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The autonomy of EU law and international investment arbitration

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ABSTRACT: This article argues that, in the context of international investment law, the principle of autonomy need not be construed as broadly as the recent judgment in *Achmea* may appear to suggest. The Court's approach in this case is formalist, inward-looking and hostile to the harmonious co-existence between EU and international law. The article argues, however, that this conception of autonomy ought to be confined to the specific legal and policy context of investment agreements between Member States of the Union. A careful reading of *Achmea* supports such a view. There are, also, sound conceptual, legal, and policy reasons that militate for a more open approach to autonomy when it comes to the Union's trade agreements with third countries.

1. Introduction

International investment law provides both a suitable and topical framework within which to examine the principle of autonomy of the European Union (EU) legal order. This is the case for a number of reasons. First, the emphasis on investment law reflects the increasingly prominent stature of the EU on the international scene and the related reform of the rules and procedures under the Lisbon Treaty that govern the Union's external action. Foreign direct investment was included for the first time within the scope of the Common Commercial Policy pursuant to Article 207 TFEU at Lisbon.¹ As the EU was endowed with express external competence in the area, and given the exclusive nature of this competence,² it was only a matter of time before the interactions between international investment law and EU law raised questions about the implications of the former for the fundamental principles of the latter.³

Secondly, these implications in the field of investment arbitration have been raised in concrete ways in a wide range of legal contexts and with a range of different actors involved. These include: the preliminary reference by the German Federal Court of Justice (*Bundesgerichtshof*) in Case C-284/16 *Achmea* about the compatibility with EU primary law of the arbitration procedure laid down in the BIT between Czechoslovakia and the Netherlands;⁴ the enforcement actions brought by the Commission against Austria, the Netherlands, Romania, Slovakia and Sweden for maintaining intra-EU Bilateral Investment Treaties (BITs); the request by Belgium for an Opinion under Art. 218(11) TFEU on the compatibility of the arbitration procedure laid down in the Comprehensive Economic and Trade Agreement between and the EU and its Member States and Canada (CETA) with EU primary law;⁵ finally, the *Micula* saga about the application of the Romania-Sweden BIT award and a number of related actions brought before

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¹ See P Koutrakos, *EU International Relations Law* 2nd ed (Hart Publishing, 2015) at p30 et seq.

² Art. 3(1)(e) TFEU.

³ On whether autonomy is a general principle, see the article by Niamh Nic Shuibhne in this issue.

⁴ Case C-234/16 *Slovak Republic V Achmea* EU:C:2018:158.

⁵ Opinion 1/17 (pending).

the General Court of the European Union (the General Court)⁶ and various Member States (Belgium, Luxembourg, United Kingdom,⁷ and France) as well as the United States.⁸

Thirdly, the role of the autonomy of the EU legal order in the area has been brought to the fore under deeply politicised terms. There has been an ongoing lively, and at times strident, debate about arbitral tribunals established pursuant to international investment treaties and the enforcement of their awards against the policy choices of elected governments. In fact, there has been increasing hostility to the continuing role of such tribunals, so much so that that the prevailing policy question is not so much about whether the existing Investor-State Dispute Settlement (ISDS) mechanism would be reformed but rather about the extent of such reform. This adds yet another layer to the analysis of autonomy in the area, not least because the EU has been an active participant in the process of ISDS reform, both in its bilateral agreements with third countries and in a multilateral context.

The analysis in this article is structured in three parts. The first part will unpack the development of the principle of autonomy in the context of the Union's external relations. It will do by teasing out its main characteristics: it will highlight the ill-defined and increasingly fluid scope of the principle, as well as the difficulty of distinguishing between its internal and external dimension, and will reflect on the prominent role of the protection of domestic courts in the reasoning of the Court of Justice. The second part will analyse the concept of autonomy that emerges from the judgment in *Achmea*, that is the only judicial authority to date on the principle in the area of international investment law. It will argue that the Court's approach is formalist, inward looking and hostile to the harmonious co-existence between EU and international law. The third part of the article will argue that the concept of autonomy articulated in *Achmea* should be confined to the specific legal and policy context of that dispute. There are good conceptual, legal, and policy reasons that militate for a more open approach to autonomy when it comes to the Union's trade agreements with third countries.

2. The emerging external dimension of the principle of autonomy

The principle of autonomy of EU law is the outcome of judicial creation. There is no reference to it in primary law. Instead, the principle emerged in the early constitutional case-law of the Court of Justice which stressed the fundamentally distinct character of the then new legal order. It was the conception of the latter as 'a new legal order of international law for the benefit of which the states have limited their sovereign rights'⁹ that led to what appears now to be the unavoidable conclusion that, '[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply'.¹⁰

It was this extraordinary character of the Community's founding document, the unique legal features of its rules and their normative implications for the Member States that became the foundations of the autonomy of the Community, and later the Union, legal system. As the Court put it in *Costa* itself, "... the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal

⁶ Case T-694/15 and Case T-704/15 (pending).

⁷ [2017] EWHC 31 (Comm) (https://www.italaw.com/sites/default/files/case-documents/italaw8133_6.pdf).

⁸ See the decision of the US Court of Appeal (2nd Cir): <https://www.italaw.com/sites/default/files/case-documents/italaw94011.pdf>.

⁹ Case 26/62 *Van Gend en Loos* EU:C:1963:1.

¹⁰ Case 6/64 *Costa v. ENEL* EU:C:1964:66.

provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”.¹¹

It was this notion of the Union legal order as a new and distinct part of international law that gave rise to the process of constitutionalisation which then led gradually and inexorably to the constitutional maturity and complexity of the current EU legal order.¹² In this early context, autonomy had an internal dimension: it was intended to bolster the normative features of the nascent legal order in order to enable it to withstand challenges from national law. It was for this reason that the unique features of EU law were relied upon in order to enable the Court of Justice to assume a constitutional function and introduce the principles which shape the relationship between the EU legal order and the Member States and which also determine the legal status of individuals. In addition to the principles of supremacy and direct effect,¹³ these principles include the liability of national authorities for a violation of EU law,¹⁴ the gradual transformation of national courts into EU courts,¹⁵ and the reliance upon general principles and fundamental human rights as a matter of EU law against both EU and national measures.¹⁶

Over the years, the internal function of autonomy has met its objectives: the above principles have been accepted and applied by domestic courts as a matter of course and the EU and domestic legal orders interact successfully on the basis of a pragmatic understanding of their relationship. Since the 1990s, however, an external dimension of the principle of autonomy has emerged clearly and, at times, forcefully. This is now about protecting the distinct characteristics of the mature EU legal order from interferences that originate beyond the Union.

This aspect of autonomy first appeared in Opinion 1/91 where the Court of Justice held that the European Economic Area Agreement constituted ‘a threat ... to the autonomy of the Community legal order’:¹⁷ it would impinge on the exclusive jurisdiction of the Court of Justice (provided now under Article 344 TFEU) to rule on the division of competence, and hence, the responsibility between the then EEC and its Member States in relation to the issues covered by the Agreement, and would interfere with the binding jurisdiction of the Court in relation to EU law issues adopted after the entry into force of the Agreement.

¹¹ *Ibid.*

¹² On the ‘new’ aspects of the EU legal order, see S Weatherill, ‘From Myth to Reality: The EU’s “New Legal Order” and the Place of General Principles Within It’ in S Vogenauer and S Weatherill (eds), *General Principles of Law – European and Comparative Perspectives* (Oxford: Hart Publishing, 2017) 21). See also K. Alter, *Establishing the Supremacy of European Law: The Making of An International Rule of Law in Europe* (Oxford: Oxford University Press, 2001), M Claes, ‘The Primacy of EU Law in European and National Law’ in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford: Oxford University Press, 2015) 178, and B. de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in G De Búrca and P Craig (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2nd ed., 2011), 323.

¹³ See A. Dashwood, ‘From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?’, CYELS, 9 (2006-2007), 81.

¹⁴ See M. Dougan, ‘The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts’ in De Búrca and Craig (eds.), n12 above, 407.

¹⁵ See A. Arnull, ‘Judicial Dialogue in the European Union’ in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012), 109 and T Tridimas, ‘The ECJ and the National Courts: Dialogue, Cooperation and Instability’ in Arnull and Chalmers, n12 above, 403.

¹⁶ See G. De Búrca, ‘The Evolution of EU Human Rights Law’ in De Búrca and Craig (eds.), n. 12 above, 465, and T. Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2nd ed., 2006).

¹⁷ Opinion 1/91 EU:C:1991:49 para. 35.

A detailed examination of the development of the concept of autonomy in the EU external relations case-law is beyond the scope of this article.¹⁸ There are certain themes, however, that should be teased out at this juncture, as they will provide a useful backdrop for the analysis of autonomy in relation to investment law. The first is about the ambiguity, if not vagueness, that appears to be inherent in what autonomy is actually about. In Opinion 1/00, for instance, the Court held that compliance with the principle would entail that ‘the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered’.¹⁹ This statement is open-ended and may only be clarified on the basis of concrete cases where the Court is asked to rule on the compatibility with EU law of specific international treaties. Over the years, the interpretation of the principle of autonomy has acquired a strong self-referential dimension - De Witte describes it as ‘a subtext of selfishness’.²⁰ Whilst it accepts, in principle, that a treaty setting up a judicial body with jurisdiction binding on the institutions of the parties, including the EU’s judiciary, may be compatible with the EU’s primary rules,²¹ the Court of Justice has been less than enthusiastic in its approach to such arrangements in practice. In *Mox Plant*, the initiation of a dispute between two EU Member States before an arbitral tribunal set up under the 1982 United Nations Convention on the Law of Sea was deemed to ‘involve a manifest risk that the jurisdictional order laid down in the treaties and, consequently, the autonomy of the Community legal system may be adversely affected’.²² In *Opinion 1/09*, it held that the establishment of a European and Community Patents Court would impinge on the right of national courts to refer questions about EU patent law to the Court of Justice.²³ Most controversially, the Court held in *Opinion 2/13* that the draft agreement on the Union’s accession to the European Convention of Human Rights (ECHR), negotiated between 2010 and 2013, was incompatible with the Union’s primary law.²⁴

The earlier case-law, however, provided some indications that the application of the principle was not all about enhancing the powers of the Court of Justice. In Opinion 1/00, the ambiguous statement mentioned in the above paragraph was followed by another according to which autonomy requires that ‘the procedures for ensuring uniform interpretation of the rules of the [envisaged] Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement’.²⁵ What we see here is a rather restrained understanding of what autonomy would mean for the Union’s judiciary: it is about whether international judicial bodies would be endowed with the power to interpret and apply EU rules in a manner that would be binding on the EU’s institutions.

¹⁸ See 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) 54 CMLRev 1627, J Odermatt, ‘The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?’ in M Cremona (ed), *Structural Principles in EU External Relations Law* (Oxford: Hart Publishing, 2018) 291 and J.W. van Rossem, ‘The Autonomy of EU Law: More is Less?’ in R.A. Wessel and S. Blockmans (eds.), *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (Berlin: Springer, 2013) 13.

¹⁹ Opinion 1/00 (European Common Aviation Area) EU:C:2002:231 at para 12.

²⁰ B. De Witte, ‘A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union’ in M. Cremona and A. Thies (eds.), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Oxford: Hart Publishing, 2014), pp. 33-46, at p. 39.

²¹ Opinion 1/91, supra n17, paras 39-40.

²² Case C-459/03 *Commission v. Ireland (re: Mox Plant)* EU:C:2006:345 (paragraph 154).

²³ *Opinion 1/09* EU:C:2011:123.

²⁴ *Opinion 2/13* EU:C:2014:2454.

²⁵ Opinion 1/00, n19 above at para 13.

This definition also includes domestic courts, in so far as they act as EU courts.²⁶ Put differently, autonomy is not about requiring that any EU law issue raised in any international context would be determined exclusively by the Court of Justice. This point will be explored further in Section 3 below in the discussion of the *Achmea* judgment.

A second thread that emerges from the gradual prominence of autonomy is that the Court's interpretation of the principle is somewhat detached from the substantive issues that are at stake.²⁷ This was illustrated in a striking manner in Opinion 2/13: whilst ostensibly about the protection of human rights and the implementation of Article 6(2) TEU which requires that the Union accede to ECHR, the long analysis in Opinion 2/13 had nothing to do with the protection of fundamental human rights.²⁸ It was about the institutional and procedural arrangements negotiated carefully—and with input from the Court of Justice itself—in order to ensure that the interpretation of EU law would be a matter left for the Court of Justice. The concept of autonomy was, therefore, viewed through a narrow Court-centred lens and the co-operation with the European Court of Human Rights was treated suspiciously, even though the relationship between the two courts had been deeply symbiotic.²⁹ This aspect of the Court's understanding of autonomy is tied in with the self-referential aspect of the case-law that was mentioned above. As the powers of the Union's institutions (mainly those of the Court of Justice) provide the main lense through which autonomy is construed in the case-law, the substance of the envisaged agreements and their implications for the Union's policies are decidedly ignored. An exception is provided in another controversial judgment, that is *Kadi* where the Court of Justice, rather spectacularly, annulled EU measures implementing United Nations Security Council Resolutions requiring the freezing of assets of individuals and organizations suspected of financing international terrorism.³⁰ This was a rare example where autonomy was about a substantive policy, that is protection of fundamental human rights.

A third theme of autonomy, as it emerges from the case-law, is that its internal and external functions are not easy to distinguish. This is the case not only in conceptual but also in policy terms. The EU's judges render their judgment with an eye to national courts and, for instance in the *Kadi* cases,³¹ in full awareness of the potential role that national judges might be called upon to assume if judicial review in Luxembourg was viewed as deficient. In other words, by protecting the EU legal order against international rules that threatened the Union's system of

²⁶ Under Art. 19(1) second subparagraph, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

²⁷ In her analysis of structural principles of EU external relations law, Cremona points out that these are not 'concerned with the *substantive content* of policy, but rather with *process* and the *relationships* between the actors in those processes, and their normative content reflects this': M Cremona, 'Structural Principles and their Role in EU External Relations Law' in Cremona (ed), n18 above, 3 at 12 (emphasis in the original).

²⁸ See, amongst others, B De Witte and Š Imamovic, 'Opinion 2/13 on accession to the ECHR: defending the EU legal order against a Foreign Human Rights Court', (2015) 40 ELRev 683, S Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare', (2015) 16 German Law Journal 213, and E. Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13', (2015) 22 *Maastricht Journal of European and Comparative Law* 35.

²⁹ See, for instance, M Cartabia and S Ninatti, 'Fundamental rights in the European Court of Justice and the European Court of Human Rights' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Cheltenham: E Elgar Publishing, 2017) 211, S Greer, J.H. Gerards and R Slowe, *Human rights in the Council of Europe and the European Union: achievements, trends and challenges* (Cambridge: Cambridge University Press, 2018), in particular chs 4 and 5.

³⁰ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* EU:C:2008:461.

³¹ See, also, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518 (where the Court annulled, on appeal, the relisting of *Kadi* on the grounds of violation of fundamental human rights by the EU institutions).

human rights protection, the Court also protected the EU legal order against recalcitrant domestic courts which might take it upon themselves to protect domestic human rights systems and, therefore, challenge the supremacy of EU law. After all, the *Kadi* judgment was rendered in the context of widespread and intense criticism of the UN rules and procedures governing the listing regime in question. In the multi-layered constitutional order of the EU, the intrinsic linkages between the internal and external function of autonomy condition the construction of the principle by the Court of Justice.

The fourth theme of the development of the principle is the increasing prominence of domestic courts in the Court's approach. A striking illustration of this theme was provided in Opinion 1/09 where a draft agreement on a unified patent litigation system was found to impinge on the rights of domestic courts to refer issues of EU law to the Court of Justice pursuant to the preliminary reference procedure.³² The loss of these rights was deemed intolerable, given that, along with the Court of Justice, national courts are 'the guardians of [the Union] legal order and [its] judicial system',³³ and that 'the tasks attributed to [them] are indispensable to the preservation of the very nature of the law established by the Treaties'.³⁴ There is no doubt about the central role that EU law places on domestic courts, and the Court of Justice has not shied away from articulating it clearly and forcefully.³⁵ The fervor, however, with which it guards the role of national courts in Opinion 1/09 is not only noteworthy in the light of the Court's manifest eagerness to guard its own jurisdiction from actual or potential intrusions from other international tribunals; it may, in fact, appear somewhat disingenuous, as at no point in the Opinion do we find any analysis of the implications of the draft agreement for the jurisdiction of the Court itself. This lack of reasoning is striking, given the guarantees that the draft Agreement offered for the binding effect of the case-law and the exclusive jurisdiction of the Court of Justice on the interpretation of primary EU law and the validity and interpretation of secondary EU law.³⁶

By teasing out the main themes that underpin the development of autonomy, this Section has highlighted the ambivalent position of the principle in the EU legal order: on the one hand, its prominence has increased and its implications have been profound for the development of EU law and its interactions with international law; on the other hand, its scope has been somewhat nebulous, its limits ill-defined, and its function intrinsically linked to furthering the powers of the Court of Justice. It is against this context that the issue of the definition of autonomy is raised in the specific context of international investment law. This issue was addressed for the first time in Case C-284/16 *Achmea* which will be examined in the following section.

3. Autonomy in the context of investment arbitration: the *Achmea* case

In Case C-284/16 *Achmea*, the Court was asked for the first time directly to rule on the compatibility of intra-EU BITs with EU law. These are investment treaties between Member States which were concluded prior to the accession of one of the contracting parties to the EU (invariably in the 1990s and early 2000s). The case arose from a reference from the

³² Opinion 1/09, n23 above.

³³ *Ibid*, para. 66.

³⁴ *Ibid*, para. 85.

³⁵ Consider, for instance, the oft repeated analysis in Case C-50/00 P *UPA* EU:C:2002:462 of the complete system of remedies and procedures laid down in EU law. See also D Edward, 'National Courts – The Powerhouse of Community Law', (2002-3) 5 *CYELS* 1 and A Rosas, 'The National Judge as EU Judge; Some Constitutional Observations', (2014) 67 *SMU Law Review* 717.

³⁶ See P Koutrakos, 'The Court of Justice as the guardian of national courts – or not?' (2011) 36 *ELRev* 319.

Bundesgerichtshof before which an annulment action had been brought against the final award by an arbitral tribunal constituted under the BIT between The Netherlands and Czechoslovakia.

Consistently with the theme of substantive detachment, mentioned in Section 2 above, this case was not about a substantive incompatibility between the intra-BIT in question and EU law. In fact, no such argument was put forward. This case raised, instead, a broader constitutional question: does the ISDS mechanism provided for in the Agreement³⁷ and pursuant to which the arbitral tribunal rendered its award violate three of the main tenets of EU law, namely the principle of non-discrimination (Article 18 TEU), the preliminary reference procedure (Article 267 TFEU), and the exclusive jurisdiction of the Court of Justice (Article 344 TFEU)?

In its judgment, the Court held that the arbitration procedure laid down in the intra-BIT was contrary both to the preliminary reference procedure and the exclusive jurisdiction of the Court of Justice (it did not examine its compatibility with the principle of non-discrimination).³⁸ This conclusion was reached on the basis of three main considerations. First, as arbitral tribunals take account of domestic law and international treaties between the contracting parties and given that EU law forms part of both these sets of rules, arbitral tribunals may be called on to interpret or apply EU law (including provisions on the freedom of establishment and free movement of capital). Secondly, arbitral tribunals may not refer questions about the interpretation and application of EU law to the Court of Justice because they do not constitute parts of the judicial system of the contracting Member States. Their decisions, therefore, are not subject to the mechanisms that ensure the full effectiveness of EU law. Thirdly, the decisions of arbitral tribunals are not subject to full judicial review by domestic courts which may not, therefore, refer EU law issues pertaining to such decisions to the Court of Justice.

Autonomy constitutes the main thread that underlies the judgment. And yet, the precise content of the principle and its implications for the Union's broader investment policy are not easy to gauge, as the language of the judgment is couched at a high level of abstraction. This sense of abstraction is also borne out by the structure of the judgment: the answer to the questions raised by the referring court is preceded by six paragraphs which set out the main aspects of the specific characteristics, including the principle of autonomy, of the EU legal order. These introductory paragraphs rely heavily on Opinion 2/13 and its statements about the requirement that the EU's judicial system ensure consistency and uniformity in the interpretation of EU law. This section will explore the different aspects of autonomy that emerge from the short but dense judgment in *Achmea*.

3.1. Autonomy and formalism

In its interpretation of autonomy, the judgment in *Achmea* illustrates a most orthodox reading of the orthodoxy of EU law. This is illustrated by the starting point for the judgment: in order to ascertain whether the ISDS mechanism in the intra-EU BIT ensures consistency with EU

³⁷ Art. 8 of the BIT between The Netherlands and Czechoslovakia which provided as follows in para. 6: 'The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

- the law in force of the Contracting Party concerned;
- the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;
- the provisions of special agreements relating to the investment;
- the general principles of international law'.

³⁸ This was examined by AG Wathelet who found no violation: in his view, intra-EU BITs are similar to double taxation treaties which have been viewed by the Court as consistent with EU law (EU:C:2017:699, paras 49-82, with references to Case C-376/03 *D* EU:C:2005:424). This point was not examined by the Court.

law, the question the Court addresses is whether an EU law issue related to the dispute might be brought before an arbitral tribunal. This question, however, is too broad. As such, it enables the Court to construe the reach of the EU legal order and, more to the point, the scope of its own jurisdiction in similarly broad terms. In essence, the judgment may appear to suggest that every time an EU law issue pertains to a dispute before any international tribunal, the autonomy of the EU legal order would be at stake and the Court's exclusive jurisdiction should be triggered.

The implications of such a maximalist position would be striking. In fact, it would be difficult to envisage an international dispute settlement system which would meet this high normative threshold. After all, courts in all legal orders are faced with rules of other legal orders as a matter of course. The highly principled but inflexible approach that emerges from the judgment in *Achmea* is in stark contrast to the nuanced approach of the Arbitral Tribunal itself in *Achmea* which had pointed out the following: '[c]ourts and tribunals throughout the EU interpret and apply EU law daily. What the ECJ has is a monopoly on the final and authoritative interpretation of EU law'.³⁹ And this was not an isolated approach. In *Euram*, for instance,⁴⁰ whilst the Arbitral Tribunal had rejected all the jurisdictional objections put forward by both the Commission and Slovakia about the application of the Austria-Slovakia BIT to Austrian investors, it made it clear that it had no power to determine the validity of an act of an EU institution. In other words, it is not in dispute that, as a matter of law, the jurisdiction of an arbitral tribunal is confined to the interpretation and application of the BITs pursuant to which a dispute was brought before them.

And things are not that different as a matter of practice, either. In his Opinion in *Achmea*, Advocate General Wathelet argued that 'the systemic risk which, according to the Commission, intra-EU BITs represent to the uniformity and effectiveness of EU law is greatly exaggerated'.⁴¹ he referred to UNCTAD's statistics, according to which investors have been successful in only 16.1% of intra-EU BITs arbitral proceedings over several decades;⁴² and he pointed out that in none of these cases were arbitral tribunals required to review the validity of EU measures or the compatibility of domestic measures with EU law.⁴³ Advocate General Wathelet referred to *Micula* as the single case where an arbitral award was viewed as contrary to EU law (and even that case he viewed as irrelevant as EU was not applicable, given that Romania had not acceded to the EU when the arbitration commenced).⁴⁴ Put differently, there is no evidence to suggest that the way that EU law is invoked in the context of ISDS would make arbitral tribunals usurp the function of either the Court of Justice or domestic courts as EU law courts. The position, therefore, that the autonomy of the EU legal order is under threat by how arbitral tribunals approach EU law as part of the law of the contracting parties is based on principle rather than practice.

What follows from the above is a maximalist construction of autonomy which may not tolerate a dispute-settlement system envisaged under an international treaty if it might pertain to the

³⁹ PCA Case No 2008-13, *Eureko B.V v Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension (26 October 2010) para. 282.

⁴⁰ *European American Investment Bank AG v Slovakia*, PCA Case No 2010-17, Award on Jurisdiction (22 October 2012) at para. 263. It also added that 'if a Member State were minded to enforce an arbitral award that would violate EU law, tools remain in the hands of the EU institutions – and particularly the ECJ – to ensure a proper application of EU law' (para. 264)

⁴¹ n37 above, para. 44 of his Opinion, and again in para. 45.

⁴² *Ibid*, para. 44 of the Opinion.

⁴³ *Ibid*, para. 45 of the Opinion.

⁴⁴ *Ibid*, para. 45 and n49 of the Opinion.

interpretation of an EU law issue. In order to ensure compliance with the principle of autonomy, however, a more narrow criterion would have been more appropriate: this should be about whether an arbitral award might bind a Member State to a given interpretation of EU law. Not only would this give rise to a more nuanced picture of the interactions between EU, international, and national law, but it would also bring the principle of autonomy closer to its conceptual origins (it is recalled that this criterion was expressly set out in Opinion 1/00).⁴⁵

3.2. Autonomy and the cloak of protecting domestic courts

Consistently with previous case-law, for instance Opinions 1/00 and 2/13, the judgment in *Achmea* places emphasis on the limited role of domestic courts called upon to deal with an arbitral award. The broad terms in which this is approached are striking. Reference is only made to two factors: the final nature of the award and the freedom of the tribunal to choose its seat and law applicable to the procedure; and the fact that domestic courts may only review the award to the extent that national law permits. There is no discussion at all of the central role of domestic courts in enforcing arbitral awards or their power to condition the enforcement of such awards on the basis of their compatibility with public policy.⁴⁶ And whilst the public policy exception is not provided for in all international investment regimes,⁴⁷ it was not prohibited under the rules pertaining to the enforcement of the arbitral award in *Achmea*.

Instead, the judgment distinguishes between commercial arbitration and arbitration based on an intra-EU BITs. It does so by relying upon Article 19(1) TEU and emphasising the removal by Member States from their own courts of jurisdiction over disputes which may concern the interpretation and application of EU law. In other words, what the Court purports to protect in *Achmea* is the jurisdiction of domestic courts to interpret and apply EU law, as this is deemed to be threatened by the binding nature of arbitral awards; the latter, the judgment suggests, prevents domestic courts from exercising unlimited judicial review and making a reference under Article 267 TFEU. There is some delicious irony in the fact that the Court's concern for the existence of the power of domestic court to refer questions would be expressed in response to a preliminary reference.

By rendering the protection of domestic courts a central tenet of autonomy, the judgment appears to address the view of the principle 'as a rhetorical shield to help to protect the Court's own exclusive jurisdiction'.⁴⁸ And yet, it does not follow that the pivotal position of domestic courts should rule out ISDS under intra-EU BITs. In his Opinion in *Achmea*, Advocate General Wathelet had relied upon the role of domestic courts in enforcing arbitral awards in order to point out how they could, in fact, protect autonomy.⁴⁹ Having pointed out that arbitral awards may only be enforced by domestic courts, he had argued that, in principle, the latter are largely granted leeway under international investment law to rely upon EU law and protect EU rules as a matter of public policy.⁵⁰ His approach, therefore, highlighted a different function for

⁴⁵ N25 above and the accompanying text.

⁴⁶ In Case C-126/97 *Eco Swiss* EU:C:1999:269, it was held that a domestic court could refuse to enforce an arbitral award on public policy grounds, including compliance with the EU's competition and state aids rules. This public policy exception is allowed under international rules governing investment arbitration (see Art. V (2)(b) of the 1958 Convention for the Recognition and Enforcement of Foreign Arbitral Awards).

⁴⁷ See Article Art. 53(1) International Centre for Settlement of Investment Disputes Convention.

⁴⁸ De Witte, *supra* nX at 150.

⁴⁹ N37 above, paras 229 et seq.

⁵⁰ As the ICSID Convention requires that domestic courts view an arbitral award as if it were a judgment by a domestic court of last instance, AG Wathelet suggested that the Member States should avoid the choice of ICSID

domestic courts in the context of autonomy: rather than in need of protection, they were, actually, themselves active guarantors of the principle.

This aspect of the role of domestic courts is illustrated by a recent episode of the *Micula* saga that arose before the English High Court. Having obtained an arbitral award in their favour, the claimants sought to enforce it before, amongst others, English courts. The award was registered in the High Court by means of an Order pursuant to the domestic law implementing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in the UK.⁵¹ The Order was challenged by the Romanian Government, supported by the Commission, on EU law grounds.

In January 2017, the High Court rejected the Romanian appeal but granted a stay of enforcement proceedings pending the resolution by the General Court of the annulment action against the Commission's Decision that had found the enforcement of the award to constitute payment of unlawful state aid.⁵² This decision was based on a distinction between registration and enforcement of the arbitral award: while necessary under domestic law implementing ICSID, registration did not amount to enforcement and could not, therefore, give rise to the risk of a conflict between decisions of domestic and EU institutions. This was not the case with the enforcement of the award, as it hinged on the determination of issues pending before the EU courts. Mr Justice Blair equated the award, following its registration under English law, to a final domestic judgment. As domestic courts are bound by EU law and the duty of cooperation, the High Court

cannot therefore proceed to enforce the judgment consequent on registration of the Award in circumstances in which the Commission has prohibited Romania from making any payment under the Award to the claimants because in doing so, the court would, in effect, be acting unlawfully. This does not (in the court's view) create a conflict with the international obligations of the UK as contained in the 1966 Arbitration Act implementing the ICSID Convention in UK law, because a purely domestic judgment would be subject to the same limitation.⁵³

This approach, which was upheld by the Court of Appeal,⁵⁴ is elegant and distinctly pragmatic: on the one hand, it seeks to comply with EU law and take seriously the obligations under which domestic courts function; on the other hand, it is faithful to the letter of the international commitments assumed by the United Kingdom in the context of ICSID. It follows from the above that domestic courts need not become the cloak for a narrow and inward-looking conception of autonomy of EU law. In fact, they may become a more active participant in safeguarding the essential characteristics of the EU legal order that the principle of autonomy is designed to protect.

3.3. Autonomy and conflict

The principle of autonomy that emerges in *Achmea* may appear to follow from and be entirely consistent with previous case-law. It is, for instance, consistent with the approach articulated in Opinion 2/13, on which the *Achmea* judgment draws heavily. It is articulated, however, in

in their BITs (n38 above, para. 253 of his Opinion). He also pointed out that that point was irrelevant in *Achmea*, as the award had not been rendered pursuant to the ICSID Convention.

⁵¹ Arbitration (International Investment Disputes) Act 1966.

⁵² [2017] EWHC 31 (Comm).

⁵³ *Ibid*, para. 132.

⁵⁴ [2018] EWCA Civ 1801, where the High Court's judgment is viewed as 'careful' and its conclusion as 'both pragmatic and ... principled' (para. 249).

bolder and broader terms. It is noteworthy, for instance, that, whilst the Court considers the violation of autonomy to be based on the violation of Articles 267 and 344 TFEU, the latter is not analysed in the judgment. Instead, autonomy is viewed through the lense of safeguarding the rights of domestic courts. This may be because Article 344 TFEU does not substantiate the broad reading of autonomy put forward in the judgment. After all, this provision refers to Member States only, and, therefore, does not cover actions brought by individuals.⁵⁵ The contrast with the rejection of the draft Agreement on the EU's accession to ECHR is telling: whilst it illustrated as strong and uncompromising a statement of the exclusive jurisdiction of the Court of Justice as one might find in recent case-law, Opinion 2/13 focused on the violations of Article 344 TFEU in the context of actions brought between Member States or by Member States against the EU. Actions brought by individuals, that is the type of actions that pertains to the ISDS system under intra-EU BITs, were not mentioned in Opinion 2/13.⁵⁶ By shifting its focus away from Article 344 TFEU, the judgment in *Achmea* articulates a richer conception of autonomy. And it does so in strikingly abstract terms, all the more so given the distinctly literal interpretation that characterises the recent case-law in other strands of EU external relations, such as treaty-making under Article 218 TFEU.⁵⁷

This point is also illustrated by the contrast with the judgment in *Mox Plant*.⁵⁸ It is recalled that that judgment attracted considerable criticism, especially by international lawyers.⁵⁹ And yet, for all its unnecessarily convoluted reasoning, the judgment reached a conclusion which was both sensible and justified by the specific legal and factual context of the case. After all, recourse to the enforcement proceedings laid down in EU primary law was sanctioned by Article 282 UNCLOS. Given that the case pertained to the interpretation of Article 344 TFEU, the concept of autonomy underpinning the judgment in *Mox Plant* is not as broad as it might appear.⁶⁰

The judgment in *Achmea*, therefore, put forward a richer and broader concept of autonomy than the previous case-law had suggested. Viewed from this angle, autonomy becomes, in essence, about conflict. The main features of the principle as they emerge in the judgment (the low threshold of tolerance for arbitration tribunals dealing with EU law issues, the broad language of the judgment, the purported need of domestic courts to have their EU law role protected in any theoretical set of circumstances) enable the Court to construe the relationship between EU law and international investment law as an antagonistic one. Autonomy is understood in broad and uncompromising terms and compliance with it may not envisage any alternatives for safeguarding the essential features of the EU's legal order. There is no consideration of whether a symbiotic relationship between BITs and EU law might be possible in constitutional and substantive terms. Instead, the Court's reading of autonomy views these two as distinct legal spheres the interactions of which threaten the functioning of the EU legal order.

⁵⁵ This point was also made by the referring court (paras 15-17), as well as AG Wathelet (n38 above, paras 138-159).

⁵⁶ See Opinion 2/13, n24 above, paras 201-214. This point is made by AG Wathelet in his Opinion (n38 above, paras 151-2).

⁵⁷ This theme is developed in P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law' (2019) 68 ICLQ (forthcoming).

⁵⁸ Case C-459/03 *Commission v. Ireland (re: Mox Plant)*, n22 above.

⁵⁹ Koskenniemi considered the judgment 'stunning' and 'squarely on the oldest, and most conservative trajectory of European thinking about the role of international law and its relations with national law': M Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education', (2007) *European Journal of Legal Studies* (www.ejls.eu/1/3UK.pdf).

⁶⁰ See Koutrakos, n1 above, at 184-191.

And yet, the autonomy of EU law need not lead to conflict. An alternative approach to the principle is possible. In his Opinion in *Achmea*, to which the Court did not refer at all, Advocate General Wathelet had argued that the right of investors to rely upon arbitral tribunals in order to enforce intra-EU BITs was in full compliance with EU law. The main thrust of his analysis was two-fold. First, arbitral tribunals established by an intra-EU BITs meet all the requirements necessary for them to be considered courts or tribunals in the meaning of Article 267 TFEU⁶¹ and, as they are common to the two Member States that are parties to the Treaty in question,⁶² they are bound by this provision as far as the application and interpretation of EU law is concerned. Second, the role of arbitral tribunals pursuant to intra-EU BITs does not violate the Court's exclusive jurisdiction under Article 344 TFEU as they are required to respect the principles of EU law, failing which the Member States would be liable in damages⁶³ and subject to enforcement actions by the Commission and other Member States.⁶⁴

Viewed at the time as 'a remarkable defence of ISDS',⁶⁵ the approach adopted by Advocate General Wathelet understands EU law and intra-EU BITs as two distinct legal spheres the interactions of which need not threaten the functioning of either. In developing this approach, his line of reasoning is characterised by a strong realist streak that anchors the Opinion in the practice of arbitral tribunals set up under intra-EU BITs,⁶⁶ as well as the avoidance of grand teleological arguments. Instead, his analysis is firmly based on a literal interpretation of primary law (he refers, for instance, to the wording of Article 344 TFEU and the ensuing irrelevance of this provision to the dispute). This is a different construction of autonomy: it is about the harmonious co-existence between EU and international investment law. At the core of this approach is the idea that the structures and principles laid down in the EU's primary law are sufficiently robust to absorb any tensions that may arise between the two sets of rules, for instance in the context of the preliminary reference procedure and the principle of State liability. Viewed from this angle, whilst understood as two separate legal regimes, ISDS under intra-EU BITs and EU law are connected by a factor that they have in common and that is essential to their functioning, namely domestic courts and their role (examined above in 3.2).

4. What now? Perspectives on the development of the principle of autonomy after *Achmea*

The analysis so far has shed light on the conception of autonomy that emerges from the judgment in *Achmea*. This is a principle that is anchored in a narrow understanding of how EU law relates to international investment law and purports to protect the jurisdiction of domestic courts whilst, in essence, aiming to buttress the role of the Court of Justice. Taken at face value, autonomy may be construed so widely as to render a conflict with international law

⁶¹ The requirements are set out in Case C-54/96 *Dorsch Consult* EU:C:1997:413 para. 23 and reaffirmed ever since (eg Case C-394/11 *Belov* EU:C:2013:48, para. 38).

⁶² See Case C-337/95 *Parfums Christian Dior* EU:C:1997:517 para. 21 where a court established under an international treaty concluded between the BENELUX countries was deemed to be in the same position as courts of tribunals in the meaning of Art. 267 TFEU. AG Wathelet had expressed this view briefly in his Opinion in Case C-567/14, *Genentech* EU:C:2016:177, footnote 34 (considering arbitral tribunals as courts common to a number of Member States for the purposes of Art. 267 TFEU 'could help to ensure the correct and effective implementation of EU law').

⁶³ Case C-224/01 *Köbler* EU:C:2003:513.

⁶⁴ Arts 258 and 259 TFEU.

⁶⁵ A Carta and L. Ankersmit, 'AG Wathelet in C-284/16 *Achmea*: Savind ISDS?' (AG Wathelet in C-284/16 *Achmea*: Saving ISDS? <https://europeanlawblog.eu/tag/ag-wathelet-in-c-28416-achmea/>

⁶⁶ This point is made above in Section 3.1 above.

unavoidable.

The question that is, then, raised is how this principle is going to develop in another context, that is agreements that the EU negotiates with third countries. Legal and policy developments make this a pertinent question. At the time of writing, the request by Belgium for an Opinion on the compatibility with EU law of the arbitration procedure laid down in CETA is pending before the Court of Justice. This has reached the Court in the context of considerable public disquiet about the role of the ISDS in international trade agreements. It was also felt quite strongly in relation to the now moribund Transatlantic Trade and Investment Partnership (TTIP).⁶⁷

In the light of the distinct scepticism, if not outright hostility, by the wider public, the EU has sought to reform the existing ISDS model. It has been doing so both bilaterally and multilaterally. On the one hand, in the agreements that it has negotiated with Canada (CETA), the arbitral tribunal model is replaced with an investment court.⁶⁸ On the other hand, the Union has been pushing for a multilateral investment court the establishment of which the Commission has been authorised to negotiate in the context of the United Nations Commission on International Trade Law (UNCITRAL).⁶⁹

In this politically charged context, does the principle of autonomy rule out the ISDS system set out in agreements negotiated by the EU? The abstract language in which the judgment in *Achmea* is couched may appear to support a reading of autonomy that would render the ISDS system in such agreements inconsistent with EU law. This view, however, should be rejected on a number of grounds.

The first is about the specific legal and policy context with which the dispute in *Achmea* arose. This was about intra-EU BITs, and the judgment places emphasis on the constitutionalised setting within which relations between Member States are regulated under EU law. It is within this setting that it views intra-EU BITs as an attempt by Member States to impinge upon the EU jurisdiction of their domestic courts and establish a parallel system that would bestow special protection to investors. It is due to this specific context that the judgment stresses the principle of mutual trust that binds the Member States.⁷⁰ This principle would have no place in

⁶⁷ From the voluminous literature on the topic, see D. Behn, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art', (2015) 46 *Georgetown Journal of International Law* 363, S.D. Franck, 'The legitimacy crisis in investment treaty arbitration: Privatizing public international law through inconsistent decisions' (2005) 73 *Fordham Law Review* 1521, J. E. Kalicki and A. Joubin-Bret (eds), *Reshaping the Investor-State Dispute Settlement System – Journeys for the 21st Century* (Leiden: Brill Nijhoff, 2015), A. Kaushal, 'How the Past Matters for the Present Backlash against the Foreign Investment Regime', (2009) 50 *Harvard International Law Journal* 491, A. Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (CUP, 2016), J. Maupin, 'Transparency in international investment law: the good, the bad, and the murky' in A. Bianchi and A. Peters (eds), *Transparency in International Law* (Cambridge: CUP, 2013) 142, A. von Staden, 'The democratic legitimacy of judicial review beyond the state: Normative subsidiarity and judicial standards of review' (2012) 10 *International Journal of Constitutional Law* 1023, M. Waibel, A. Kaushal, K.-H. Chung, and C. Balchin (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (The Hague: Kluwer, 2010).

⁶⁸ The idea of a self-standing court with jurisdiction pursuant to a bilateral trade agreement was first raised by the EU in the context of TTIP: European Commission, Concept Paper: Investment in TTIP and beyond – the path for reform: Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court (Brussels, 12 November 2015).

⁶⁹ The negotiating directives are set out here: <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

⁷⁰ Case C-284/16 *Achmea*, n4 above, paras 34 and 58

the set of rules and procedures set out in an agreement between the EU and a third country. As it happens, the judgment itself seeks to distinguish between such agreements and intra-EU agreements in its final paragraph where it mentions, again, the principle of mutual trust.⁷¹ In the light of the above, the richer concept of autonomy that is articulated in *Achmea* may be confined to the specific legal and policy context from which it emerged.

The second reason that militates against the extension of the *Achmea* judgment to other international agreements is about these agreements themselves. The increasingly robust construction of the principle of autonomy is not lost on the Union's decision-makers. Consider, for instance, CETA which will provide the first test for the implications of *Achmea* beyond the intra-EU context. The Agreement contains a domestic law clause that is laid down in Article 8.31(2) and reads as follows:

The 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 the disputing Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing 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.

This clause seeks to make it clear that the Investment Tribunal established under CETA would not bind either the EU institutions or the Member States to any meaning it may give to domestic law. The Agreement also provides the Appellate Tribunal with jurisdiction to uphold, modify or reverse a Tribunal's award based on 'manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law'.⁷² This local law clause illustrates an effort by its drafters to address the concerns of the Union's judiciary about the implications of dispute settlement for the autonomy of EU law.

Third, a narrow reading of *Achmea* would introduce some conceptual clarity about the hitherto ill-defined scope of the principle of autonomy. It would do so by anchoring the principle more firmly in its original conception as a mechanism which would either preserve the essential character of the powers of the EU and its institutions or ensure that the EU and its institutions would not be bound to a particular interpretation of EU law in the exercise of their internal powers.⁷³ This interpretation would restore the protective function of the principle, which was apparent in the earlier case-law, whilst avoiding the maximalist overtones of the more recent rulings on autonomy, in particular Opinion 2/13.⁷⁴

It would also provide a welcome riposte to the criticism against the Court's alleged 'worrisome' attitude to international law which 'aspire[s] to build a fence around EU law'.⁷⁵ This criticism has been levelled with increasing regularity and in relation to different aspects of the interactions between EU and international law, including the effect of United Nations Security Council Resolutions in the EU legal order,⁷⁶ the adoption of legislation of extra-territorial

⁷¹ *Ibid*, para. 58.

⁷² Art. 8.28(2)(b) CETA.

⁷³ See Opinion 1/91, n17 above, paras 61-5, Opinion 1/92, EU:C:1992:189 paras 32 and 41, and Opinion 1/00, n19 above, paras 12-3, and the analysis above in 3.1.

⁷⁴ See the criticism of this Opinion in the contribution by B De Witte in this issue.

⁷⁵ J Klabbers, *Treaty Conflict and the European Union* (Cambridge: Cambridge University Press, 2009) 148.

⁷⁶ This is based on the case-law following Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat International Foundations* EU:C:2008:461. See the criticism in, amongst others, G de Búrca, 'The ECJ and the international legal order: a re-evaluation' in G de Búrca and J.H.H. Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge: CUP, 2012) 105 and J Klabbers, 'Volkerrechtsfreundlich? International Law and

scope,⁷⁷ and the direct effect of international agreements concluded by the EU.⁷⁸ It is beyond the scope of this article to address this criticism.⁷⁹ For the purposes of this analysis, suffice it to point out that, as criteria for assessing the relationship between EU and international law, the above differ substantially from autonomy: they refer to specific instances of this relationship which have to do with either the enforcement of international law in the EU legal order or the reach of specific EU legislation to third parties. Autonomy, however, is about much more than that: it is about the very co-existence of EU and international law and the fundamental basis on which these two sets of rules interact. Its function is, in other words, systemic. If, therefore, construed as broadly as a particular reading of *Achmea* might suggest, and extended beyond the narrow context of intra-EU agreements, the principle of autonomy may well reflect the EU legal order at its most insecure and inward-looking. This would be both unfair and damaging: on the one hand, it would not do justice to the openness towards international law that characterises a considerable part of the case-law of the Court of Justice;⁸⁰ on the other hand, it would fail to interact creatively with other legal systems and to show comity in the functioning of a dynamic and multi-layered international legal order.⁸¹

Finally, confining the broad reading of the principle of autonomy that emerges from *Achmea* to the narrow legal and policy context of this case would reflect the pragmatism that prevails in other strands of the law that governs the interactions between EU and international investment law. A case in point is the status of BITs concluded by Member States with third countries (extra-BITs). The legal position of these agreements became controversial after foreign direct investment had become part of the CCP pursuant to the Lisbon Treaty. As the EU had been endowed with express external competence in the area, and given the exclusive nature of this competence,⁸² the power of the Member States to retain investment agreements appeared to be incompatible with EU law. This was not an insignificant matter, given that approximately 1400 agreements concluded by Member States were in force.

And yet, the EU did not demand that such agreements be revoked. Instead, it introduced a set of transitional arrangements which brought the management and amendment of the BITs that the Member States had concluded within the scope of EU law. Adopted in 2012, Regulation 1219/2012 (the Grandfathering Regulation) provides for the maintenance in force and amendment of existing, as well as the negotiation and conclusion of new, BITs under certain

the Union Legal Order' in P Koutrakos (ed.), *European Foreign Policy – Legal and Political Perspectives* (Cheltenham: E Elgar Publishing, 2011) 95.

⁷⁷ See Case C-366/10 *ATAA* EU:C:2011:864 on extending EU's greenhouse gas emission scheme to international aviation. See A Gattini, 'Between Splendid Isolation and Tentative Imperialism: the EU's Extension of its Emission Trading Scheme to International Aviation and the ECJ's Judgment in the *ATAA* case', (2012) 61 ICLQ 977. For another view, see E Denza, 'International Aviation and the EU Carbon Trading Scheme: Comment on the *Air Transport Association of America* Case', (2012) 37 ELRev 314 and J Scott and L Rajamani, 'EU Climate Change Unilateralism', (2012) 23 EJIL 469.

⁷⁸ See the analysis by C Kaddous in this issue. See also M Mendez, *The Legal Effect of Community Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques* (Oxford: OUP, 2010) and A Rosas, 'The Status in EU Law of Agreements Concluded by Member States', 34 *Fordham Int Law J* (2011) 1304.

⁷⁹ See P Koutrakos, n1 above at chs 6 and 8.

⁸⁰ In this vein, see E Denza, 'Placing the European Union in International Context: Legitimacy of the Case Law' in M Adams, H De Waele, J Meussen and G Straetmans (eds), *Judging Europe's judges* (Oxford: Hart Publishing, 2013) 175.

⁸¹ See, for instance, also A Skordas, 'Völkerrechtsfreundlichkeit as Comity and the Disquiet of Neoformalism: A Response to Jan Klabbers' in P Koutrakos (ed.), *European Foreign Policy – Legal and Political Perspectives* (Cheltenham: E Elgar Publishing, 2011) 115.

⁸² Art. 3(1)(e) TFEU.

conditions.⁸³ It establishes a procedural framework at the centre of which is the Commission itself. The latter may authorise and, if so, be involved actively in, the negotiation or amendment of existing BITs by the Member States. The Grandfathering Regulation is, therefore, an example of the Member States being empowered to exercise powers that primary law is deemed to have conferred on the Union.⁸⁴ This regulatory solution was adopted for an eminently sensible practical reason: the determination of investment policy may not come about on the basis of a single policy measure. It requires a careful weighing of various economic, policy, and political considerations and entails a long and complex process which involves a range of different actors. In other words, the entry into force of the Lisbon Treaty on 1 December 2009 and the endowment of the Union with exclusive competence in certain areas of foreign investment by no means gave rise to a Union investment policy. Practical exigencies, therefore, would have rendered the possibility of a Member State revoking parts of its BITs in the light of the Union's exclusive competence and in anticipation of a Union approach inconceivable. Investors could not be left in a vacuum, as legal uncertainty would undermine investor confidence.

The above example of dealing with extra-EU BITs illustrates the pragmatism that may govern the Union's approach to the interactions between international investment and EU law.⁸⁵ This pragmatism aims to preserve the integrity of the EU legal order whilst managing the harmonious coexistence between EU and international law. This section has suggested that the Court of Justice could do a lot worse than draw on this approach when it defines the scope of autonomy in the context of trade agreements concluded by the EU. It has also argued that the judgment in *Achmea* may well be read in that light.

5. Conclusion

Whilst a foundation principle of EU law, autonomy continues to puzzle scholars, practitioners and decision-makers as to its scope and implications. It is a testament to the constantly evolving and flexible nature of the EU legal order that more than sixty years since the establishment of the EEC, such a principle would still be looking for its definition.

This article has approached this issue in the area of international investment law. It has criticized the concept of autonomy that emerges from the judgment in *Achmea* for its formalism, the potentially open-ended scope of the principle it articulated, and the conflictual relationship with international law that it envisaged. This construction of autonomy, however, need not be extended to other strands of investment law, in particular in relation to agreements concluded by the EU with third countries. It should be confined, instead, to the specific legal context of intra-EU agreements. The article has argued for a more streamlined definition of autonomy which would be conducive to the symbiotic relationship between EU and

⁸³ Reg. 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40.

⁸⁴ This is not in itself novel: see, for instance, Case C-45/07 *Commission v Greece (re: IMO)* EU:C:2009:81 and Opinion 1/13 (re: Hague Convention on the Civil Aspects of the International Child Abduction) EU:C:2014:2303. See M Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union' in A Arnall, C Barnard, M Dougan, E Spaventa (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011) 435 and Koutrakos, n1 above, 196-200.

⁸⁵ This theme is explored in P Koutrakos, 'Managing interlegality: conceptualizing the EU's interactions with international investment law' in J Klabbbers and G Palombella (eds), *Interlegality* (Cambridge: Cambridge University Press, 2019) (forthcoming).

international investment law. Such an approach would reflect the specific context within which *Achmea* was rendered. It would also be consistent with the conceptual origins of the principle and coherent with the pragmatism that prevails in the Union's regulation of other aspects of its international investment policy.