Article* will focus on the Court of Justice's reliance on certain hypotheticals, the usage of various legal fictions, and the cursory analyses of certain issues during the compatibility assessment. These techniques influence whether the Court uses a strict or a lenient approach, which in turn affect the compatibility of a foreign DSM with EU law and its autonomy. I shall contrast the approach used in Opinion 1/17 with prior judgments and opinions of the Court. Furthermore, as the borders of external autonomy are quite porous and in some cases the Court is asked to decide on other issues of compatibility, besides autonomy, the *Article* highlights those examples that do not strictly pertain to the autonomy "test", but which help illustrate the Court's various techniques.

II.1. Hypotheticals can make the difference between a strict or a lenient approach

Opinion 2/13 on the EU's accession to the European Convention on Human Rights (ECHR) has received ample academic ink.[8] What strikes the reader are not the numerous conditions the Accession Agreement had to comply with, but the overly *strict approach* the Court took when assessing the compatibility of the safeguard mechanisms to be set up by the Accession Agreement. This strict approach manifests itself in the Court's excessive focus on every *hypothetical* situation that could have created a "potential" conflict between the accession to the ECHR and the EU legal order, further enhanced by the disregard of the practical relevance of some of those hypotheticals.

For example, strictly speaking, the Court was right in holding that the Accession Agreement did not provide for a mechanism that stopped an EU Member State from bringing a case against another EU Member State before the European Court of Human Rights (ECtHR). As is well known, art. 33 of the ECHR allows for inter-State cases in which a party to the Convention can bring a case against another Member for any alleged breaches of the Convention and its Protocols by the latter. Thus, hypothetically, there was a minute chance

[8] See in German Law Journal, Special Section 'Opinion 2/13 The EU and the European Convention on Human Rights', 2015, the following authors: D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward'; C Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13'; Sø Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences'; A Lazowski and RA Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR'; S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare'. For other academic discussions see Editorial Comments, 'The EU's Accession to the ECHR – a 'No' from the ECJ!' (2015) CMLRev 1; P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' (2015) FordhamIntlLJ 955; G Butler, 'A Political Decision Disguised as Legal Argument? Opinion 2/13 and European Union Accession to the European Convention on Human Rights. Interview with David Thór Björgvinsson' (2015) Utrecht Journal of International and European Law 104.

that somehow an issue concerning EU law would pop up in such a case. However, what were the chances of this actually happening? Two observations can be made.

Firstly, if the Court takes an absolute view of EU law's autonomy,[9] meaning that any threat – even a potential one – to its autonomy is enough to render a foreign DSM incompatible with EU law, then the CETA ICS, just like the Accession Agreement to the ECHR, should also have been incompatible with EU law. For example (see below), the Appellate Tribunal for the CETA ICS is only succinctly described in the actual trade agreement. It is up to the contracting parties to provide further details concerning its set-up and composition, in arrangements following the agreement's entry into force. In other words, there is a hypothetical chance that the final set-up of the CETA Appellate Tribunal, which the Court could not control in Opinion 1/17, might be incompatible with EU law and its autonomy. Nevertheless, the Court did not find this to be problematic. Thus, one wonders whether the autonomy of EU law is as absolute as the Court says.

Secondly, in the case of Opinion 2/13 there was also an empirical argument to be made concerning the likelihood of cases between EU Member States coming before the ECtHR. So far, a mere 24 cases in the entire existence of the ECtHR were inter-State cases. Of these, only one case (!) concerned EU Member States that were both Members of the EU when the application to the ECtHR was made.[10] Conversely, just in 2018 the ECtHR delivered 1014 judgments following 2738 applications by individuals.[11] In other words, hypothetically, there was a (minute) chance for a case between EU Member States to end up before the ECtHR. However, in practice the likelihood that two EU Member States would appear as opponents in a case before the ECtHR – and that case would involve EU law matters the interpretation of which would interfere with the EU legal order and its autonomy – is extremely small (especially given the other safety mechanisms in the Accession Agreement, such as the procedure for the prior involvement of the Court of Justice).

Thus, in Opinion 2/13 the Court used a strict and overly formal approach, based on every hypothetical scenario that could have affected the autonomy of EU law, disregarding the practical relevance of some of the scenarios.

Contrast this approach to the one used by the Court in Opinion 1/17. Much of the conditions for compatibility are the same as in Opinion 2/13, but what differs is the way in which the Court deems that the CETA ICS satisfies them. The Court takes a very *lenient approach*. Three examples come to mind, two which concern the autonomy test and one related to other issues of compatibility with EU law.

[9] I thank Cristina Contartese for pointing this out.

[10] ECtHR, *Q & A on Inter-State Cases*, www.echr.coe.int and *Inter-State applications by date* www.echr.coe.int; ECtHR, *Slovenia v Croatia*, App n. 54155/16 [15.09.2016] concerning proceedings brought by a Slovenian bank to collect debts owed by Croatian companies.

[11] ECtHR, *Analysis of Statistics 2018*, www.echr.coe.int.

Firstly, as mentioned, CETA includes only one article on the Appellate Tribunal of the ICS.[12] The detailed provisions on its actual functioning (procedures to conduct appeals, administrative support, the number of its members) and set-up (appointment of its members and their remuneration) will be provided in a future decision of the CETA Joint Committee.[13] Thus, hypothetically, there is a chance (not minute) that the Joint Committee could include a clause in its decision that is incompatible with EU law. Still, the Court considered this to be a good enough guarantee that the entire ICS is compatible with EU law.[14] Let me phrase it differently: the Court of Justice found the second-tier mechanism of a future international tribunal to be compatible with EU law, even though the actual text for how that body will function and how it will be set up *did* (*and does*) *not yet exist*. One can thus ask whether sufficient safeguard mechanisms exist to ensure that the future CETA Appellate Tribunal shall comply with the Court's strict conditions.

Secondly, the Court did not consider the hypothetical situation of the EU not providing the investor with information on the proper respondent.[15] Over the years the Court has been adamant about ensuring that foreign DSMs would not affect the allocation of competences between the EU and its Member States. To this end, the CETA drafters included a safeguard in art. 8.21(3) of the agreement, pursuant to which the EU would inform the investor on whether it or a Member State is to be the respondent in a dispute before the ICS. This way, the ICS would not need to decide on the issue of EU or Member State responsibility, which could affect the allocation of powers between the EU and its Member States. However, art. 8.21(4) CETA stipulates that in case no such determination is made within 50 days, either the EU or the Member State shall be the respondent depending on who the measure belongs to. In deciding this, there is a chance that the ICS would touch upon issues concerning the allocation of responsibility and competences between the EU and its Member States.

Thirdly, the Court used similar techniques in those parts of the Opinion 1/17 compatibility assessment that did not concern the autonomy of EU law. For example, the Court also had to look at whether the ICS was compatible with the right of access to an independent tribunal, because small and medium sized enterprises (SMEs) might find it too financially burdensome to use the ICS.[16] The Court found that even though no provisions *existed yet* within the treaty text that would ease the access of SMEs to the ICS, the Commission and the Council had given a commitment to implement, rapidly and adequately, measures to ensure the access of SMEs to the ICS, even if the Joint Committee's work would be fruitless.[17] Therefore, hypothetically speaking, there is a chance that no such measures helping

[12] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [14 January 2017] art. 8.28.

[13] *Ibid*. art. 8.28(3) and (7).

[14] Opinion 1/17 cit. para. 228 ff.

[15] I would like to thank Cristina Contartese and Luca Pantaleo for suggesting this scenario.

[16] Opinion 1/17 cit. para. 57.

[17] *Ibid*. paras 215-218.

SMEs will be enacted. Nevertheless, it seems that in this case such a hypothetical was not an enough reason to adopt a strict approach and find in favour of incompatibility. In other words, once again, the Court judged the compatibility of a future, foreign DSM with EU law, when the actual text detailing the access of SMEs to the DSM *did* (*and does*) *not yet exist*.

In conclusion, the approaches used in Opinion 1/17 and Opinion 2/13 are clearly different and this is in part due to the usage or neglect of certain hypotheticals. This in turn affects the compatibility assessment and the outcomes of the cases. In Part III, I embark on a broader discussion of what this means for the concept of "autonomy".

II.2. Fictions and assumptions used as legal arguments

The usage of certain legal fictions and assumptions to substantiate a legal argument is not new in either EU law, national law or international law. However, a growing number of empirical studies in various fields are challenging some of these preconceptions, assumptions and fictions. For example, the liability of Member States for breaches of EU law is often portrayed as part of the "complete system" of remedies that EU law offers, which can complement the deficiencies of other procedures, such as infringement proceedings.[18] Nonetheless, Lock's 2012 empirical study on Member State liability actions before German and English courts challenged the assumption that Member State liability is an effective remedy. He found that very few cases had been successful as the "suitability of *Frankovich* claims as a means of private enforcement is overestimated".[19] In investment law as well a rising number of empirical projects[20] challenge long held assumptions about investor-state arbitration. Some assumptions, such as that ISDS encourage investments, were even used by Advocate General Bot to substantiate his arguments in his opinion to Opinion 1/17.[21]

Thus, one can rightfully ask the question whether the Court should use legal fictions and assumptions in its compatibility assessment or whether a practical view of these assumptions makes their usage questionable. In the following sections let us look at two

[18] T Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich' (2012) CMLRev 1675, 1677.

[19] T Lock, 'Is Private Enforcement of EU Law' cit. 1678.

[20] G Gertz, S Jandhyalab and LN Skovgaard Poulsen, 'Legalization, Diplomacy and Development: Do Investment Treaties De-Politicize Investment Disputes?' (2018) World Development 239; S Franck, J Freda, K Lavin, TA Lehmann and A van Aaken, 'International Arbitration: Demographics, Precision and Justice' ICCA Congress Series No. 18, Legitimacy: Myths, Realities, Challenges, 2015; M Langford, D Behn and R Lie, 'The Revolving Door in International Investment Arbitration' (2017) Journal of International Economic Law 301; JW Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) Law & Society Review 805.

[21] Opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:72, opinion of Advocate General Bot, para. 12. According to him ISDS is intended to encourage investments. However, see JW Yackee, 'Do BITs Promote Foreign Direct Investment?' cit. For a criticism of AG Bot's opinion see Sz Gáspár-Szilágyi, 'AG Bot in Opinion 1/17. The Autonomy of the EU Legal Order v. The Reasons why the CETA ICS might be Needed' European Law Blog (6 February 2019) europeanlawblog.eu.

fictions used by the Court in *Achmea* and Opinion 1/17; the first one is used to strengthen a stricter approach and the second one substantiates a more lenient approach.

a) Fiction No. 1: Intra-EU investment awards upset the uniform application and effectiveness of EU Law.

Throughout its case law on the compatibility of foreign DSMs with EU law, the Court mentions the need to safeguard the uniform application and interpretation of EU law as a cornerstone to protect autonomy.[22] Member State courts have a key role in ensuring this.[23] For example, in Opinion 1/09 and in *Achmea* one of the problems noticed by the Court, was that by creating the European Patent Court and by allowing for intra-EU investment arbitrations, Member State courts would be deprived from hearing certain cases.[24] This in turn could affect the uniformity and effectiveness of EU law.

In both cases, the Court used the fiction of the uniform and effective application of EU law to use a stricter approach and to find in favour of incompatibility. However, when it comes to the uniformity and effectiveness of EU law, one should ask the following questions:

1) Does the uniform and effective application of EU law exist in practice?

2) Or, when the evidence on the ground is to the contrary, are there mechanisms in place to ensure the uniformity and effectiveness of EU law?

For example, Pavone's empirical studies on the application of EU law in Member State courts are very telling.[25] As he argues, the legal touch of the Court of Justice "within the member states is more patch-worked and contingent than universal and entrenched".[26] The effective application of EU law in Member State courts and the national courts' judicial dialogue with the Court of Justice is often impeded by factors including the age of the judge, the education received by the judge, and the judge's relationship to higher national courts.[27] One could argue that in very complex, federal-like systems, in which there are existing tensions between federal and sub-federal level courts, it is impossible to ensure always the uniform and effective application of the federal-like law in the sub-units.[28] Thus, believing that this is achievable is a fiction. Nevertheless, what should matter is that mechanisms are in place that "catch" the misapplication of the federal-like law.

Thus, when it comes to the integrity and effective application of EU law, the question that should be most important for the Court, is not whether a foreign court will apply or interpret EU law. It clearly will (see Section II.2). What matters is whether mechanisms are

[22] Opinion 1/09 *Creation of a unified patent litigation system* ECLI:EU:C:2011:123 para. 84; Opinion 2/13 cit. para. 174.

[23] Opinion 2/13 cit. para. 175; case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 36.

[24] Opinion 1/09 cit.; *Achmea* cit. para. 55.

[25] T Pavone, 'Revisiting Judicial Empowerment in the European Union' (2018) Journal of Law and Courts 303.

[26] T Pavone, 'Dancing in Place: The Spatial Micro-foundation of the EU's Judicial Dialogue' Paper for the 'It Takes two to Tango' workshop (Ede Netherlands, 12-13 June 2019) 6.

[27] T Pavone, 'Revisiting Judicial Empowerment' cit. 325-6.

[28] See T Lock, 'Is Private Enforcement of EU Law' cit. 1675.

in place that stop such (mis)application and interpretation of EU law taking effect *in the* EU legal order. Such mechanisms do exist when it comes to checking whether foreign DSMs misapply and interpret EU law:

a) art. 267 TFEU – any national court can/has to refer a question to the Court if the award of a foreign DSM has the potential to affect EU law

b) art. 258 TFEU – the Commission can launch infringement proceedings against Member States that enforce the awards of foreign DSMs, which might be incompatible with EU law

c) The supremacy of EU law over any inter-state agreements of Member States[29]

d) art. 351 TFEU – prior international agreements of the Member States need to be in conformity with EU law. In the case of non-conformity, the Court can force the MS to disapply the international agreement.[30]

e) art. 344 TFEU – prohibits Member States from submitting a dispute to a foreign DSM concerning the interpretation and application of the EU Treaties.

In *Achmea*, one of the concerns of the Court was that the intra-EU investment tribunal could not ensure the "full effectiveness of EU Law".[31] The question is where? *Outside* or *inside* the EU legal order? Outside the EU legal order, the Court cannot control how other courts interpret and apply EU law. A case in point, very recently a US based court held that *Achmea* does not affect the validity of an intra-EU investment award that the US court was asked to enforce under the International Centre for the Settlement of Investment Disputes (ICSID) Convention.[32] *Inside* the EU legal order it is a different matter. There, the Court has and should have full control over how EU law is applied and interpreted. Inside the EU legal order (as explained above) there are mechanisms to uphold the integrity and effectiveness of EU law against the decision of intra-EU investment tribunals.

Firstly, there is art. 267 TFEU, which was used when the German Federal Court of Justice referred the question in *Achmea* under the very same mechanism.[33] However, one might argue that the original *Achmea* arbitration is special. In that case, the award could be challenged, because the original arbitration was conducted under UNCITRAL rules in Germany and the German law at the seat of arbitration allowed for the award's limited

[29] Art. 351 TFEU does not protect prior intra-EU agreements. See, case C-301/08 *Bogiatzi* ECLI:EU:C:2009:649 paras 16-20.

[30] See joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461 para. 304; joined cases 209 to 213/84 *Ministère public v Asjes* ECLI:EU:C:1986:188; case C-62/98 *Commission v Portugal* ECLI:EU:C:2000:358. J Klabbers, 'The Validity of EU Norms Conflicting with International Obligations' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 122.

[31] *Achmea* cit. para. 56.

[32] LPP Dechert, 'Intra-EU Arbitral Award Enforced in the U.S. - Achmea Objection Dismissed by D.C. District Court for the First Time' (19 September 2019) Lexology www.lexology.com.

[33] *Achmea* cit. para. 2.

review.[34] Conversely, in the case of ICSID arbitrations the grounds for national review of the award are pretty much non-existent.[35] True, but that is when art. 258 TFEU, the supremacy of EU law and art. 351 TFEU (in case there is a conflict between pre-accession ICSID obligations and EU law) kick in. In *Micula* the Commission threatened to bring infringement proceedings against Romania for enforcing an ICSID award while the Romanian Constitutional Court gave primacy to EU law over Romania's competing obligations under the ICSID Convention.[36]

In other words, one wonders what the revelation in *Achmea* was. As mentioned, it is a fiction that EU law can be applied in a uniform and effective manner everywhere, including *within* the EU. However, there are mechanisms in place within the EU legal order to stop the enforcement of decisions/awards of foreign courts that misapply and interpret EU law, which could affect its uniformity and effectiveness.

b) Fiction No. 2: The CETA Investment Court will not Apply and Interpret EU law.

The second fiction, used to substantiate the Court's lenient approach in Opinion 1/17, is that a CETA paragraph stating that the ICS will only apply domestic law "as a matter of fact"[37] means that in practice the said DSM will not apply and interpret EU law.[38] This in turn is enough of a guarantee for the autonomy of EU law so that no preliminary reference mechanism between the ICS and the Court of Justice is required.[39]

I believe this approach to be very problematic if one follows the argument presented in the previous section. The question should not be whether the ICS will apply and interpreted EU law. As argued below, in practice the ICS will apply it and interpret it, as it must do so in order to fulfil its functions. Claiming that it will do otherwise, is a fiction.[40] However, what matters in such cases is whether a mechanism – such as a preliminary reference from the ICS to the Court[41]– exists that would stop the misapplication of EU law. Unfortunately, no such mechanism was included in the CETA ICS and this *should have been a* real cause for concern in light of the approach taken in previous cases.

International investment tribunals routinely apply and interpret EU law, in either the jurisdictional or the merits phase, regardless of whether EU law applies to the dispute as law or fact. In a recent project we looked at how intra-EU investment tribunals reacted to

[34] *Ibid*. para. 53.

[35] ICSID Convention, art. 53(1).

[36] Constitutional Court of Romania *Micula and Others* (File n. 1214D/2015) decision n. 887 of 15 December 2016 (in Romanian).

[37] Art. 8.31(2) CETA cit.

[38] Opinion 1/17 cit. paras 120-136.

[39] *Ibid*.

[40] There is of course a long-standing debate on where one draws the line between applying law as "fact" to a case and actually applying and interpreting said law as applicable to the case.

[41] Such a mechanism exists in the EU-Swiss and EU-UK Brexit agreements.

the Court's *Achmea* ruling. We found that in practice intra-EU investment tribunals regularly apply and interpret EU law before upholding their jurisdiction.[42] In intra-EU investment arbitrations, EU law and *Achmea* are routinely invoked by the respondent EU State or the intervening Commission, as objections to the jurisdiction of the tribunals. In order to address these objections, the investment tribunals have to interpret EU law. For example, in the pre-*Achmea* case of *Euram v Slovakia* the tribunal interpreted art. 344 TFEU as not applying to intra-EU BITs.[43] The tribunal in *Masdar v Spain* interpreted the limits of the actual *Achmea* ruling and held that it concerned a BIT between the Netherlands and the Czech and Slovak Federal Republic. Therefore, it "[could not] be applied to multilateral treaties, such as the [Energy Charter Treaty], to which the EU itself is a party".[44]

EU law will also be applied in the merits phase of an international dispute. This should not be a surprise. International courts that assess the conformity of EU measures with an international treaty *need to apply and interpret EU law, but they cannot invalidate it*. For example, the WTO Panel in *EC Bananas III (Complaint by Ecuador)* concluded that the EU had only one regime for banana imports for the purposes of analysing its conformity with art. XIII GATT, and not two as the Commission claimed.[45] Furthermore, investment tribunals do not have the power to declare a domestic piece of legislation invalid (it remains unclear why this had to be specifically stated in art. 8.31(2) of CETA). The most they can do is order the respondent State to pay compensation to the investor – or sometimes restitution or specific performance[46] – following an analysis in which they ascertain whether domestic measures breach the standards of protection provided for in the underlying investment treaty. In other words, during that analysis they will apply and interpret domestic measures, including domestic laws. Claiming that somehow the CETA ICS will not do this in practice is simply a legal fiction.

Yet, it is a legal fiction that in this case helped the Court conclude that the ICS was compatible with EU law. If the Court chose to accept that in reality investment tribunals – including the CETA ICS in the future – and other foreign tribunals regularly interpret and apply EU law (because they have to in order to fulfil their functions) then the Court would have more seriously looked at whether the CETA ICS could affect the autonomy of EU law. If the same standard was applied as in *Achmea*, then the lack of a preliminary reference mechanism from the ICS should have been a cause for concern for the Court.

[42] Sz Gáspár-Szilágyi and M Usynin, 'The Uneasy Relationship between Intra-EU Investment Tribunals and the Court of Justice's Achmea Judgment' (2019) European Investment Law and Arbitration Review 29.

[43] UNCITRAL *EURAM v Slovak Republic* (Award on Jurisdiction) [22 October 2012] paras 248-267.

[44] ICSID Case n. ARB/14/1 *Masdar Solar v Kingdom of Spain* (Award) [16 May 2018] para. 679.

[45] WTO Panel, WT/DS27/R/ECU *European Communities - Regime for the Importation, Sale and Distribution of Bananas* [22 May 1997] paras 7.78-7.82.

[46] B Demirkol, 'Remedies in Investment Treaty Arbitration' (2015) Journal of International Dispute Settlement 403.

This example further cements the argument that what matters are not only the conditions of compatibility, but the strict or lenient approach the Court takes to the autonomy and compatibility test, which materialize in the Court's reliance on certain fictions, assumptions, and hypotheses.

II.3. Not analysing an issue thoroughly enough

A third technique used by the Court is to address summarily an issue, which could cause problems on a more thorough analysis. This helps the Court use a more lenient approach and find in favour of compatibility.

Compared to the thorough compatibility analysis in Opinion 2/13, the analysis in *Achmea* is noticeably shorter and leaves out the question of discrimination under art. 18 TFEU,[47] while in Opinion 1/17 the discussion on whether CETA discriminates between Canadian and EU investors was summarily handled. The question of discrimination does not strictly belong to the part of the conformity assessment that deals with autonomy.[48] However, it is a good example of how the overall compatibility assessment can be moulded in order to promote some of the policy preferences of the Court.

In Opinion 1/17 Belgium asked the Court whether CETA discriminated against EU investors investing in the EU compared to their Canadian counterparts investing in the EU, as the latter could rely on the ICS, while the former could not. After dismissing the applicability of art. 21 of the Charter on Fundamental Rights to the case (which is a replication of art. 18 TFEU on the prohibition of discrimination based on nationality), the Court found that the more general prohibition of discrimination under art. 20 of the Charter was applicable.

On the face of it, in the CETA Opinion the Court of Justice chose the right elements to compare and found no breach of art. 20 of the Charter. Contrary to the Belgian claim that EU investors investing in the EU were discriminated against Canadian investors in the EU, the Court compared how CETA gives *EU investors investing in Canada* the possibility to resort to the ICS, just as it gives the same possibility to *Canadian investors investing in the EU*.[49] The Court, however, stopped the analysis at this level and chose not to dissect the realities of intra-EU investments, even if it somewhat hinted at them in para. 181 of the Opinion.

On a more thorough analysis, the Court would have seen that the presence of the ICS in CETA will *indirectly* lead to discrimination *between* different EU investors (not between Canadian and EU investors) investing in another EU Member State. For example, a German and a Polish company investing in Slovakia will have the same remedies (domestic courts and the preliminary reference procedure) against Slovakia in case the latter enacts measures that interfere with their investments. However, if the German company

[47] Sz Gáspár-Szilágyi, 'It is Not Just About Investor-State Arbitration' cit.
[48] For the limits of external autonomy see C Contartese, 'The Autonomy of the EU Legal Order' cit.
[49] Opinion 1/17 cit. para. 180.

is owned or controlled by a Canadian investor, the former will have an extra remedy compared to the Polish company: the CETA ICS (see Figure 1). In investment treaty arbitration it is not only the investor that can bring a claim – either on its behalf or on behalf of the investment-,[50] but in certain instances the locally established company can also bring a case.[51] This means that the German company will have an extra remedy against Slovakia (the CETA ICS), compared to the Polish company.

To conclude, while on the face of it CETA does not discriminate between EU and Canadian investors, on closer examination it will indirectly discriminate between different EU investors investing in another EU state, thus breaching art. 18 TFEU. One may wonder whether the Court was fully aware of this situation and chose not to tackle it in detail, as this could have changed the outcome of compatibility.

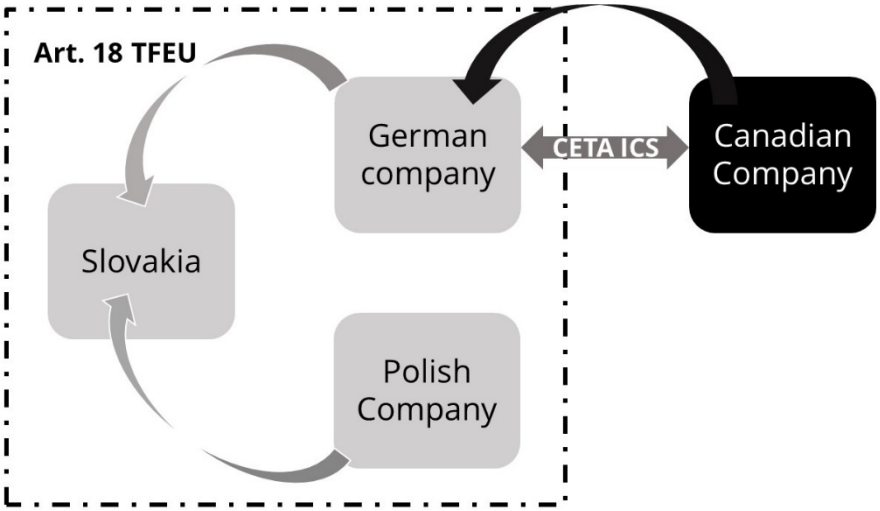

FIGURE 1: Intra-EU investment and the CETA ICS.

III. External autonomy as a shapeshifter and its similar functions to direct effect

Following the previous discussion, one can ask the simple question what is more important for the compatibility with EU law and its autonomy "test"? Is it the actual, *legal* conditions a foreign DSM must meet; or whether the Court takes a formal or a lenient approach, using the afore-mentioned techniques, which might be informed by various

[50] See also art. 8.23 CETA.

[51] See ICSID 25(2)(b). CETA allows a case to be brought under the ICSID rules. Furthermore, the Canadian company does not have to own the German company in its entirety. art. 8.1 CETA includes under the term "investment", among others, enterprises, branches and equity participation.

non-legal considerations, such as the strength of the foreign DSM, the parties to the agreement, or the implications for EU policy?

This is a crucial question as it goes to the heart of what the "external autonomy" of EU law and the compatibility analysis is in practice. Thus, autonomy is not that much a structural principle of EU constitutional law[52] based on which one can perform a *predictable* constitutional analysis. Instead, it is a *shapeshifter*. A mechanism that depending on not just legal conditions, but also *non-legal* considerations, can morph into a shield against international law or it can embrace it.

Those interested in the relationship between EU and international law may see similarities with the *direct effect* of international law in the EU legal order. As has been noted over the years, the Court of Justice uses direct effect as a way to shield EU law from certain international "threats", while in other cases it provides "easy passage" to international law.[53] Whether or not international law (treaties,[54] customary international law,[55] and decisions of DSMs[56]) has direct effect, will often depend more on the ways in which the Court uses the direct effect test[57] to address non-legal considerations, than the legal conditions for direct effect. Among these, one can mention the purposes for which international law was relied on, the policy field covered by the agreement, or the parties that concluded it.[58] For example, when the validity of secondary EU law was challenged in light of the GATT[59] and later the WTO Agreement,[60] the *lack of direct effect* of the international agreements stopped private parties from invoking them against EU law. The same was true for damages claims by private parties, incurred following the EU's prolonged breach of WTO rules.[61] Conversely, when the conformity of Member State measures with EU international agreements was involved, the Court found no problem granting international agreements direct effect.[62]

[52] See NN Shuibhne, 'What Is the Autonomy of EU Law', cit.

[53] M Mendez, 'The Enforcement of EU Agreements: Bolstering the Effectiveness of Treaty Law?' (2010) CMLRev 1719; M Mendez, *The Legal Effects of EU Agreements. Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford University Press 2013); Sz Gáspár-Szilágyi, 'EU International Agreements through a US lens: Different Methods of Interpretation, Tests and the Issue of 'Rights' (2014) European Law Review 601; A Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) European Journal of International Law 105.

[54] Case 104/81 *Kupferberg* ECLI:EU:C:1982:326; Case C-213/03 *Pêcheurs de l'étang de Berre* ECLI:EU:C:2004:464; Case C-149/96 *Portugal v Council* ECLI:EU:C:1999:574; Case C-240/09 *Lesoochranárske zoskupenie* ECLI:EU:C:2016:838.

[55] Case C-162/96 *Racke v Hauptzollamt Mainz* ECLI:EU:C:1998:293.

[56] Joined cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* ECLI:EU:C:2008:476.

[57] Sz Gáspár-Szilágyi, 'EU International Agreements through a US lens' cit.

[58] See M Mendez, *The Enforcement of EU Agreements* cit.

[59] Case C-280/93 *Germany v Council (Bananas I)* ECLI:EU:C:1994:367.

[60] Case C-122/95 *Germany v Council (Bananas II)* ECLI:EU:C:1998:94; *Portugal v Council* cit.

[61] *FIAMM and Others v Council and Commission* cit.

[62] *Pêcheurs de l'étang de Berre* cit.; case C-265/03 *Simutenkov* ECLI:EU:C:2005:213.

Just as in the case of direct effect, I believe there are several important *non-legal* considerations one needs to be aware of when assessing the compatibility of an outside DSM with EU law (see Table 1). In my opinion, such considerations are at least as important as the *legal* conditions developed by the Court.

Case	Treaty Parties	Strength of foreign DSM	Implications of incompatibility for EU	Compatible with EU law
Opinion 1/91 (EEA Court)	(EU + MS) – 3rd state *de facto* bilateral	High	Medium	No
Opinion 1/92 (EFTA Court)	(EU + MS) – 3rd state *de facto* bilateral	Low	High	Yes
Opinion 1/00 (ECAA)	(EU + MS) – 3rd state plurilateral	Low	Medium	Yes
Opinion 1/09 (EPC)	MS – MS plurilateral	Medium	Low	No
Opinion 2/13 (ECtHR)	(EU + MS) – 3rd state plurilateral	High	Medium	No
Achmea (*intra*-EU ISDS)	MS – MS bilateral	Medium	Medium	No
Opinion 1/17 (CETA ICS)	(EU + MS) – 3rd state *de facto* bilateral	Medium	High	Yes
Energy Charter (*intra*-EU ISDS)	(EU + MS) – 3rd state plurilateral	Medium	Medium	?
*Extra-EU MS BIT*s (*extra*-EU ISDS)	MS – 3rd state bilateral	Medium	High	?

TABLE 1. Other factors that might affect the compatibility of foreign DSMs with EU law.

Firstly, it seems to matter *who concludes* or *has concluded* the international agreement setting up the DSM. As illustrated in the second column of Table 1, when the cases concerned the compatibility of DSMs set up under agreements concluded by the Member States with other Member States (bilateral in *Achmea*, multilateral in Opinion 1/09), the Court found the DSMs not to be compatible with EU law. On the other hand, in Opinion 1/17, a mixed agreement (concluded by the EU and its Member States on the one side and a third state on the other) that included the brainchild of the EU Commission (the ICS) was deemed to be compatible with EU law and its autonomy. Thus, if it is a Member State agreement, chances are higher that autonomy will shield EU law from the foreign DSM than if it were an EU agreement. Similar trends were noticed when it came to the

granting of direct effect to international agreements in case Member State, and not EU, measures were challenged before the Court.[63]

Secondly, the "strength and prestige" of the foreign DSMs seem to matter as well.[64] On the one hand, there are the *less* prestigious and powerful foreign DSMs (see Table 1, third column). In such cases autonomy functioned like an embracer. The EFTA Court (Opinion 1/92) is a small regional court that only has jurisdiction over the EFTA countries,[65] while disputes under the Agreement on a European Common Aviation Area (Opinion 1/00) are not even handled by a court, but by a Joint Committee.[66] The CETA Investment Court also cannot be considered a "strong" court, but rather a small or a medium one. It will be a bilateral investment court, which might one day function or not, with a very limited jurisdiction. Furthermore, it can only decide on damages. On the other hand, there are the *more* prestigious and more powerful foreign DSMs with extensive powers. In such cases, the Court decided that the foreign DSMs were not compatible with EU law. The ECtHR is the posterchild for regional human rights protection, with far-reaching judgments that affect 47 countries (not two or three), including all the EU Member States. The European Patent Court and the EEA Court would have also been stronger, regional courts with judgments affecting all EU Member States.

Thirdly, the Court does not exist in a vacuum and is aware of the *wider implications on EU policy* of an incompatibility decision. In order to rank the implications in Table 1 (column four) I asked the following question from the Court's perspective: If we decide on incompatibility will the implications for EU policy be high or low? The answer will in part depend on the objectives of the underlying international agreement. For example, as Table 1 illustrates, the Court decided in favour of compatibility whenever the implications of a negative decision were high for EU policy. In Opinion 1/92 the EEA Agreement would have most probably failed if the Court said no to the EFTA Court and said no to the EEA Agreement the second time. Similarly, in Opinion 1/17 an opinion on the incompatibility of the CETA ICS with EU law would have frozen the EU's investment policy, it would have affected the ICS in other EU bilateral agreements[67] and it would have slowed down the UNCITRAL process to reform ISDS on the multilateral level.[68]

[63] See footnote 53.

[64] For a similar argument, but relating to direct effect see BI Bonafé, 'Direct Effect of International Agreements in the EU Legal Order: Does It Depend on the Existence of an International Dispute Settlement Mechanism?' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff 2012) 229.

[65] Opinion 1/00 *Accord sur la création d'un espace aérien européen commun* ECLI:EU:C:2002:231 I-3501 and I-3502.

[66] Agreement between the European Union and its Member States and the Republic of Moldova of 20 October 2012 on a Common Aviation Area, art. 27.

[67] Included in the EU-Vietnam and EU-Singapore IPAs.

[68] UNCITRAL, *Working Group III, Investor-State Dispute Settlement Reform* uncitral.un.org.

In the case of medium or low-level implications for EU policy, the Court decided in favour of incompatibility. One could criticize the choice to rank the implications of Opinion 2/13 in case of incompatibility as medium. However, even though the aim was human rights protection (one of the most important aims of any legal system), not acceding to the ECtHR would not have changed much in human rights protection in the EU. The Member States would remain parties to the Convention and subject to the ECtHR's jurisdiction, while for matters covered by EU law, the EU Charter of Fundamental Rights also provides far-reaching protection. Furthermore, Charter rights that correspond to rights under the ECHR must have the same meaning and scope as ECHR rights.[69] Similarly, in the case of *Achmea* the level of implication for EU policy was rather medium than high. If the aim is the protection of investors within the EU, then intra-EU investors already receive ample protection under EU law. Thus, incompatibility would only affect ongoing and future investment cases under intra-EU BITs (not a negligible issue). However, it would not strip intra-EU investors from their EU protections.

Given these factors, it is interesting to see what will happen with Member State BITs with third countries. These agreements are concluded by Member States and the strength of the foreign DSMs is towards medium. Thus, the Court could decide in favour of incompatibility. Nonetheless, the policy implications for such an outcome would be enormous, as it would strip EU investors from protection in third countries (unlike *Achmea*) under more than 1000 Member State BITs with third countries. Thus, the Court might be inclined to decide in favour of compatibility. In the case of intra-EU ISDS under the Energy Charter Treaty, we are confronted with a mixed, multilateral agreement, with a medium DSM. The policy implications of incompatibility are also similar to the ones in *Achmea.* Intra-EU investors will still benefit from the protections of EU law. Thus, the Court would probably decide in favour of incompatibility. It will be interesting to see what techniques the Court will use when these cases come before it and the extent to which they will inform the Court's decision to use a stricter or more lenient version of the compatibility test.

What about the WTO DSM? It is a multilateral and – up to very recently[70] – a powerful foreign DSM, which regularly delivers reports against the EU. Why then is it compatible with EU law? This is a fair question to ask. However, in Opinion 1/94 on the EU's accession to the WTO,[71] the Court was never asked to decide on the *ex-ante* compatibility of the WTO DSM with EU law. Subsequently, the EU acceded to the WTO Agreement and the Court of Justice blocked the direct effect of the WTO Agreement in the EU legal order, *ex post*. If it was not asked to do an *ex ante* control, it made sure it did an *ex post* one.

[69] Art. 52(3) EU Charter.
[70] WTO, *Fairwell Speech of Appellate Body Member Peter Van den Bossche*, www.wto.org.
[71] Opinion 1/94 *Accords annexés à l'accord OMC* ECLI:EU:C:1994:384.

IV. Conclusions

Instead of getting caught up in every minute legal technicality of the Court's assessment of a foreign DSM's compatibility with EU law and its autonomy what I suggest – following Opinion 1/17 – is to view autonomy as a shapeshifter. Just like the direct effect of international law in the EU legal order, autonomy will morph into a shield that protects EU law from international law or it will become an embracer of international law and international DSMs.

The shapeshifting might in part depend on the extent to which non-legal considerations inform the Court's strict or narrow approaches to the compatibility assessment. The Court achieves this with the help of different techniques, such as the reliance on various hypotheses and fictions, and the summary treatment of certain issues that might be crucial to the assessment.