



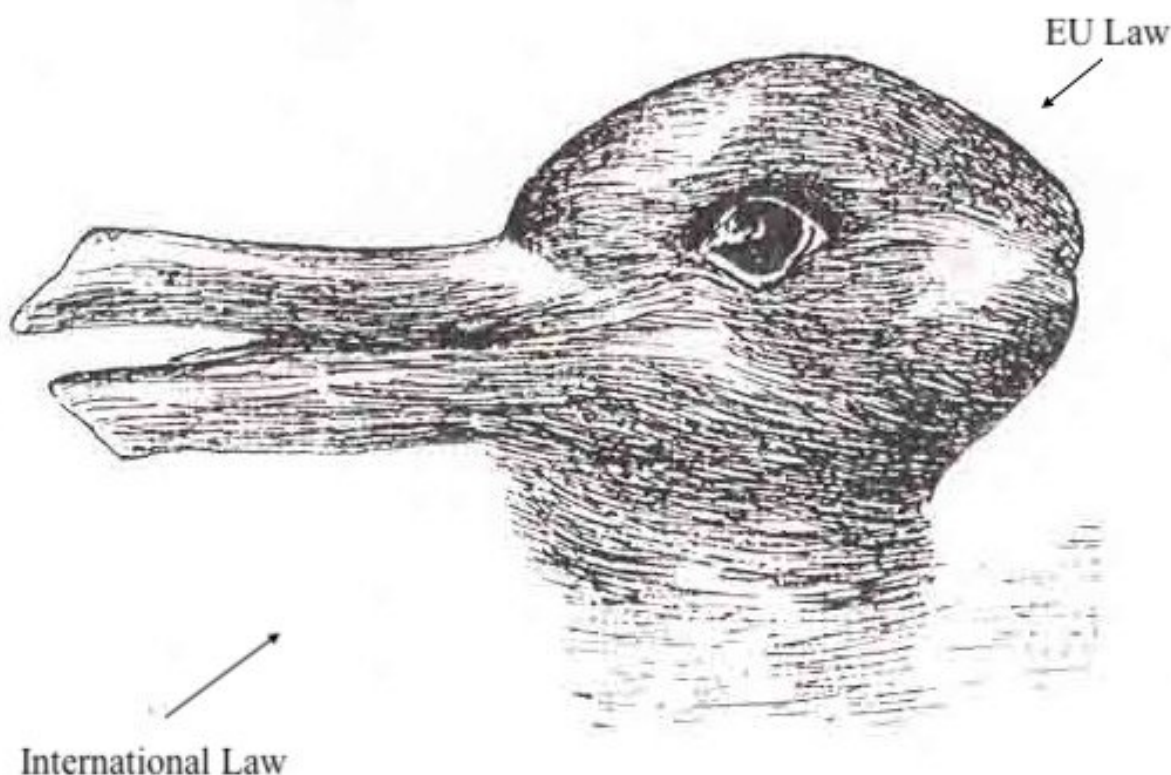
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## Regime Interactions and the Dual Legality of EU Law: The case of Slovak Republic v. Achmea

By globalgovernanceiheid (<https://theglobal.blog/author/globalgovernanceiheid/>), April 26, 2018



The implications of the Court of Justice of the European Union (CJEU) decision in **Slovak Republic v. Achmea** (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=952720>) on 6 March 2018 have been brilliantly discussed in many blogs on what concerns investment arbitration (see [here](https://www.ejiltalk.org/achmea-the-principle-of-autonomy-and-its-implications-for-intra-and-extra-eu-bits/) (<https://www.ejiltalk.org/achmea-the-principle-of-autonomy-and-its-implications-for-intra-and-extra-eu-bits/>) and [here](http://www.sidiblog.org/2018/04/17/eu-law-is-alive-and-healthy-the-achmea-case-and-a-happy-good-bye-to-intra-eu-bilateral-investment-treaties/) (<http://www.sidiblog.org/2018/04/17/eu-law-is-alive-and-healthy-the-achmea-case-and-a-happy-good-bye-to-intra-eu-bilateral-investment-treaties/>), to mention only two). However, this remarkable decision deserves a second look for its consequences on the law of international organizations and regime interaction. In particular, important questions arise from the decision by the Court to explicitly refer to EU law as being at the same time international and internal:

“41. Given the nature and characteristics of EU law mentioned in paragraph 33 above, that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.” (emphasis added)

Where paragraph 33 reads:

“33. Also according to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other (see, to

that effect, Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and the case-law cited)." (emphasis added)

The origin of this argument can be tracked back to **Van Gend and Loos** (<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61962CJ0026&from=IT>), in which the Court famously affirmed that "the community constitutes a new legal order of international law". In the process of European integration only the first part of this finding had far-reaching consequences for the creation of a new internal legal order. The consequences of the belonging to (or derivation from) international law are less developed. The Achmea decision reminds us that the international origin of EU law is not abandoned.

### Can EU law be at the same time international and internal?

The CJEU frames the autonomy of EU law in its interactions with international and national systems. EU law is an integral part of national law, and, at the same time, "it stems from" (or derives from) international law as codified in the EU Treaties. This dual legality is one solution among others. The International Law Commission (ILC), for example, identified **four theories on the rules of international organizations** ([http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9\\_11\\_2011.pdf&lang=EF](http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9_11_2011.pdf&lang=EF)) (p. 63): 1. All rules are international; 2. All rules are internal; 3. Only some administrative rules are internal while the rest are international; 4. Only some organizations develop internal rules. The ILC did not consider the dual legality option.

This is not the occasion to engage with the consequences of each theory, but, concerning the EU, it is important to highlight that this issue cannot be resolved by claiming an exceptional status of EU law (the fourth theory above). The same problem was faced by the International Court of Justice (ICJ) concerning the legal system of the United Nations, and the same solution was proposed. In several occasions the ICJ claimed that the UN Charter is at the same time a treaty and a **"constituent instrument"** (<http://www.icj-cij.org/files/case-related/93/093-19960708-ADV-01-00-EN.pdf>) (para. 19), and it affirmed that UN Security Council resolutions are capable of belonging to international law and, at the same time, functioning **"as part of a specific legal order"** (<http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf>) (para. 89).

The two faces of international organizations reflect their peculiar status, in balance between autonomy from and dependence on member states: if the EU is created by member states with a treaty, its law appears to be international; if the EU constitutes an autonomous community with a constitution, its law appears to be internal. One perspective does not exclude the other.

### Is it only a question of perspective?

The compromise between autonomy and dependence is affected by the adoption of a specific point of view: the state-centric perspective leads us to consider the rules of international organizations as merely international law, while the organization-centric perspective leads us to consider the rules as merely internal law. This is particularly convenient, allowing the use of one concept or the other to face contingencies. Indeed, relevant actors (courts, but also states and organizations themselves) move from one perspective to the other to make their points. For instance, from an internal perspective the CJEU relied on the **internal appearance of EU law** (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1002857>) to contrast the supremacy of the UN legal system, while using the dual legality to affirm the invalidity of intra-EU Bilateral Investment Treaties (BITs). Conversely, from an international perspective, investment tribunals relied on the internal appearance of the dual legality of EU law in order to claim the validity of BITs (like in **AES v. Hungary** (<https://www.italaw.com/documents/AESvHungaryAward.pdf>), para 7.6.6). Both are correct if it is only a question of perspective. In the clash between regimes, the winner is the most powerful.

A similar process is currently going on in the context of the attribution of conduct for international responsibility. In order to establish responsibility, an external regime (the European Court of Human Rights in the **Al-Dulimi** (<http://hudoc.echr.coe.int/eng?i=001-164515>) case, for instance) has to rely on the international appearance of the dual legality, even when member states are merely implementing rules of the organization. Conversely, from the internal perspective of EU law trying to avoid external interference (CJEU in **opinion 2/13** (<http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>), for instance), the rules cannot be international law and member states become organs of the organization. Both findings are correct if it is only a question of perspective. Again, in the clash between regimes the winner is the most powerful.

### What about regime interaction?

The capacity of EU law to be at the same time international and internal fosters a new perspective on the relationship between legal regimes. At least two set of issues are inevitable: 1. The relationship with the pre-existent sys-

tem; 2. The relationship between systems with a common origin.

The fact that EU law is internal and international inevitably affects the relationship between the EU legal system and the international legal system. The former cannot be considered as perfectly “self-contained”, as the ECJ previously depicted it, especially in **Kadi** (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1002857>) case and in **opinion 2/13** (<http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>). If the law is dual, its validity must derive from both legal systems. In particular, the dual legality fosters the study of the relationship between international organizations and customary international law. For instance, legal personality has to be attributed (or implied) by member states and, at the same time, be derived from (or inherent in) customary international law.

This brings us to consider the second issue, concerning the relationship between regimes with a common origin. The immediate consequence of the dual legality is that when two organizations are facing each other it is not ‘internal law’ against ‘international law’ (as the issue was framed in the **Kadi** (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=67611&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1002857>) case). They both derive from the international legal system and, at the same time, develop particular regimes. If EU law is dual as much as UN law, the validity of an act coming from a different regime should be first assessed looking at customary international law, which is common to both.

### Conclusion: Which Autonomy?

The concept of autonomy used in the Achmea case is different from the concept of autonomy used in previous decisions where the CJEU did not rely much on the international appearance of EU law. For instance, compare paragraph 33 of Achmea (above) with paragraph 170 of **opinion 2/13** (<http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>):

“The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU”.

In Achmea, the Court relied on a concept of ‘autonomy’ under which EU law is both integrated with national systems and derived from international law. The differences are outstanding.

By way of conclusion, dual legality can be considered as a useful expedient to solve an immediate problem without indulging in its implications, or it can be acknowledged and used to study fundamental issues of the law of international organizations, such as legal personality, international responsibility and *ultra vires* acts.

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