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# Putting Opinion 1/17 in context

CELS Seminar, 13 November 2019

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# STRUCTURE OF THE PRESENTATION

Understanding Opinion  
1/17  
(the context)

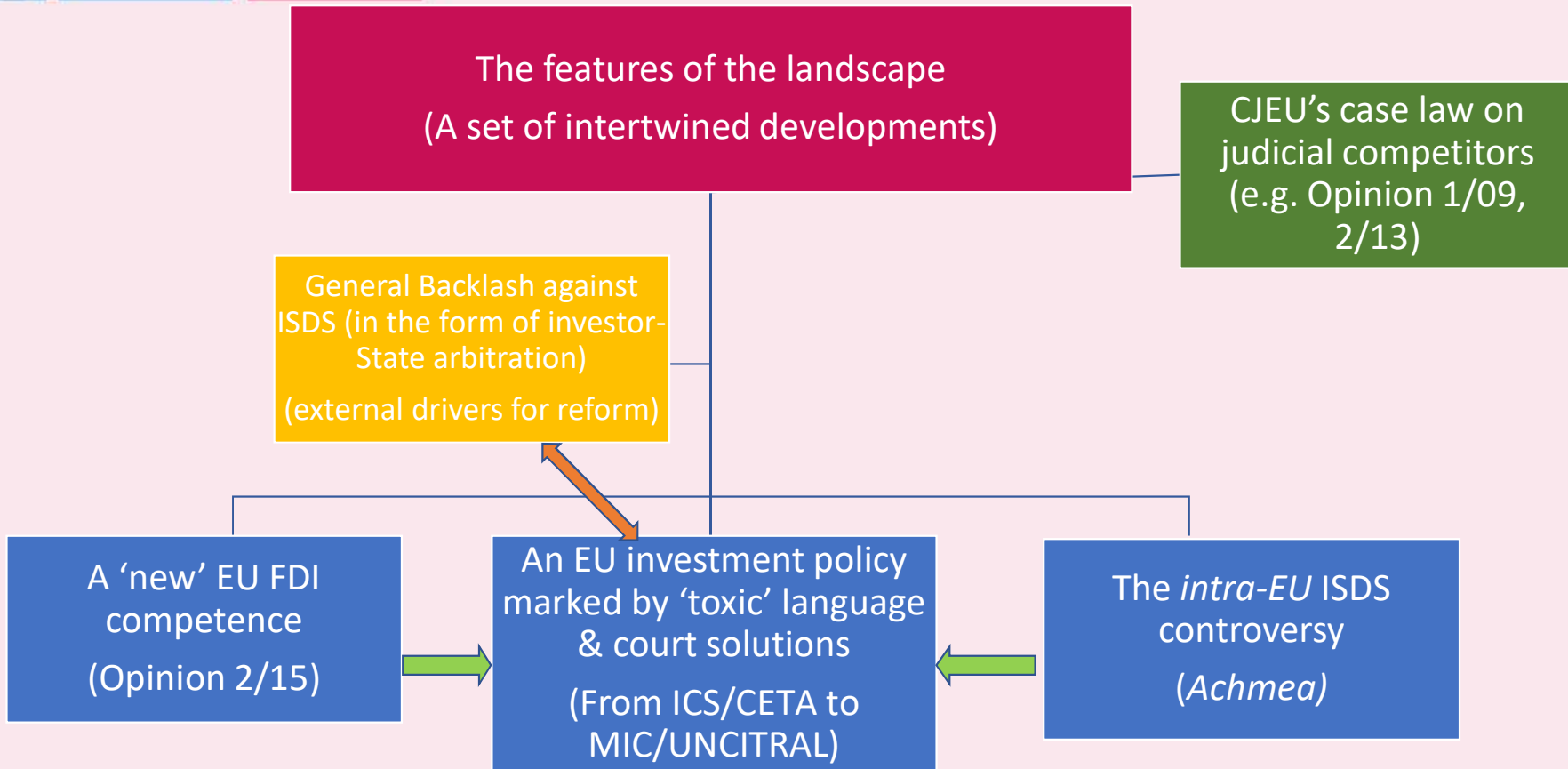
(I) The path towards Opinion  
1/17 (the main features of the  
pre-Opinion 1/17 landscape)

(II) Opinion 1/17  
The CETA ICS and the  
compatibility concerns  
raised

(III) The CETA ICS as a  
blueprint for the MIC. Any  
lessons post-Opinion 1/17?



# I – THE LANDSCAPE





## ‘Old-style ISDS’ part of the EU policy in the early days

“For these reasons, future EU agreements including investment protection *should include* investor-state dispute settlement. This raises challenges relating, in part, to the uniqueness of investor-state dispute settlement in international economic law and in part to the fact that *the Union has not historically been a significant actor in this field*. Current structures are to some extent ill-adapted to the advent of the Union. To take one example, the [ICSID Convention], is open to signature and ratification by states members of the World Bank or party to the Statute of the International Court of Justice. The European Union qualifies under neither.” (‘Towards a comprehensive European International Investment Policy’ [2010] <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0343:FIN:EN:PDF>>, 10)



## EU investment policy: An investment court system (ICS) as a panacea - No return to the old-style ISDS

'ISDS: The most toxic acronym in Europe'  
(17.09.2015)

[http://www.politico.eu/  
article/isds-the-most-  
toxic-acronym-in-  
europe/](http://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/)

“CETA moves decisively away from the traditional approach of investment dispute resolution and establishes independent, impartial and permanent investment Tribunals, inspired by the principles of public judicial systems”

*Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement, Point 6(f)  
Opinion 1/17 (para 195)*



## A MULTILATERAL INVESTMENT COURT



*"Trade is about exporting our standards, be they social or environmental standards, data protection or food safety requirements. Europe has always been an attractive place to do business. Open trade must go hand in hand with open policy making."*

European Commission President Jean-Claude Juncker, State of the Union Address, 13 September 2017

## A NEW SYSTEM FOR RESOLVING DISPUTES BETWEEN FOREIGN INVESTORS AND STATES IN A FAIR AND EFFICIENT WAY

The EU is the world's biggest recipient and source of foreign direct investment. That investment creates growth and jobs, at home and abroad.

To invest in other countries, investors need to know they will:

- be treated fairly
- not face discrimination
- be able to transfer funds freely
- be compensated for any expropriation
- be able to enforce their rights.

Since the 1960s, this has been ensured through a system known as Investor to State Dispute Settlement, or ISDS: a model of ad hoc dispute settlement found in virtually all the **3000-plus international investment agreements** in force today around the world. EU Member States are party to some 1400 of these agreements.

However, the EU has recently made clear that it is determined to move away from this old-style system as its ad hoc nature does not sufficiently guarantee impartiality and predictability. That is why, after a long and thorough debate with all relevant stakeholders, the EU replaced ISDS in all its negotiations with a **permanent Investment Court System**.

Today's proposal of a multilateral investment court is a logical next step in the approach to set up a **more transparent, coherent and fair system** to deal with investor complaints under investment protection agreements.



## CETA, Article 8.29:

“The Parties shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes. Upon establishment of such a multilateral mechanism, the CETA Joint Committee shall adopt a decision providing that investment disputes under this Section will be decided pursuant to the multilateral mechanism and make appropriate transitional arrangements.”

### *Cf. Article 15 of the Netherlands Model BIT (2019)*

#### Multilateral investment court

1. The Parties shall pursue with each other and other interested partners the multilateral reform of ISDS. Upon the entry into force between the Contracting Parties of an international agreement providing for a multilateral investment court applicable to disputes under this Agreement, the relevant provisions set out in this Section shall cease to apply.



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## General Backlash against investor-State arbitration – Grouping the critiques

### Group I: Independence and Impartiality

- *E.g. Appointment of arbitrators (especially party-appointed), challenges*

### Group II: Lack of an appellate review

- *E.g. Lack of consistency, No checks and balances*

### Group III: Transparency Concerns

### Group IV: Length and Costs

**Regulatory chill + An inbuilt pro-investor bias**





## The characteristics of the hybrid CETA ICS

Composition (permanence + two-tier)

Not a court of the EU, Not a court of Canada + Applicable law clause (EU law is treated as a *fact*)

Use of arbitration language and instruments (e.g. multiple references to the ICSID Convention, ICSID Secretariat, IBA Guidelines, UNCITRAL Transparency Rules)

Born to become multilateral (Article 8.29 CETA, Opinion 1/17 paras 7-8)

= A hybrid



# PART II – OPINION 1/17: THE COMPATIBILITY CONCERNS RAISED

Compatibility Concerns

Autonomy of EU law  
(Articles 267, 344 TFEU, 19 TEU)

~~Discrimination  
(Articles 20-21 Charter)~~

Independence, Impartiality, Accessibility  
(Article 47 Charter)



## The applicable law provision in CETA (Article 8.31)

The CETA tribunal **applies only CETA** “as interpreted in accordance with the [VCLT] [...], and other rules and principles of international law applicable between the Parties.”

Furthermore, the CETA tribunal

“shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. *For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party”.*



## The Opinion 1/17 autonomy test

Does the envisaged ISDS mechanism prevent the Union from operating in accordance with its unique constitutional framework (as defined by the CJEU)?

(i) Does the CETA ICS have the power to apply and interpret EU law ?

(ii) Is the ICS jurisdiction determined in such a way that the awards it will issue may have “the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework”?



## The Opinion 1/17 autonomy test (first limb)

(i) Does the CETA ICS have the power to apply and interpret EU law ?

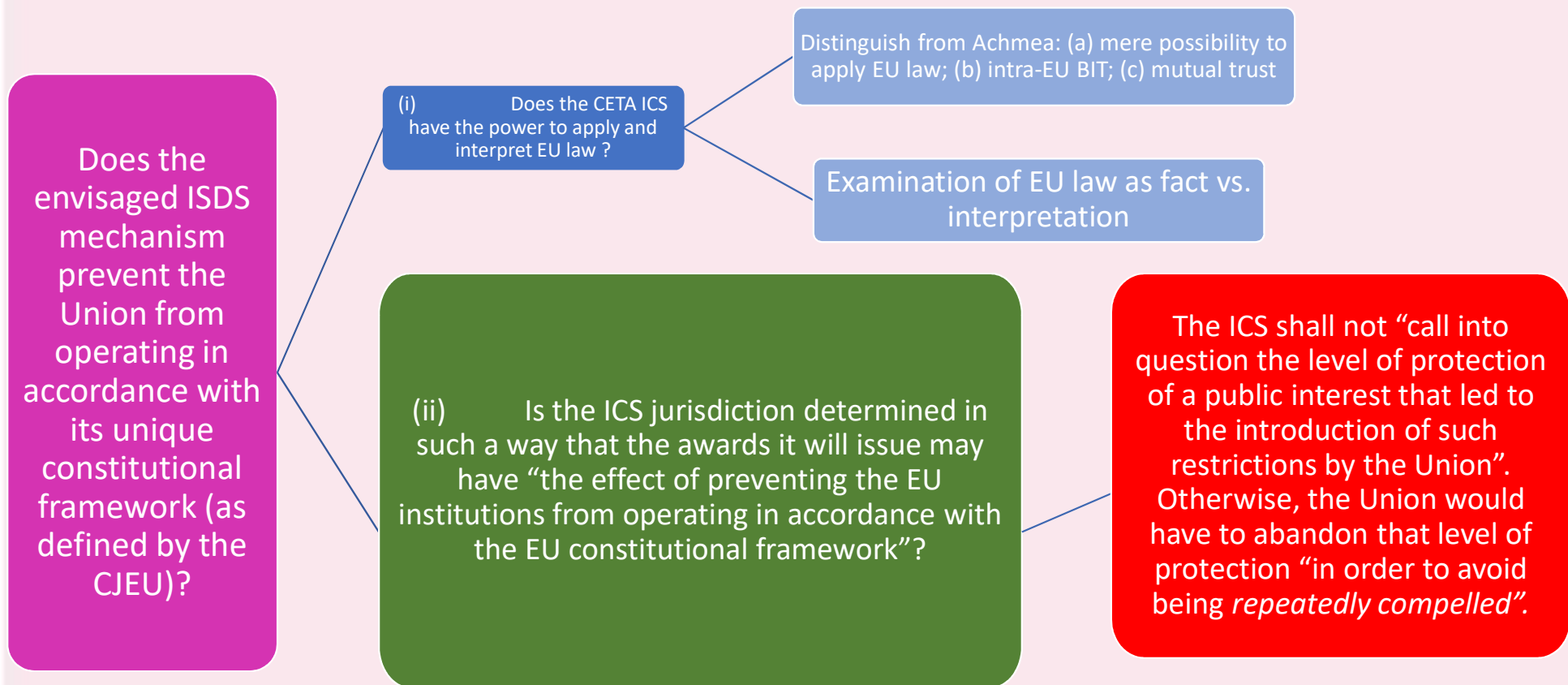
Distinguish from *Achmea*: (a) a (mere) possibility to apply EU law; (b) intra-EU BIT; (c) mutual trust

Examination of EU law as fact vs. interpretation of EU law as law

Article 8.21 CETA: EU determines the respondent



# The Opinion 1/17 autonomy test (second limb)





## Is the CETA ICS an independent and impartial tribunal?

Under Article 47 of the Charter:

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”



### III- ANY OPINION 1/17 LESSONS FOR THE MIC? A “COMPATIBILITY CHECKLIST”?

#### The Autonomy test and the Jurisdiction of the MIC

- 1. No power to apply or interpret EU law
  - i. Express and clear applicable law clause: EU law as a fact
  - ii. The EU *only* will be able to determine the respondent in each case
- 2.No effect of preventing the EU institutions from operating in accordance with the EU constitutional framework
  - i. Express, broad and declaratory provision on the parties’ right to regulate
  - ii. The only remedy: compensation
  - iii. Narrow FET clause

Applicability

*Applicable to all DS systems incl. the MIC*

#### Independence and impartiality indicators

- 1. Permanence
- 2. Random and unpredictable divisions
- 3. Autonomous exercise of judicial functions (external aspect of independence)
- 4. Guarantees against removal from office
- 5. Remuneration at a level adequate for the importance of the functions
- 6. Impartiality: qualifications, length of service, grounds of dismissal
- 7. No independence concerns raised if all members are appointed by states only (consent of the parties to the treaty not the dispute)
- 8. Binding interpretations by a CETA Joint Committee-type body are permissible so long as they have no retroactive effect
- 9. IBA Guidelines: good guidance

Applicability

*What about arbitral bodies?*





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Thank you for your attention!

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