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# The anatomy of autonomy: themes and perspectives on an elusive principle

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## 1 Introduction

Few EU law principles have attracted as much attention in the last few years from such diverse audiences as that of autonomy. International and EU lawyers, constitutional and trade specialists, scholars and practitioners, decision-makers and the civil society have all been exercised by the implications that the principle of autonomy has in areas that range from the protection of fundamental human rights to investment arbitration.<sup>2</sup>

This paper aims to reflect on the scope and legal implications of autonomy in two ways. First, it will step back and tease out four themes that emerge from the origins and development of the principle. It will, then, look forward by identifying three perspectives which are central not only to the position of the principle in the light of the recent Opinion 1/17 on the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada,<sup>3</sup> but also to its further evolution as a significant part of the fabric of the EU's constitutional order.

## 2 Looking back: four themes on the origins and development of autonomy

### 2.1 First theme: judicial origin

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

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<sup>2</sup> From the increasingly voluminous literature, 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, P Koutrakos, 'The Autonomy of EU law and International Investment Arbitration (2019) 88 Nordic Journal of International Law 41, 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.

<sup>3</sup> EU:C:2019:341.

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”<sup>4</sup> 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”.<sup>5</sup>

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 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”.<sup>6</sup>

## 2.2 Second theme: internal and external dimensions

It was the above notion of the Union legal order as a new and distinct part of international law that gave rise to the process of constitutionalisation which led gradually and inexorably to the constitutional maturity and complexity of the current EU legal order.<sup>7</sup> 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,<sup>8</sup> these principles include the liability of national authorities for a violation of EU law,<sup>9</sup> the gradual transformation of national courts into EU courts,<sup>10</sup> and the reliance upon general principles and fundamental human rights as a matter of EU law against both EU and national measures.

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<sup>4</sup> Case 26/62, *Van Gend en Loos*, EU:C:1963:1.

<sup>5</sup> Case 6/64, *Costa v. ENEL*, EU:C:1964:66.

<sup>6</sup> *ibid.*

<sup>7</sup> 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).

<sup>8</sup> See A. Dashwood, ‘From Van Duyn to Mangold via Marshall: Reducing Direct Effect to Absurdity?’, *CYELS*, 9 (2006-2007), 81.

<sup>9</sup> See M. Dougan, ‘The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts’ in G De Búrca and P Craig (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2nd ed., 2011) 407.

<sup>10</sup> See A. Arnall, ‘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.

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.<sup>11</sup> 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”.<sup>12</sup> 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.

The internal and external functions of autonomy are not easy to distinguish, either in conceptual or in policy terms. The EU’s judges render their judgment with an eye to national courts and, for instance in the *Kadi* cases,<sup>13</sup> in full awareness of the potential role that national judges might be called upon to assume if judicial review in Luxembourg were viewed as deficient. In other words, by protecting the EU legal order against international rules that threatened the Union’s system of 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.

## 2.3 Third theme: ambiguity

There is considerable ambiguity, if not vagueness, 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”.<sup>14</sup> This statement is open-ended and, given the judicial origins of the principle it purports to define, may only mean what the Court tells us it means on the basis of concrete cases about the compatibility with EU law of specific international treaties.

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<sup>11</sup> See G. De Búrca, ‘The Evolution of EU Human Rights Law’ in De Búrca and Craig (eds.), op. cit. 465.

<sup>12</sup> Opinion 1/91, EU:C:1991:49, para. 35.

<sup>13</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi*, EU:C:2008:461.

<sup>14</sup> Opinion 1/00 (European Common Aviation Area), EU:C:2002:231, para 12.

This theme is underlined by the *Achmea* judgment<sup>15</sup> the line of reasoning of which is lacking in clarity. Whilst, for instance, 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.<sup>16</sup> This lack of clarity is compounded by the high level of abstraction in which the language of the judgment is couched. This makes it difficult to gauge the precise content of the principle of autonomy and its implications for the Union's broader investment policy. The abstract language of the judgment is all the more striking 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.<sup>17</sup> As such, it may whet the appetite for a wide construction of autonomy.

On the other hand, there are also elements in the judgment that may suggest a more narrow understanding of what autonomy is about, confining the judgment to the specific context of the case. After all, this was not just about an intra-EU BIT, but one whose jurisdiction clause in relation to the arbitration tribunal established thereunder was unusually broad in its scope. It is in this context that the reference to the principle of mutual trust must be understood,<sup>18</sup> a point clarified in the more recent Opinion 1/17.<sup>19</sup>

The ambiguity that underpins the articulation of autonomy is not confined to the case-law on investment arbitration. A case in point is the judgment in *Mox Plant*<sup>20</sup> which has attracted considerable criticism, especially by international lawyers.<sup>21</sup> Again, one would have to go past the unnecessarily convoluted reasoning of the judgment in order to consider its eminently sensible conclusion in the light of 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.<sup>22</sup>

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<sup>15</sup> Case C-284/16, *Achmea*, EU:C:2018:158.

<sup>16</sup> This point was also made by the referring court (paras 15-17), as well as AG Wathelet (paras 138-159).

<sup>17</sup> This theme is developed in P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law' (2019) 68 ICLQ 1-33.

<sup>18</sup> Case C-284/16, *Achmea*, op cit, para. 58.

<sup>19</sup> Opinion 1/17, op cit, paras 126-9.

<sup>20</sup> Case C-459/03, *Commission v. Ireland (re: Mox Plant)*, EU:C:2006:345.

<sup>21</sup> 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](http://www.ejls.eu/1/3UK.pdf)).

<sup>22</sup> See Koutrakos, EU International Relations Law 2nd ed (Oxford: Hart Publishing: 2015), at 184-191.

## 2.4 Fourth theme: autonomy is about power

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”.<sup>23</sup> 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,<sup>24</sup> 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”.<sup>25</sup> In Opinion 1/09, the establishment of a European and Community Patents Court was viewed as contrary to the right of national courts to refer questions about EU patent law to the Court of Justice.<sup>26</sup> 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.<sup>27</sup>

What follows from the above is a rather narrow, Court-centred approach to the definition and implications of autonomy. A striking illustration of this theme was provided 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 line of reasoning underpinning the Opinion had nothing to do in fact with the protection of fundamental human rights.<sup>28</sup> It was, instead, about the institutional and procedural arrangements negotiated carefully—and not without some 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. This approach led to the co-operation with the European Court of Human Rights being treated suspiciously, even though the relationship between the two courts had been deeply symbiotic.<sup>29</sup>

It has not, however, always been thus. The earlier case-law 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, for instance, it was pointed out that, in accordance with autonomy, “the procedures for ensuring uniform interpretation of the rules of the [envisaged] Agreement and for resolving disputes will not have the

<sup>23</sup> 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.

<sup>24</sup> Opinion 1/91, *op cit*, paras 39-40.

<sup>25</sup> Case C-459/03, *Commission v. Ireland (re: Mox Plant)*, *op cit*, para. 154.

<sup>26</sup> Opinion 1/09, EU:C:2011:123.

<sup>27</sup> Opinion 2/13, EU:C:2014:2454.

<sup>28</sup> See, amongst others, B De Witte, ‘The Relative Autonomy of the European Union’s Fundamental Rights Regime’, (2019) 88 *Nordic Journal of International Law* 65-85.

<sup>29</sup> 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.

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 ....”<sup>30</sup> This illustrates 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. This definition also includes domestic courts, in so far as they act as EU courts,<sup>31</sup> a point to which this analysis will return below.

It follows from the above that not only are the scope of autonomy somewhat nebulous and its limits ill-defined, but its function has also been intrinsically linked to furthering the powers of the Court of Justice. In other words, autonomy is, really, about power – what this power would cover, however, which actor would be endowed with it, and under which conditions is a matter left entirely for the Court of Justice to determine.

### 3 Looking forward: three perspectives on the future of autonomy

The analysis so far was about teasing out themes that emerge from the genesis and development of the principle of autonomy. The remaining of this paper focuses on the recent case-law on the principle, in particular Opinion 1/17, and identifies three perspectives that may shape the future of the principle. In doing so, the analysis draws on the theme of this book, that is building bridges, and explains how these perspectives are about bridges, either building or ignoring them.

#### 3.1 First perspective: pragmatism

The more recent approach to autonomy by the Court of Justice emerges from Opinion 1/17. This is underpinned by a distinctly pragmatic streak which is illustrated in different ways. These may be classified as principled, policy, and procedural pragmatism.

First, principled pragmatism is about openness to the role of other international tribunals. Opinion 1/17 starts off by acknowledging that, in principle, an agreement concluded by the EU may confer jurisdiction to interpret its provisions on a new court whose decisions may be binding on the EU.<sup>32</sup> This in itself is hardly surprising, as the Court of Justice had made this point on a number of occasions in the past,<sup>33</sup> only to show distinct reluctance to accept it as a matter of principle. In Opinion 1/17,

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<sup>30</sup> Opinion 1/00, *op cit*, para 13.

<sup>31</sup> Under Art. 19(1) second subparagraph, ‘Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’.

<sup>32</sup> Opinion 1/17, *op cit*, para. 106.

<sup>33</sup> Opinion 1/91, EU:C:1991:490, paras 40 and 70; Opinion 1/09, EU:C:2011:123, paras 74 and 76; Opinion 2/13, EU:C:2014:2454, paras 182-3.

however, a different approach emerges. Having repeated this point of principle at the outset, the Court of Justice opines that the jurisdiction of the EU and domestic courts to interpret international agreements concluded by the EU does not take precedence over either the jurisdiction of the courts of the Union's interlocutors or that of the international courts established under such agreements.<sup>34</sup> It is in this context that reference is made to the "reciprocal nature of international agreements".<sup>35</sup> This emphasis on the role of non-EU courts is also apparent in other parts of the Opinion, where it is considered "consistent" with the nature of the CETA Tribunal beyond the EU legal system that there should be no mechanism for its interactions with the Court of Justice<sup>36</sup> or for review of its decisions by the latter.<sup>37</sup>

Second, there is also policy pragmatism in Opinion 1/17 that is illustrated by the firm acknowledgment of the powers of the Union's institutions. In recognising the powers of other, non-EU, courts to interpret agreements concluded by the EU, the Court refers expressly to "the need to maintain the powers of the Union in international relations".<sup>38</sup> This point of emphasis is noteworthy, especially given the ongoing effort of the EU to reform the traditional Investor-State Dispute Settlement System and replace it, ultimately, with a Multilateral Investment Court.<sup>39</sup> Given the ongoing negotiations under the auspices of UNCITRAL,<sup>40</sup> the reference in the Opinion to "the need to maintain the powers of the Union in international relations" is a reminder of the intense policy context within which the CETA Opinion was rendered: it would have been a truly brave choice for the Union's judiciary to make the Union's executive and legislature unravel their policy on this matter.

This policy pragmatism is all the more noticeable in the light of the formalist streak that underpinned the judgment in *Achmea* only a year earlier. That judgment illustrated a most orthodox reading of the orthodoxy of EU law. This emerged from the outset, as the question the Court set out to address in order to ascertain whether the ISDS mechanism in the intra-EU BIT ensures consistency with EU law was 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 enabled 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, if taken literally, the judgment in *Achmea* 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

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<sup>34</sup> Opinion 1/17, op cit, para. 116.

<sup>35</sup> Opinion 1/17, op cit, para. 117.

<sup>36</sup> Opinion 1/17, op cit, para. 134.

<sup>37</sup> Opinion 1/17, op cit, para. 135.

<sup>38</sup> Opinion 1/17, op cit, para. 117.

<sup>39</sup> See 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.

<sup>40</sup> The negotiating directives are available here: <http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>.

high normative threshold. After all, courts in all legal orders are faced with rules of other legal orders as a matter of course.<sup>41</sup> In *Achmea*, therefore, autonomy had been construed broadly and in uncompromising terms, it had been about conflict and viewed the relationship between EU law and international investment law as an antagonistic one. It was against that background that the policy pragmatism that emerges from Opinion 1/17 is all the more noteworthy.

Third, there is also procedural pragmatism in Opinion 1/17 and is about the Court's approach to the procedural constraints that are imposed on the jurisdiction of the non-EU tribunal under the treaty concluded by the EU. The Court of Justice held that the principle of autonomy was complied with, as the jurisdiction of the CETA Tribunal would be confined to the provisions of CETA itself<sup>42</sup> and would be exercised in accordance not with EU law but with international law applicable to the parties. Viewed against the prior case-law on autonomy, the jurisdiction of the CETA Tribunal would be narrow: it would not extend to the interpretation and application of EU law, as had been the case in Opinion 1/91;<sup>43</sup> it would not trigger the principle of mutual trust, given that it would not pertain to relations between Member states, as had been the case in *Achmea*;<sup>44</sup> and it would not extend to the determination of responsibility as between the EU and/or a Member State in actions brought before the Tribunal,<sup>45</sup> hence meeting the requirement set out in Opinion 2/13.<sup>46</sup>

The line of reasoning that underpins this procedural pragmatism is convincing. After all, the CETA Agreement contains various provisions which are emphatic in their objective to define the jurisdiction of the CETA Tribunal as narrowly as possible. In particular, these provisions read as if the drafters of CETA took utmost care to avoid any inferences that EU law, rather than CETA itself, would be interpreted in a binding manner by the CETA Tribunal. They were, therefore, in striking contrast to the broad scope of the jurisdiction clause in Article 8(6) of the Netherlands-Slovakia BIT in *Achmea*.

And yet, as it emerges from Opinion 1/17, pragmatism is not merely a question of treaty guarantees. There is also a leap of faith that characterises the Court's approach and that is absent in previous case-law. A case in point is the approach to the power of the CETA Tribunal "to consider ... the domestic law of the disputing party as a matter of fact" under Article 8.31.2 CETA. This provision is viewed as consistent with the powers of the EU Courts, as it would not give rise to an interpretation of EU law by the Tribunal: whilst the examination by the latter "may, on occasion, require that the domestic law of the respondent Party be taken into

<sup>41</sup> The Court's approach was in stark contrast both to the more pragmatic Opinion by AG Wathelet (EU:C:2017:699), as well as the nuanced approach of the Arbitral Tribunal itself in *Achmea* which had pointed out that '[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' (PCA Case No 2008-13, *Eureko B.V v Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension* (26 October 2010) para. 282.

<sup>42</sup> Art. 8.3.1. CETA.

<sup>43</sup> EU:C:2011:123. The point was made in Opinion 1/17 in paras 123-5, as well as in para. 133 regarding the Appellate Tribunal.

<sup>44</sup> Opinion 1/17, op cit, paras 126-9.

<sup>45</sup> Art. 8.21 CETA.

<sup>46</sup> Opinion 1/17, op cit, para. 132.

account”, “that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law”, as it would only be as a matter of fact in cases where the Tribunal would be bound to follow the interpretation of EU law given by the EU authorities, whilst, in any case, the latter would not be bound by the Tribunal’s own interpretation.<sup>47</sup> This approach differs from the formalist scepticism that permeated prior case-law. In Opinion 2/13, for instance, the Court had objected to the co-respondent mechanism because it would only be granted an opportunity to rule subject to an assessment by the ECtHR that there had been no CJEU case-law on the matter. This somewhat innocuous provision had been viewed by the Court of Justice as tantamount to conferring on the Strasbourg Court jurisdiction to interpret the CJEU’s case-law.<sup>48</sup>

Viewed together, the principled, policy, and procedural strands of pragmatism examined in this section illustrate an approach that is more understanding of and conciliatory towards the different ways in which non-EU courts may deal with EU-related issues. It is in this vein that the leap of faith mentioned above must be understood. It is noteworthy, for instance, that this leap of faith is not confined to the Court’s approach to autonomy in Opinion 1/17, but also to equal treatment under Article 20 of the Charter.<sup>49</sup> It appears, therefore, that Opinion 1/17 suggests a shift of focus towards how best to ensure that the EU’s own power to interpret authoritatively EU law may be affected by the parallel jurisdiction of non-EU courts in interlocking proceedings. Even though the legal context in *Achmea* was different, had this been the focus of that judgment, the ambiguity raised by the Court’s opaque line of reasoning would have been avoided.

## 3.2 Second perspective: substantive constraints

In Opinion 1/17, the Court articulated a substantive constraint on the implications of autonomy: the CETA tribunal would have no jurisdiction to call into question the level of protection that the EU institutions choose about the Union’s fundamental interests, such as public security, public morals, to maintain public order, to protect human, animal or plant life of health. This conclusion was reached on the basis of three interrelated considerations. First, the CETA Tribunal may only rule on a specific restriction and on the situation of a specific investor, not generally about how the EU regulates the internal market.<sup>50</sup> Second, CETA includes both general and investment-specific provisions that would prevent the parties from encroaching on substantive policy choices made by the parties.<sup>51</sup> Third, the jurisdiction of the CETA Tribunal is circumscribed by Article 8.10.2 CETA which lists exhaustively the

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<sup>47</sup> Opinion 1/17, op cit, para. 131.

<sup>48</sup> Opinion 2/13, op cit, paras 236-245.

<sup>49</sup> See Opinion 1/17, op cit, paras 185-6.

<sup>50</sup> Opinion 1/17, op cit, para. 148.

<sup>51</sup> The general provision is set out in Art. 28.3.2 CETA, whereas the investment-specific assurances are set out in Articles 8.9.1 and 8.9.2, as well as Points 1(d) and 2 of the Joint Interpretative Statement, and Point 3 of Annex 8-A to CETA.

situations in which the fair and equitable treatment obligation may be viewed to have been violated.<sup>52</sup>

The articulation of this substantive dimension of the principle of autonomy is noteworthy, as it illustrates a break from a body of case-law that had focused on the procedural aspects of the principle. A glaring illustration of that trend was provided by Opinion 2/13 which, whilst ostensibly about the EU's accession to the ECHR, was all about the scope and intensity of the jurisdiction of the Court of Justice. In fact, Opinion 1/17 is only the second ruling on autonomy that construes the principle in substantive terms.<sup>53</sup>

There is also another aspect of autonomy that is novel, namely the emphasis in Opinion 1/17 not only on the requirement to preserve the powers of the EU's institutions to protect the public interest as they see fit, but also on the democratic process that pertains to such choices. There are four references in the Opinion to the democratic process that underpins decision-making by the EU.<sup>54</sup> These draw on the Joint Interpretative Instrument the preamble of which provides as follows: "The European Union and its Member States and Canada will therefore continue to have the ability to achieve the legitimate public policy objectives that their democratic institutions set, such as public health, social services, public education, safety, environment, public morals, privacy and data protection and the promotion and protection of cultural diversity".<sup>55</sup>

The emphasis on democratic process may shed some light on the function of the substantive constraint that Opinion 1/17 appears to articulate. After all, the Joint Interpretative Instrument was adopted in October 2016 following the challenge to the process of ratification of CETA that the Walloon Parliament had raised. The purpose of the Instrument was to assuage concerns about the allegedly pernicious impact of the CETA dispute settlement mechanism on policy-making in the EU. There is, in other words, a deeply political context within which the very function of CETA had become deeply contested. It also worth recalling, in this vein, that, in its request for an Opinion under Article 218(11) TFEU, Belgium had asked specifically whether the CETA Tribunal might, in effect, undermine the exclusive jurisdiction of the Court of Justice by interpreting the terms 'fair and equitable treatment', indirect expropriation, or unjustified restriction on the freedom to make a payment<sup>56</sup> in a manner that would overrule EU measures adopted in order to protect public interests pursuant to primary EU law. Viewed from this angle, the substantive policy layer that Opinion 1/17 introduces provides a response to the deeply politicised context within which the Court was asked to rule on the compatibility of CETA with EU law. It is a nod to the increasingly vocal concerns about the impact of the EU's trade deals, and the distinct scepticism, if not outright hostility, in Member States and parts of civil society.

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<sup>52</sup> Opinion 1/17, paras 158-9.

<sup>53</sup> The first was in Joined Cases C-402/05 P and C-415/05 P, *Kadi*, EU:C:2008:461 which was rendered in the context of the protection of fundamental human rights as a core principle of the Union's constitutional order.

<sup>54</sup> Opinion 1/17, op cit, paras 151, 156, 159, and 160.

<sup>55</sup> Point 1(d).

<sup>56</sup> Arts 8.10, 8.12 and 8.13 CETA respectively.

It also illustrates an astute effort to address the potentially destabilising implications of the ensuing public disquiet for the ratification process.

While the contested position of CETA may explain the introduction of the substantive aspect of autonomy in Opinion 1/17, it does not illuminate its legal implications. The part of the Opinion dealing with this issue lacks the clarity that we find in the earlier parts about autonomy. Instead, in its references to democratic process and the policy choices of the EU's institutions, the Court appears to oscillate between the circumscribed jurisdiction of the CETA Tribunal and the regulatory autonomy of the CETA parties. Its line of reasoning, however, raises questions about the scope of the requirement that the Opinion articulates, the threshold it would introduce, and its implications for the jurisdiction of international tribunals established under treaties concluded by the EU. While quite context-specific in Opinion 1/17, it is not clear whether it may open the door to expanding further what the principle of autonomy is about.

### 3.3 Third perspective: the role of domestic courts

Domestic courts have played an increasingly prominent role in the development of the principle of autonomy. In Opinion 1/09, the Court concluded that the draft Agreement on the European and Community Patents Court, drawn up in the context of the European Patent Convention, was not consistent with the principle, as it would undermine the rights of domestic courts to refer questions about the interpretation of EU law to the Court of Justice.<sup>57</sup> The pivotal role of domestic courts for the EU's system of judicial review was also stressed in Opinion 2/13<sup>58</sup> and the judgment in *Achmea*. Their prominence in the context of autonomy aims to strengthen the powers with which they are endowed under EU law. In *Achmea*, for instance, what was central to the Court's conclusion was the impact of the intra-EU BIT on the binding jurisdiction of domestic courts, namely to deprive them of the power to exercise full judicial review under Article 267 TFEU.

The other side of the coin, however, is the protection of the jurisdiction of the Court itself. After all, so intertwined is the function of domestic courts and the Court of Justice in the EU's judicial system that safeguarding the jurisdiction of the latter entails the protection of the former. The emphasis on the role of the domestic courts makes the principle of autonomy appear less self-referential than it is and aims to address the view that autonomy amounts to 'a rhetorical shield to help to protect the Court's own exclusive jurisdiction'.<sup>59</sup> Put differently, the more it focuses on domestic courts, the less autonomy may appear to be about the Court itself.

While this view may come across as somewhat cynical, it is supported by the line of reasoning we find in the case-law which is, at times, broad-brush and far from

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<sup>57</sup> Opinion 1/09, op cit, paras 80-89.

<sup>58</sup> Opinion 2/13, EU:C:2014:2454, paras 175-6.

<sup>59</sup> B. de Witte, 'European Union Law: How Autonomous is its Legal Order?' 65 *Zeitschrift für öffentliches Recht* (2010) 141, at 150.

convincing. There is, for instance, some delicious irony in the fact that the Court's concern in *Achmea* for protecting the power of the domestic court to refer would be expressed in response to a preliminary reference. In fact, the broad terms in which the role of domestic courts was approached in that judgment is striking. Reference was 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 was no discussion 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.<sup>60</sup> And whilst the public policy exception is not provided for in all international investment regimes,<sup>61</sup> it was not prohibited under the rules pertaining to the enforcement of the arbitral award in *Achmea*.

In the light of the above, there is a somewhat paternalistic streak in how domestic courts are approached within the context of the principle of autonomy. The rhetoric is about their significance in the EU's judicial architecture, but, in fact, they are not entrusted with protecting autonomy themselves. This approach is in contrast with a more liberal view of the position of domestic courts. In his Opinion in *Achmea*, Advocate General Wathelet had relied upon the role of the latter in enforcing arbitral awards in order to point out how they could, in fact, protect autonomy.<sup>62</sup> 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.<sup>63</sup> His approach, therefore, highlighted a different function for domestic courts in the context of autonomy: rather than in need of protection, they were, actually, themselves active guarantors of the principle.

The judgment in *Achmea* made no reference to the Opinion of Advocate General Wathelet. And yet, there is a lot to suggest that a more trusting approach to domestic courts would be warranted. This is borne out by the ongoing episode of the Micula saga that has been playing out before English courts. 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

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<sup>60</sup> 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).

<sup>61</sup> See Article 53(1) International Centre for Settlement of Investment Disputes Convention.

<sup>62</sup> EU:C:2017:699, paras 229 et seq.

<sup>63</sup> 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 in their BITs (EU:C:2017:699, 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.

Convention) in the UK.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

Upheld by the Court of Appeal,<sup>67</sup> this approach 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.

The disjunction examined in this section between the rhetoric about the role of domestic courts as EU law courts and the practice of entrusting them with safeguarding EU law is not confined to the principle of autonomy. We also find it in another area of acute sensitivity for the EU legal order, that is the Common Foreign and Security Policy, where the Court has interpreted its limited jurisdiction broadly at the expense of the jurisdiction of domestic courts to review EU measures.<sup>68</sup> In the context of this paper, however, 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

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<sup>64</sup> Arbitration (International Investment Disputes) Act 1966.

<sup>65</sup> [2017] EWHC 31 (Comm).

<sup>66</sup> *ibid.*, para. 132.

<sup>67</sup> [2018] EWCA Civ 1801, where the High Court's judgment is viewed as 'careful' and its conclusion as 'both pragmatic and ... principled' (para. 249). At the time of writing, the case is pending before the UK Supreme Court.

<sup>68</sup> This argument is made in P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy', (2018) 67 *International and Comparative Law Quarterly* 1-35.

protect. Viewed from this angle, autonomy would become truly multi-dimensional in its scope and subtler in its implications.

## 4 Conclusion

Looking back at the genesis and development of the principle and, then, reflecting on its current state and further evolution, this paper highlighted the significance of the context within which autonomy is examined in the case-law. Autonomy may mean different things in different contexts. The CETA provisions, for instance, were carefully drafted in order to give as little ammunition as possible to any concern about impinging on the jurisdiction of the Court of Justice, and not all dispute settlement provisions in agreements concluded by the EU have been drafted in such manner.

Viewed from this angle, and even though we have become familiar with the far reaching implications of autonomy, we are still not clear about what it means in a number of significant legal settings. For instance, the role of investment arbitration in intra-EU BITs is far from over. While the Member States declared in January 2019 that they would revoke such agreements by the end of 2019 and, in any case, they withdrew their consent to arbitration with immediate effect, no arbitral tribunal has agreed so far not to exercise jurisdiction on the basis of the judgment in *Achmea* and the above declarations.<sup>69</sup> There is also the issue of managing existing claims brought under the relevant BITs. Similarly, the impact of *Achmea* and Opinion 1/17 on the Energy Charter Treaty is still unclear. This is an important question, not least because arbitral tribunals have consistently declined to accept that the Court's case-law so has any relevance to arbitration under that Treaty.<sup>70</sup>

It is indicative of the dynamic nature of the EU legal order that such important questions about the function of such a pivotal principle should still be open. Autonomy emerges, therefore, as defined by the very characteristics that have shaped the overall constitutional order that it is designed to protect: constantly evolving and flexible in both its scope and implications, it challenges our understanding of not only how EU law may interact with international law, but also how domestic courts may interact with the CJEU.

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<sup>69</sup> See, for instance, *United Utilities v Estonia*, ICSID Case No 1RB/14/24 of 21 June 2019, paras 531-560.

<sup>70</sup> See, for instance, *Belenergia S.A. v Italy*, ICSID Case No ARB/15/40 of 6 August 2019, paras 288-340.