The Autonomy of EU Law in External Relations: an Elusive Principle

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1. Introduction

While not new, the principle of autonomy of EU law has assumed considerable significance in the last few years in the context of the relationship between EU and international investment law, in particular regarding the adjudication by arbitral tribunals and the enforcement of arbitral awards by courts of the Member States. A somewhat limited body of case-law by the European Court of Justice has had profound implications for Member States and investors alike and has attracted attention from both policy-makers and legal scholars.[1]

The objective of this chapter is not to provide an exhaustive analysis of the principle and its implications. Instead, by focusing on the recent case-law, it will make a three-fold argument: autonomy has not been construed in an one-dimensional manner, as its scope and implications depend on the legal context of the dispute in question; in intra-EU disputes the Court interprets autonomy in an uncompromising manner whereas its approach is more pragmatic when it comes to the relationship between the EU and third countries; there is a whiff of maximalism in the Court's approach to autonomy in intra-EU disputes which has not been justified in legal terms and is unwarranted in practical terms.

The analysis is structured as follows. First, it will identify four main themes that underpin the genesis and development of the principle. Second, it will zoom in and reflect on recent judicial developments that shape the principle in the context of the relationship between investment arbitration and EU law. Third, it will zoom out and analyse the different approaches to

[1] From the voluminous literature, see J Klabbers and P Koutrakos (eds), 'An Anatomy of Autonomy: Special Issue' (2019) 88 *Nordic Journal of International Law* 1–133 and M De Boeck, *EU Law and International Investment Arbitration: The Compatibility of ISDS in Bilateral Investment Treaties (BITs) and the Energy Charter Treaty (ECT) with the Autonomy of EU Law*, Nijhoff Studies in European Union Law (Leiden, Brill Nijhoff, 2022) 21.

autonomy on legal and practical grounds and will reflect on their pitfalls at the current stage of development of the EU legal order.

2. The Origins and Development of Autonomy

The origins and development of the principle of autonomy may be charted through the prism of four themes.

The first theme is about its 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 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'[2] 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'.[3]

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'.[4]

The second theme has to do with the internal and external dimensions of the principle. 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

[2] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1, [1963] ECR 1.

[3] Case 6/64 *Costa v E.N.E.L.* ECLI:EU:C:1964:66, [1964] ECR 585.

[4] ibid.

constitutional maturity and complexity of the current EU legal order.[5] 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 supremacy and direct effect,[6] these principles include the liability of national authorities for a violation of EU law,[7] the gradual transformation of national courts into EU courts,[8] and the reliance upon general principles and fundamental human rights as a matter of EU law against both EU and national measures.

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.[9] 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

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[5] 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).

[6] See A Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?' (2007) 9 *CYELS* 81.

[7] 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*, 2nd edn (Oxford, Oxford University Press, 2011).

[8] 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).

[9] See G de Búrca, 'The Evolution of EU Human Rights Law' in de Búrca and Craig (eds) (n 7).

Community legal order':[10] it would impinge on the exclusive jurisdiction of the Court of Justice (provided now under Article 344 Treaty on the Functioning of the European Union (TFEU)) to rule on the division of competence, and hence, the responsibility between the then European Economic Community (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,[11] 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. It is recalled that the *Kadi I* judgment was handed down at a time of considerable disquiet amongst international lawyers and policy-makers about the design and functioning of the UN sanctions system. The compliance of the latter with fundamental human rights was widely contested, so much so that, following the *Kadi* cases, a gradual adjustment took place at the UN in order to make the process of the adoption of smart sanctions and its review more transparent and fair.[12] Had the Court of Justice not acknowledged the issues of the clearly problematic UN system for the protection of fundamental human rights, the courts of the Member States might have stepped in and, by protecting human rights under domestic constitutional law, challenged the legality of the relevant UN measures. However, by doing so, and given the initial deference shown to the latter by the Court of First Instance, as it then was, domestic courts would also have cast doubt on the authority of the CJEU, as the *Bundesverfassungsgericht* had done in the 1970s and early 1980s following the *Solange I* judgment.[13]

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[10] Opinion 1/91 *Draft Agreement relating to the creation of the European Economic Area* ECLI:EU:C:1991:490, [1991] ECR I-6079, para 35.

[11] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, [2008] ECR I-6351.

[12] See D Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (Oxford, Oxford University Press, 2016) and G Sullivan, *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law*, Global Law Series (Cambridge, Cambridge University Press, 2020).

[13] BverfG 2 BvL 52/71 *Beschluß des Zweiten Senats vom 29. Mai 1974*, BVerfGE 37, 271.

Viewed from this angle, by protecting the EU legal order against international rules that threatened the Union's system of human rights protection, the Court put the protection of fundamental human rights at the very centre of the EU legal order (they were viewed as principles which 'form part of the very foundations of the Community legal order', a formulation repeated three times in the *Kadi I* judgment).[14] In doing so, it avoided yet another battleground where recalcitrant domestic courts which might taken it upon themselves to protect domestic human rights law and, therefore, challenging the supremacy of EU law. 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 third theme is about what underpins the principle: 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'.[15] 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,[16] 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 (UNCLOS) 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'.[17] 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.[18] Most

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[14] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, [2008] ECR I-6351, paras 282, 290, and 304.

[15] B de Witte, 'A Selfish Court: The Court of Justice and the Design of International Dispute Settlement Beyond the EU' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges*, Modern Studies in European Law (Oxford, Hart Publishing, 2014) 39.

[16] Opinion 1/91 *Draft Agreement relating to the creation of the European Economic Area* ECLI:EU:C:1991:490, [1991] ECR I-6079, paras 39–40.

[17] Case C-459/03 *Commission v Ireland* ELCI:EU:C:2006:345, [2006] ECR I-4635, para 154.

[18] Opinion 1/09 *Creation of a Unified Patent Litigation System* ECLI:EU:C:2011:123, [2011] ECR I-1137.

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.[19]

Finally, the fourth theme is about the scope of the principle: 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'.[20] 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.

This theme of ambiguity is underlined by the *Achmea* judgment,[21] 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 about the preliminary reference procedure and 344 TFEU,[22] the latter is not analysed in the judgment. Instead, autonomy is viewed through the lens 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.[23] 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,

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

[20] Opinion 1/00 *Agreement on the establishment of a European Common Aviation Area* ECLI:EU:C:2002:231, [2002] ECR I-3493, para 12.

[21] Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

[22] Art 344 TFEU reads as follows: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'.

[23] This point was also made by the referring court (Case C-284/16 *Achmea* ECLI:EU:C:2018:158, paras 15–17), as well as Advocate General Wathelet (Opinion of Advocate General Wathelet in Case C-284/16 *Achmea* ECLI:EU:C:2017:699, paras 138–159).

such as treaty-making under Article 218 TFEU.[24] 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 narrower understanding of what autonomy is about, confining the judgment to the specific context of the case.[25] After all, this was not just about any Bilateral Investment Treaty between Member States (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,[26] a point clarified in the more recent *Opinion 1/17*.[27]

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*[28] which has attracted considerable criticism, especially by international lawyers.[29] 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: given that the United Nations Convention on the Law of the Sea enabled its parties that were EU Member States to settle an UNCLOS dispute by having recourse to EU enforcement procedures,[30] the request by an EU Member State that the UNCLOS Arbitral Tribunal interpret and apply EU law would challenge the exclusive jurisdiction of the Court of Justice and, ultimately, the autonomy of the EU legal order. As the case pertained to the interpretation of Article 344

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[24] This theme is developed in P Koutrakos, 'Institutional Balance and Sincere Cooperation in Treaty-Making under EU Law' (2019) 68 *ICLQ* 1.

[25] See, for instance, A Dashwood, 'Article 26 ECT and Intra-EU Disputes – The Case against an Expansive Reading of Achmea' (2021) 46 *EL Rev* 415.

[26] Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 58.

[27] Opinion 1/17 *CETA* ECLI:EU:C:2019:341, paras 126–129.

[28] Case C-459/03 *Commission v Ireland* ELCI:EU:C:2006:345, [2006] ECR I-4635.

[29] 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) 1 *European Journal of Legal Studies* 8.

[30] Art 282 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982) (UNCLOS).

TFEU, the concept of autonomy underpinning the judgment in *Mox Plant* is not as broad as it might appear.[31]

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.[32] 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 (ECtHR) being treated suspiciously, even though the relationship between the two courts had been deeply symbiotic.[33]

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 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 …'.[34] 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

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[31] See P Koutrakos, *EU International Relations Law*, 2nd edn (Oxford, Hart Publishing, 2015) 184–191.

[32] 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.

[33] 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, Edward Elgar Publishing, 2017); S Greer, JH Gerards and R Slowe, *Human rights in the Council of Europe and the European Union: Achievements, Trends and Challenges*, Cambridge Studies in European Law and Policy (Cambridge, Cambridge University Press, 2018), in particular chs 4 and 5.

[34] Opinion 1/00 *Agreement on the establishment of a European Common Aviation Area* ECLI:EU:C:2002:231, [2002] ECR I-3493, para 13.

would be binding on the EU's institutions. This definition also includes domestic courts, in so far as they act as EU courts,[35] a point to which this analysis will return below.

It follows from the above that not only is the scope of autonomy somewhat nebulous and its limits ill-defined, but its function have 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. Two Dimensions of Autonomy

Autonomy has not been construed in a one-dimensional manner. Instead, the scope and implications of the principle depend on the legal context within which a specific dispute arises.

3.1. Autonomy in Intra-EU Relations: A Most Orthodox Approach

As mentioned above, the judgment in *Achmea* provided ammunition for an expanding reading of the implications of autonomy in the context of intra-EU BITs while not without ruling out entirely a context-specific construction of the scope of the principle. This point is confirmed in Case C-109/20 *PL Holdings*.[36]

This reference from the Swedish Supreme Court arose from a dispute between a Luxembourg company (PL Holdings) and Poland due to the fact that the former was forced by the Polish Financial Supervision Authority to sell its shares in a Polish bank. PL Holdings initiated arbitration proceedings against Poland under Article 9 of the 1987 BIT between Belgium/Luxembourg and Poland. In proceedings for the annulment of the arbitral award, the Svea Court of Appeal had held that the arbitration clause of the intra-EU BIT was invalid in the light of the ECJ judgment in *Achmea.* However, it also held that a Member State and an investor from another Member State could still conclude an *ad hoc* arbitration agreement in

[35] Under Art 19(1) second subparagraph Consolidated version of the Treaty on European Union (TEU) [2016] OJ C202/13, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

[36] Case C-109/20 *PL Holdings* ECLI:EU:C:2021:875.

respect of the same dispute, based on their common intention, as in a commercial arbitration. In fact, such an agreement had emerged in that case, as Poland had participated in the proceedings without entering a formal jurisdiction objection in accordance with domestic law. This was the question referred, on appeal, by the Supreme Court: in proceedings under an intra-EU BIT presumed to be invalid in the light of *Achmea*, may a Member State enter into an *ad hoc* agreement with an investor from another Member State by not objecting to the arbitration clause in due time?

The Grand Chamber held that the principle of autonomy may not be circumvented under those circumstances: domestic law may not enable a Member State, party to a dispute under an intra-EU BIT, to submit that dispute to an arbitral body with the same characteristics as that envisaged under the BIT by concluding an *ad hoc* arbitration agreement identical to that deemed illegal in the light of *Achmea.*

This conclusion followed from the same principles that had been relied upon in *Achmea:* to remove a dispute that may pertain to the application and interpretation of EU law from the jurisdiction of domestic courts would deprive that law of the full effectiveness that the EU legal system may guarantee. Such an outcome would be contrary to the principle of mutual trust between the Member States, the preliminary reference procedure (Article 267 TFEU), the principle of sincere cooperation (Article 4(3) Treaty on the European Union (TEU)), and the autonomy of EU law (Article 344 TFEU). In effect, the parties to the dispute may not be allowed to remedy the invalidity of the arbitration clause in an intra-EU BIT by means of a contract with an investor from another Member State. In fact, the primacy of EU law and the duty of sincere cooperation require that Member States challenge the validity of the arbitration clause or the *ad hoc* arbitration agreement in any arbitration body before which a dispute is brought.

This judgment does not only confirm but also buttresses the significance of the *Achmea* principle so that it may not be circumvented by means of domestic law. It articulates clearly and in forceful terms both the duty of Member States to challenge the validity of an arbitration clause in an intra-EU BIT before any arbitration tribunal or domestic court,[37] and that of

[37] ibid paras 52 and 55.

domestic courts of Member States to set aside an arbitration award made on the basis of an arbitration agreement that would violate the *Achmea* principle.[38]

On the one hand, it is worth noting the narrow legal context of the case: at the core of the preliminary reference was a domestic procedural device (not objecting to the arbitration clause in due time could be seen as entering into an *ad hoc* agreement with an investor from another Member State) that would be difficult to be seen as anything other than a means to bypass the *Achmea* principle and enable the Member State and the investor from another Member State to usurp, for all intents and purposes, jurisdiction from a domestic tribunal and confer it on an arbitral tribunal. Viewed from this angle, the judgment in *PL Holdings* is about the specific application of the *Achmea* principle in a narrow set of circumstances and it should come as no surprise that the Court refused to limit the temporal effects of its judgment.[39]

On the other hand, there are indications of a broader construction of what the *Achmea* principle is about: the duty of the Member States is attributed not just to the *Achmea* judgment but the principles of the primacy of EU law and of sincere cooperation.[40] It is noteworthy that the principle of primacy does not feature in the *Achmea* judgment itself expressly other than once and only in the context of a direct reference to *Opinion 2/13*.[41] The judgment also relies (twice)[42] on the Agreement on the Termination of intra-EU BITs that 23 EU Member States signed in 2020 and states that, from the date of the accession of the above States, the arbitration clauses of the BITs referred to therein could not serve as the basis for arbitration proceedings between an investor and those Member States.[43] This is noteworthy, given the distinct reluctance of arbitral tribunals to endorse the *Achmea* principle.[44] It is also worth-noting that, in her Opinion in *PL Holdings*, Advocate General Kokott had argued for a wide application of

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[38] ibid para 55.

[39] ibid paras 58–69.

[40] ibid para 52.

[41] Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 33 with reference to paras 165–167.

[42] Case C-109/20 *PL Holdings* ECLI:EU:C:2021:875, para 46 of the judgment with reference to Article 4(1) of the Agreement and para 53 of the judgment with reference to Article 7(b) of the Agreement.

[43] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1.

[44] For an exception to this trend, see *Green Power K/S and Obton A/S v Spain* SCC Case No V 2016/135.

Achmea (the judgment itself does not refer to her Opinion in relation to this issue).[45] However, the terms in which the judgment is couched are remarkably broad, suggesting that *Achmea* would apply to any intra-EU BIT, irrespective of whether its arbitration clause referred to domestic law or not (that was the conclusion reached by the Paris Court of Appeal in *Slot Group v POL*).[46] This was confirmed in Case C-638/19 P *Commission v European Foods* where prior case-law on autonomy was set out in similarly broad terms.[47]

A subsequent Grand Chamber judgment confirmed this broad construction of autonomy. In fact, the judgment in Case C-741/19 *Komstroy* (which predated the one in *PL Holdings* by a few weeks)[48] marked a distinct expansion of the *Achmea* principle.

The facts of this reference from the *Cour d'appel de Paris* were convoluted. For the purposes of this chapter, suffice it to say that they involved a Ukrainian company claiming to be an investor in Moldova which brought an action against Moldova under Article 26(4)(b) Energy Charter Treaty (ECT) for what it considered to be serious breaches of undertakings made under the Charter. The case was brought before the referring court on appeal against the decision of the lower court to annul a 2013 arbitral award on the ground that the arbitral tribunal had been wrong to declare that it had had jurisdiction. The questions referred were entirely about the definition of the term 'investment' under Articles 1(6) and 26(1) ECT. While the answers to them are not relevant to this chapter, another point in the judgment is: the Court held that a dispute between a Member State and in investor of another Member State concerning an investment made by the latter in the first Member State may not be subject to arbitration proceedings under Article 26(2)(c) ECT. Given the significance of the judgment, the remaining section will analyse the following three questions: how did the Court justify its jurisdiction in this case, how did it explain its choice to answer a question that had not been asked, and how did it answer that question.

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[45] Opinion of Advocate General Kokott in Case C-109/20 *PL Holdings* ECLI:EU:C:2021:321, paras 61v63.

[46] *Slot Group as v Republic of Poland* PCA Case No 2017-10, Judgment of the Paris Court of Appeal dated 19 April 2022.

[47] Case C-638/19 P *Commission v European Foods and Others* ECLI:EU:C:2022:50, paras 138–139.

[48] Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655.

On the first question, the Court established its jurisdiction by reference to the conclusion of the ECT by the EU, the latter having competence in the area of foreign investment (exclusive as regards direct and shared as regards indirect investment). It also held that the dispute was in fact, governed by EU law: on the one hand, it is possible that the relevant ECT provisions containing the term 'investment' would be applied in an EU context (for instance in an action concerning a dispute between a third country investor and a Member State) in which case it was necessary 'to forestall future differences of interpretation';[49] on the other hand, the seat of the arbitral tribunal had been chosen by the parties to be on the territory of a Member State whose courts are under a duty to comply with EU law under Article 19 TEU,[50] while the Court itself is required to respond to the questions referred, given the principle of cooperation that governs the preliminary reference procedure.[51]

Second, the Court justified its reference to the applicability of Article 26 ECT to intra-EU disputes by pointing out that, in order to answer the question about the definition of investment under the ECT, it was 'necessary … to specify which disputes between one Contracting Party and an investor of another Contracting Party concerning an investment made by the latter in the area of the former may be brought before an arbitral tribunal pursuant to Article 26 ECT'.[52]

The approach to both the above issues is problematic. As far as the Court's jurisdiction is concerned, the judgment goes farther than previous case-law upon which it relies regarding the significance of uniform interpretation. For instance, the judgments in Case C-53/96 *Hermès*[53] and Joined Cases C-300/98 and C-392/98 *Dior and Others*[54] were about provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which, while applied to domestic intellectual property law, were also applicable to intellectual property governed by EU secondary legislation. On the other hand, the judgment in Case C-130/95

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[49] ibid para 29 and also para 31.

[50] ibid para 34.

[51] ibid para 35.

[52] ibid para 40.

[53] Case C-53/96 *Hermès International v FHT Marketing Choice* ECLI:EU:C:1998:292, [1998] ECR I-3603.

[54] Joined Cases C-300/98 and C-392/98 *Dior and Others* ECLI:EU:C:2000:688, [2000] ECR I-11307. See also J Heliskoski, 'The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements' (2000) 69 *Nordic Journal of International Law* 395, 404 et seq.

Giloy[55] was about domestic tax legislation reproducing a provision from the Community Customs Code. Both these contexts differed considerably from that in *Komstroy* where there was no specific EU substantive hook in which the interpretation of the relevant ECT provisions could be hang. As for the reference to the set of arbitration on the territory of a Member State, it by no means follows from the involvement of domestic courts and their duties under Article 19 TEU that all disputes brought before them would be subject to EU law. The relevant part of the judgment is as obscure in its assumptions as it is broad-brush about its implications. In any case, given the tight control that it exercises over the preliminary reference procedure and the remarkable flexibility it is prepared to exercise over how it responds to references from domestic courts, depending on the circumstances, the Court's reliance on its duty under Article 267 TFEU is disingenuous at best.

This point may also apply to the statement that to rule on which parties may rely on Article 26 ECT was 'necessary' in order to answer the substantive questions about investment. In Dashwood's pithy words, this 'is simply untrue'.[56] Let us not lose sight of the context: in a dispute between an operator from a third country (Ukraine) and another third country (Moldova), the Court changed the question actually referred in order to answer another question, namely 'whether a dispute between a Member State and in investor of another Member State concerning an investment made by the latter in the first Member State may be subject to arbitration proceedings under Article 26(2)(c) ECT'.[57]

Finally, the negative answer that the Court gave to the above question was based firmly on a broad reading of the principle of autonomy as articulated in *Achmea*. In five paragraphs, the judgment construes autonomy by bringing together the legal elements that, over the years, have emerged as intrinsically linked to autonomy: Article 344 TFEU about the allocation of powers laid down in the Treaties and which may not be affected by an international agreement;[58] the

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[55] Case C-130/95 *Giloy v Hauptzollamt Frankfurt am Main-Ost* ECLI:EU:C:1997:372, [1997] ECR I-4291.

[56] A Dashwood, '*Republic of Moldova v Komstroy LCC:* Arbitration under Article 26 ECT Outlawed in Intra-EU Disputes by Obiter Dictum' (2022) 47 *EL Rev* 127, 131. Commenting on the choice of addressing the Article 26 intra-EU arbitration issue, he writes the 'purported justifications offered by the Court of Justice are so threadbare as to appear almost contemptuous' (ibid).

[57] Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655, para 47.

[58] ibid para 42 with reference to Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 32.

autonomy of EU law in respect both to domestic law of EU Member States and international law and to the essential characteristics of EU law and the ensuing mutually interdependent legal relations between the EU and its Member States;[59] the EU constitutional framework and the judicial system that is necessary to ensure that the EU's specific characteristics and its autonomy are preserved and which is 'intended to ensure consistency and uniformity in the interpretation of EU law', mainly through the role of domestic courts and the ECJ under Article 19 TEU and the preliminary reference procedure[60] and the dialogue established under the latter, with the objective 'of securing the uniform interpretation for EU law, thereby ensuring its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties'.[61]

In this construction of autonomy, a couple of things are worth-noting. While the main authority on which the Court relies is the judgment in *Achmea*, it is also *Opinion 1/17 (CETA)* that we find referred to in the judgment, their different legal contexts notwithstanding. This is striking, given that, in the latter, handed down more than a year after the former, there is only one reference to *Achmea* in which the Court distinguishes between the legal contexts that gave rise to the two rulings (namely an intra-EU investment agreement and an agreement governing investment between the EU and a third country).[62] By relying on both authorities in this manner, the judgment in *Komstroy* appears to lay down deeper roots for the principle. It is also interesting that there should be no reference in *Komstroy* to the principle of mutual trust[63] which had been central to the line of reasoning in *Achmea.*[64]

Having articulated the foundations and implications of autonomy, the Court went on to apply the principle to arbitration proceedings brought by an investor from a Member State against

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[59] Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655, para 43 with reference to Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 33 and Opinion 1/17 *CETA* ECLI:EU:C:2019:341 para 109.

[60] Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655, para 45 with reference to Case C-284/16 *Achmea* ECLI:EU:C:2018:158, paras 35–36 and Opinion 1/17 *CETA* ECLI:EU:C:2019:341 para 111.

[61] Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655, para 46 with reference to Case C-284/16 *Achmea* ECLI:EU:C:2018:158, para 37.

[62] Opinion 1/17 *CETA* ECLI:EU:C:2019:341, paras 126–127.

[63] This is a point that Dashwood makes in Dashwood, '*Republic of Moldova v Komstroy LCC*' at 132.

[64] Case C-284/16 *Achmea* ECLI:EU:C:2018:158, paras 34 and 58.

another Member State. It held that such proceedings are incompatible with the principle on three interlinked grounds: an arbitral tribunal may be 'required to interpret, or even apply, EU law' (as its jurisdiction under Article 26(6) ECT covers the ECT and the latter is an act of the EU); [65] an arbitral tribunal may not refer questions about EU law to the Court of Justice (as it is not a court or tribunal of an EU Member State under Article 267 TFEU); arbitral awards under Article 26(8) ECT are final and binding on the parties to the dispute and any review that a court of a Member State where the seat of the arbitral tribunal is established under the arbitration rules governing the dispute can only be carried in so far as the domestic law of the Member State so permits (the French Code of Civil Procedure provision, for instance, only provides for limited review concerning, in particular, the jurisdiction of the arbitral tribunal).

Where does this take us? The features of the judgment identified so far, namely the eagerness to answer a question that was not asked and was not relevant to the dispute in the main proceedings, the reliance on authorities their different legal contexts notwithstanding, and the broad language in which the judgment is couched, all point towards the same direction: autonomy is construed broadly and does not tolerate the involvement of adjudication bodies other than the CJEU and domestic courts in cases where there is any risk of deviation from EU law in the context of either an intra-EU BIT or a treaty such as the ECT.[66] The ECtHR[67] is also to be added to this list, as may be any tribunal that does not meet the exacting drafting standards set by CETA.[68]

In the light of the above, there is a degree of maximalism in the *Komstroy* line of reasoning which, along with the broad-brush approach one has come to expect from the Court in this context, does not make autonomy any less ambiguous. For instance, why is the notion of an arbitral tribunal interpreting EU law outside the judicial system of the EU legal order so objectionable? Are there grounds of concerns about arbitral tribunals showing complete

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[65] Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655, para 50.

[66] In *Komstroy*, the multilateral nature of ECT is deemed irrelevant: Article 26 ECT 'is intended, in reality, to govern bilateral relations between two of the Contracting Parties, in an analogous way' to the BIT that gave rise to *Achmea* (Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655, para 64). For criticism of this position, see Dashwood (n 56) above at 137–138.

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

[68] Opinion 1/17 *CETA* ECLI:EU:C:2019:341.

disregard for what EU law means? In his criticism of the judgment in *Komstroy*, Dashwood argues that '[t]o put it, perhaps overpolitely, the idea that the interpretation and application of the ECT itself by an ECT tribunal, even in an intra-EU dispute, would be capable of compromising the autonomy and the particular nature of EU law in any real sense strains credulity'.[69] And to what extent does the quest for 'the full effectiveness'[70] of EU law cease to be a commendable constitutional imperative and becomes a cloak to disguise an absolutist claim to authority?

3.2. Autonomy in Extra-EU Relations: a More Pragmatic Approach

In the context of a bilateral mixed agreement between the EU and its Member States and a third country, the Court of Justice applied a more pragmatic understanding of autonomy. The pragmatism that is illustrated in *Opinion 1/17* on the compatibility of the Investor-State Dispute Settlement mechanism established under the Comprehensive Economic and Trade Agreement (CETA) between the EU, its Member States and Canada may be approached from three different perspectives, namely principled, policy, and procedural.

First, principled pragmatism is about openness to the role of other international tribunals. The oft-repeated[71] but rarely followed principle that 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 is followed through: the Court 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.[72] It is in this context that reference is made to the 'reciprocal nature of international agreements'.[73] This emphasis on the role of non-EU courts

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[69] A Dashwood, '*Komstroy* and Opinion 1/20 – Curious and Curiouser' (2022) 59 *CML Rev* 51, 55.

[70] Case C-741/19 *Republic of Moldova v Komstroy LLC* ECLI:EU:C:2021:655, para 62.

[71] Opinion 1/91 *Draft Agreement relating to the creation of the European Economic Area* ECLI:EU:C:1991:490, [1991] ECR I-6079, paras 40 and 70; Opinion 1/09 *Creation of a Unified Patent Litigation System* ECLI:EU:C:2011:123, [2011] ECR I-1137, paras 74 and 76; Opinion 2/13 *Accession of the Union to the ECHR* ECLI:EU:C:2014:2454, paras 182–183.

[72] Opinion 1/17 *CETA* ECLI:EU:C:2019:341, para 116.

[73] ibid para 117.

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[74] or for review of its decisions by the latter.[75]

Second, there is 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'.[76] 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.[77] In the light of the ongoing negotiations under the auspices of the United Nations Commission on International Trade Law (UNCITRAL),[78] 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.

Third, there is also procedural pragmatism in *Opinion 1/17*. This 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 held that the principle of autonomy was complied with, as the jurisdiction of the CETA Tribunal would be confined to the provisions of CETA

[74] ibid para 134.

[75] ibid para 135.

[76] ibid para 117.

[77] See '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"' (*European Commission*, 5 May 2015), available at circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/84f1ee41-1c66-4bd2-adda-47f074336110/details.

[78] The negotiating directives are set out here: Council of the European Union, 'Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes' (2018) 12981/17 ADD 1 DCL 1.

itself[79] 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 1/09*;[80] 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*;[81] 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,[82] hence meeting the requirement set out in *Opinion 2/13*.[83] This kind of procedural pragmatism needs to be viewed against the various provisions of the CETA Agreement 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*.

However, in addition to the narrow CETA context, there is another layer that emerges from a careful reading of *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 (and subsequent) 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 was 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 account', 'that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal,

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[79] Art 8.31 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part [2017] OJ L11/23.

[80] Opinion 1/09 *Creation of a Unified Patent Litigation System* ECLI:EU:C:2011:123, [2011] ECR I-1137. The point was made in Opinion 1/17 *CETA* ECLI:EU:C:2019:341, in paras 123-125, as well as in para 133 regarding the Appellate Tribunal.

[81] Opinion 1/17 *CETA* ECLI:EU:C:2019:341, paras 126–129.

[82] Art. 8.21 CETA.

[83] Opinion 1/17 *CETA* ECLI:EU:C:2019:341, para 132.

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.[84] 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.[85] Similar considerations apply to subsequent case-law too: in the context examined in *Komstroy,* the approach to EU law by arbitral tribunal under Article 26 ECT would not bind any EU authorities (in fact, it would only be binding in the context of the specific dispute).[86]

4. Maximalism Versus Pragmatism

The above analysis of the post-*Achmea* case-law suggests that the Court's approach has not been one-dimensional: in intra-EU disputes, a most orthodox reading of autonomy has gradually prevailed and been imposed without consideration of the different legal context of the treaty pursuant to which arbitral tribunals exercise jurisdiction; in the case of an agreement concluded by the EU with a third country, a more pragmatic approach is visible.

There are four perspectives through which these approaches may be examined. The first is about the quest for full effectiveness and complete certainty which the case-law seeks to achieve in the context of intra-EU disputes. This normative claim, and the uncompromising terms in which it is couched, appear to ignore the elusive nature of the quest. The effectiveness of EU law is constantly negotiated within a legal order that is flexible enough to tolerate dissent. Consider, for instance, the principle of supremacy and the different ways in which different domestic courts of last instance understand it. The expression of the possibility of dissent in principle does not necessarily entail obstacles to the effectiveness of EU law in practice. And

[84] ibid para 131.

[85] Opinion 2/13 *Accession of the Union to the ECHR* ECLI:EU:C:2014:2454, paras 236–245.

[86] See Dashwood (n 56) 136.

the occasional dissent in practice does not necessarily derail the functioning of the EU legal order.[87] Is there such evidence to suggest that tribunals beyond the system of EU law would be eager to trample on the authority of the CJEU to interpret EU law? Is there no scope for an approach that is more understanding of and conciliatory towards the different ways in which non-EU courts may deal with EU-related issues? The maximalist approach of the Court is noteworthy even in the context of the ECtHR, an international court which has shown comity towards the Court of Justice and to which the latter refers as a matter of course.[88] And while the Court's case-law examined in this chapter is all about autonomy as a matter of principle, rather than practice, one wonders why the more pragmatic streak that one finds in the constitutional case-law of the Court of Justice is viewed by the same Court as so clearly unsuitable when it comes to the role of other international courts and arbitral tribunals. In fact, such scepticism is all the more remarkable given the openness to international law that the Court has shown in other contexts (a case in point being its approach to customary international law).[89]

The second perspective is about the role of domestic courts. The orthodox version of autonomy we find in judgments such as *Achmea* and *Komstroy* not only brings domestic courts to the fore but it also makes their defence a *raison-d' êtr*e for the Court's hostile approach to the jurisdiction of arbitral tribunals. In fact, this has been the case for some time. 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.[90] The pivotal role of domestic courts for the

[87] This issue has been inherent in the development of the EU legal order and has assumed new relevance in the light of the *Weiss* case-law of the *Bundesverfassungsgericht* and the Judgment in the name of the Republic of Poland of 7 October 2021 in K3/21 by the Constitutional Tribunal.

[88] See the analysis in de Witte (n 15).

[89] See, for instance, E Denza, 'International Aviation and the EU Carbon Trading Scheme: Comment on the *Air Transport Association of America* Case' (2012) 37 *EL Rev* 314, 323.

[90] Opinion 1/09 *Creation of a Unified Patent Litigation System* ECLI:EU:C:2011:123, [2011] ECR I-1137, paras 80–89.

EU's system of judicial review was also stressed in *Opinion 2/13*.[91] Their prominence in the context of autonomy aims to strengthen the powers with which they are endowed under EU law. However, this aspect of the role of domestic courts is intrinsically linked to 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'.[92] Put differently, the more it focuses on domestic courts, the less autonomy may appear to be about the Court itself. 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 this vein, there is a thread that brings together the perspective of domestic courts with the quest for absolute certainty that characterises the case-law on autonomy. The judgments examined in this chapter put emphasis on the limits of domestic law when it comes to adjudicating on arbitral tribunals but not nearly enough on what domestic courts may be required to do in practice as a matter of EU law when confronted with, for instance, a question of enforcing an arbitral award. Put differently, there is a somewhat paternalistic streak in how domestic courts are approached within the context 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 court: 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.[93] 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

[91] Opinion 2/13 *Accession of the Union to the ECHR* ECLI:EU:C:2014:2454, paras 175–176.

[92] B de Witte, 'European Union Law: How Autonomous is its Legal Order?' 65 (2010) *Zeitschrift für öffentliches Recht* 141, 150.

[93] Opinion of Advocate General Wathelet in Case C-284/16 *Achmea* ECLI:EU:C:2017:699, paras 229 et seq.

investment law to rely upon EU law and protect EU rules as a matter of public policy.[94] 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 third perspective brings this analysis back to where it began, that is the internal-external dimension of autonomy. In her typology of structural principles, Cremona writes about autonomy and how 'it underpins the Court's approach to the rule of law in *Kadi* and to mutual trust in *Opinion 2/13*'.[95] In both *PL Holdings* and *Komstroy*, the Court refers to the judgment in *Associação Sindical dos Juízes Portugueses*[96] which first became the starting point and, then a point of reference for what is now a burgeoning body of case-law on the rule of law.[97] Viewed from this angle, the introduction of an uncompromising understanding of autonomy in intra-EU relations is directly linked to the increasingly prominent role that the Court is bound to assume in order to deal with recalcitrant domestic authorities whose understanding of rule law in the organisation and delivery of justice runs counter to EU values.

While the above perspective may appear justified from a normative point of view, the way in which the case-law on autonomy has approached it raises questions. In terms of consistency, why is the principle of mutual trust, so prominent in the case law on the rule of law, absent from the *Komstroy* judgment? Given the increasing body of case-law on the rule of law and the independence of domestic courts of Member States, is it tenable for the Court to deprive

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[94] As the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) (Washington, 18 March 1965) requires that domestic courts view an arbitral award as if it were a judgment by a domestic court of last instance, Advocate General Wathelet suggested that the Member States should avoid the choice of ICSID in their BITs (Opinion of Advocate General Wathelet in Case C-284/16 *Achmea* ECLI:EU:C:2017:699, para 253). He also pointed out that that point was irrelevant in *Achmea*, as the award had not been rendered pursuant to the ICSID Convention.

[95] M Cremona, 'Structural Principles and their Role in EU External Relations Law' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Oxford, Hart Publishing, 2018) 28.

[96] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

[97] See the overview and analysis in L Pech and D Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' (2021-3) *Swedish Institute for European Policy Studies (SIEPS)*.

investors of the protection afforded by arbitral tribunals? And if this is tenable from a conceptual point of view, may it suggest some lack of pragmatism?

The point about pragmatism is also apposite to the wider discussion about the relationship between the Court of Justice and arbitral tribunals. Given the considerable ongoing intra-EU disputes before arbitral tribunals under the ECT, a maximalist approach to autonomy gives rise to increasing uncertainty about the enforcement of arbitral awards that complicates further the position of domestic courts. It also does little to ensure legal certainty regarding the protection of investors.

While autonomy owes its genesis and development to the ingenuity of the Court of Justice, its implications may not become fully apparent unless actors such as arbitral tribunals and domestic courts of the Member States and third countries take a consistent view of how to approach the relationship between EU and international investment law. It is ironic that, for the principle to become fully effective in the way intended by judgments such as *Komstroy*, the above courts and tribunals should adopt a more flexible stance than that adopted by the Court of Justice.