Achmea and the Autonomy of the EU Legal Order

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Judge at the European Court of Justice

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The Bologna talk’s video is available at

https://www.youtube.com/watch?v=0wXTX6cmhvY&feature=youtu.be.

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<tr>
<td>BIT</td>
<td>Bilateral Investment Treaty</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>DRM</td>
<td>Dispute Resolution Mechanism</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>PCA</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UNCITRAL</td>
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1. Introduction

I have been asked to talk to you today about the meaning of autonomy in EU law, in particular its application in Achmea. What I propose to do is to begin by looking at the origin or roots of the use of autonomy in the case law of the Court of Justice of the European Union (CJEU) before turning to Achmea.

2. The Origins of Autonomy: An Independent Legal System

At a general level autonomy is understood, at least linguistically, as having its own laws. It thus refers to the right or condition of self-government of a state, community or institution. This is an instantiation of independence, of freedom from external control or influence.¹ This notion of the EU as a “self-govern[ing] institution” which is “[free] from external control or influence” can clearly be traced back to the teething days of the Community.² Already in 1956 Advocate General Lagrange was referring to the “autonomous nature of the law rising from Treaties”.³ More importantly, what one might consider some of the foundational cases of what is now the European Union, van Gend en Loos⁴, Costa v ENEL⁵ and Internationale Handelsgesellschaft⁶, have as their common point of departure that EU law, unlike international law, is normatively independent from the domestic legal systems of the Member States.

The autonomy of EU law has not only an internal component (i.e. autonomy vis-à-vis the domestic legal systems of the Member States) but also an external component (i.e. autonomy vis-à-vis international law).⁷ Van Gend en Loos and Costa and Internationale Handelsgesellschaft largely confirm the internal autonomy of the EU. Other cases confirm its external element. In International Fruit, for example, the CJEU laid down criteria as to when international law, like the World Trade Organisation rules, can be relied on to set aside offending provisions of EU law.⁸ The fact that there are such criteria indicate that EU law can, in certain respects, be understood as “insulated”, and thus autonomous, from

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² See, Jenő Czuczai, “The Autonomy of the EU legal Order and the Law-making activities of International Organisations, Some examples Regarding the Council’s most Recent Practice”, (2012) Yearbook of European Law 452: “The EU is an autonomous legal order: this is a very early doctrine, established by the Court of Justice of the EU in the early 60s in the famous Costa v ENEL case […]” (emphasis ours).
³ Opinion of Advocate General Lagrange in 10/55 (Mirossevich v High Authority) ECLI:EU:C:1956:9. The original French reads “le caractère autonome du droit du Traité”. It has been translated into English as “the independent nature of law arising from the Treaty”. However, as in van Gend and Costa, the better translation for “autonomie” is “autonomy”, and not “independence”.
⁷ See, in particular, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, ECLI:EU:C:2014:2454, para. 170 where the CJEU refers to “The autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law […]” (emphasis ours).
international law. This emerges clearly from the Opinion of Advocate General Maduro in Kadi I:

“although the [CJEU] takes great care to respect the obligations that are incumbent on the Community by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty. Thus, it would be wrong to conclude that, once the Community is bound by a rule of international law, the Community Courts must bow to that rule with complete acquiescence and apply it unconditionally in the Community legal order. The relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”

3. Institutional Autonomy and Jurisdictional Autonomy

While the full implications of an autonomous Community may not have been appreciated in the days of Van Gend, Costa and Internationale Handelsgesellschaft, they are more fleshed out today to the point that it is now possible, and helpful, to distinguish three kinds of autonomy.

a) **Normative Autonomy.** This refers to the idea that EU law is normatively independent vis à vis both domestic and international law.⁹ EU law lays claim to a normative force which is independent from that of domestic legal orders; its validity does not stem from those national legal systems.

b) **Institutional Autonomy.** The EU Treaties provide for an allocation of defined responsibilities, like the delineation of the respective spheres of competence of the EU and the Member States, which lie at the heart of the institutional framework of the Union. The autonomy of the EU legal order requires this allocation of responsibilities, or balance, to be respected.¹⁰

c) **Jurisdictional Autonomy.** This sense of autonomy amounts to the principle that “the [CJEU] has exclusive jurisdiction over the definitive interpretation of EU law”.¹¹ The corollary of this is that the CJEU be in a position to exercise that exclusive jurisdiction,

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¹⁰ Although it may be considered as having elements of both international law and of domestic law. Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158, para.41: “Given the nature and characteristics of EU law […] that law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States.”


which means that the question of EU law must fall within the jurisdiction of a national court which can request a preliminary ruling to the CJEU under Article 267 TFEU.

I have already dealt with normative autonomy and will now turn to institutional and jurisdictional autonomy.

In 1957, the following description was offered of what was then to become, many years later, the Union we know today:

“...each institution, within the limits of its powers, is fully autonomous and cannot be subject to the authority of any other: it exercises its powers spontaneously and directly under the conditions laid down by the Treaty, with the [CJEU] appearing in this connexion as the body responsible for regulating the respective spheres of authority [...].”

It is not difficult to see the seeds of autonomy, both in its institutional and jurisdictional strains, planted in this passage. Not only does it stress a sense of autonomy of the Union by reference to the functions of the institutions but also incorporates the role of the CJEU as the overseer of those functions. These are the basic ideas that underpin institutional and jurisdictional autonomy.

Second, and this follows on from the above passage, institutional autonomy and jurisdictional autonomy are not hermetically sealed categories of autonomy. They shade into each other. The CJEU is an institution of the EU (a violation of the jurisdictional autonomy of the CJEU can therefore be understood as a violation of the institutional autonomy of the EU), and its jurisdiction extends to resolving institutional disputes (a violation of the institutional autonomy of the EU by a Dispute Resolution Mechanism (DRM) that could determine the allocation of responsibilities under the Treaty is most likely a violation of the jurisdictional autonomy of the EU). This interrelatedness of these two forms of autonomy is well-made in Kadi I:

“It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the [Union] legal system, observance of which is ensured by the [CJEU] by virtue of the exclusive jurisdiction conferred on it by Article [344 TFEU], jurisdiction that the [CJEU] has, moreover, already held to form part of the very foundations of the Community [...].”

Nonetheless, it is helpful to distinguish the two in order to form a better understanding of what the autonomy of EU law actually is. As will become clear, there is one sense of autonomy that requires the specific institutional features of the EU (such as the relationship between the Member States and the division of competences between the EU and the

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13 Opinion of Advocate General Lagrange in Joined Cases Algera and Others v Assemblée commune, 7/56 and 3/57 to 7/57, not published, ECLI:EU:C:1957:6. The passage then continues with a direct reference to “autonomy”: “However, such ‘autonomy’ clearly could not be absolute as regards financial matters, since no institution […].”

Member States) to be preserved, and another that requires the exclusive jurisdiction of the CJEU to be upheld. Such a distinction between autonomy in its jurisdictional and institutional form is reflected in the case-law, which often explains the principle of autonomy as requiring, first, the preservation of “the essential character of the powers of the Community and its institutions” and, second, that a particular DRM will not “have the effect of binding the Community and its institutions […] to a particular interpretation of the rules of Community law”.

3.1. Accession to International Courts by the EU

I will mention two seminal cases.

**Opinion 1/91**

In Opinion 1/91 the CJEU held that the proposed European Economic Area (EEA) Court was incompatible with EU law.

The EEA Court was designed to supervise the European Free Trade Agreement (EFTA), which sought to create a European Economic Area in the states who were members to that agreement. The rules which were to apply in the EEA covered the free movement of goods, persons, services and capital, and competition and were, for the most part, identical to those contained in the EU Treaties. Due to the overlap between the relevant rules, the EEA Agreement sought to ensure the consistent interpretation of the Agreement and the EU Treaties, a concept referred to as homogeneity. The keystone of that homogeneity was to be found in Article 6 of the proposed Agreement, which provided that the provisions of EFTA were to be interpreted in conformity with rulings of the CJEU on the corresponding provisions of the (then) Community Treaties and measures of Community secondary legislation which were given prior to the date of signature of the agreement. In other words, the EEA Court was seen as a parallel DRM for cases which contain an EEA aspect.

Regarding institutional autonomy, it was provided that Contracting Parties could bring actions before the EEA Court. The problem resides in the term ‘Contracting Party’. In a case involving both EFTA and Community aspects, depending on whether the case concerned shared or exclusive Community competences, the contracting party against which the case had to be brought could have been the Community together with the Member

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15 See, for example, Opinion 1/00 (Agreement on the establishment of a European Common Aviation Area) of 18 April 2002, ECLI:EU:C:2002:231, paras 12-13.
16 The members to that agreement now include all the EU Member States, as well as Lichtenstein, Norway and Iceland.
17 It is to be noted, however, that the EFTA Agreement does differ in certain respects. For example, the EFTA Agreement does not contain a corresponding provision on Union citizenship.
19 Ibid., para. 6.
20 Ibid., para. 32.
States, or the Community alone, or just the Member States.\textsuperscript{21} Since it would have been up to the EEA Court to decide whether the case was brought against the right contracting party, the EEA Court would have indirectly ruled on the division of competences between the Community and the Member States as regards the matters governed by the provisions of the agreement.\textsuperscript{22}

Regarding jurisdictional autonomy, the principal bone of contention was that EFTA sought the homogenous interpretation of the identically worded EU rules and EEA rules, without providing for sufficient guarantees that the EU institutions would not be bound by the EEA Court’s interpretation of the EEA rules.\textsuperscript{23} It is to be borne in mind that all EU Members were also party to EFTA.

In a section dedicated to considering “whether the proposed system of courts may undermine the autonomy of the [Union] legal order in pursuing its own particular objectives”, the CJEU held that this had the effect of introducing into the Community legal order a large body of legal rules which is juxtaposed to a corpus of identically-worded Community rules.\textsuperscript{24} Moreover, in interpreting the EEA rules, the EEA Court would have been bound only by the relevant rulings of the [CJEU] given prior to the date of signature of the agreement.\textsuperscript{25} Consequently, the agreement’s objective of ensuring homogeneity of the law throughout the EEA would have determined not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law. This was incompatible with the autonomy of the EU legal order.\textsuperscript{26}

\textbf{Opinion 2/13}

Opinion 2/13 concerned the legality of the accession of the EU to the ECHR, which is contemplated in the text of Article 6(3) TEU. The draft Agreement providing for such accession was considered unlawful, for a number of reasons. I will focus particularly on the issues of jurisdictional autonomy and institutional autonomy.

First the CJEU explained that by virtue of the principle of mutual trust, the Member States may be required to presume that fundamental rights have been observed by the other Member States. In such situations, the Member States cannot check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.\textsuperscript{27} This particular feature of EU law, and its consequences for the relationships between the Member States was not taken into account by the draft Agreement, which treats the EU like another state without regard for “the intrinsic nature of the EU”.\textsuperscript{28} Accession was

\textsuperscript{21} Ibid., para. 33.
\textsuperscript{22} Ibid., para. 34.
\textsuperscript{23} Ibid., para. 45.
\textsuperscript{24} Ibid., para. 42.
\textsuperscript{25} Ibid., para. 44.
\textsuperscript{26} Ibid., para. 46.
\textsuperscript{27} Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, ECLI:EU:C:2014:2454, para. 192.
\textsuperscript{28} Ibid., para. 193.
therefore liable to upset the underlying balance of the EU and undermine the autonomy of EU law, and, thereby, the autonomy of EU law.\textsuperscript{29}

Second, the CJEU held that the co-respondent mechanism offended the principle of institutional autonomy. At a level of generality, that mechanism ensured that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate. This would ensure, for example, that the EU could intervene in a case where the legality of a national measure implementing an EU Directive was contested. The CJEU, however, noted that if the EU or Member States request leave to intervene as co-respondents in a case before the ECtHR, they must give reasons, and the ECtHR is to examine the plausibility of those reasons.\textsuperscript{30} There would be the possibility, for example, that the ECtHR would have to determine the plausibility of whether a given measure fell within the shared competence of the Member States and the EU. Such a review would be liable to interfere with the division of powers between the EU and its Member States.\textsuperscript{31}

The CJEU’s reasoning on the prior involvement procedure is a good example of jurisdictional autonomy. As Advocate General Kokott explained in her View, that procedure “is to enable the [CJEU] to rule on the compatibility of EU law with the ECHR, in a case initiated before national courts or tribunals which has never been the subject of a preliminary ruling procedure pursuant to Article 267 TFEU, prior to the ECtHR reaching a decision in the case.”\textsuperscript{32} In other words, the CJEU was to be afforded the chance to pass judgment on the validity of an EU measure, whose legality has never been contested before the CJEU, before its validity is challenged in the ECtHR.

The CJEU found two faults with this procedure.

First, there was nothing to guarantee that it would be the CJEU\textsuperscript{33} that would decide whether a provision of EU law had or had not been the subject of a preliminary ruling procedure under Article 267 TFEU. This was “tantamount to conferring on [the ECtHR] jurisdiction to interpret the case-law of the [CJEU]”.\textsuperscript{34}

Second, the procedure allowed only for the CJEU to determine questions of compatibility, i.e. whether a particular provision of secondary EU law was compatible with the ECHR or the fundamental rights guaranteed by the EU. It did not allow the CJEU to determine questions of interpretation. However, the “The interpretation of a provision of EU law, including of secondary law, requires, in principle, a decision of the [CJEU]”. To bypass this requirement was to detract from the principle that CJEU has exclusive jurisdiction over the definitive interpretation of EU law.\textsuperscript{35}

\begin{footnotesize}
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\item \textsuperscript{29} Ibid., para. 194.
\item \textsuperscript{30} Ibid., para. 224.
\item \textsuperscript{31} Ibid., para. 225.
\item \textsuperscript{32} View of Advocate General Kokott in Opinion 2/13 (Accession of the European Union to the ECHR), ECLI:EU:C:2014:2475, para. 30.
\item \textsuperscript{33} The Opinion refers only to “competent EU institution” and not the CJEU.
\item \textsuperscript{34} Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, ECLI:EU:C:2014:2454, para. 239.
\item \textsuperscript{35} Ibid., para. 248.
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3.2. Article 267 TFEU

Article 267 allows, and sometimes requires, national courts to refer questions of EU law to the CJEU. Article 267 has been called the “keystone” of the EU legal order. Article 267 does not only have a functional element which allows the dialogue between national courts and the CJEU, but, rather, is reflective of an institutional relationship between national courts and the CJEU. That relationship lies at the heart of the constitutional architecture of the EU.

As was put in Opinion 2/13:

“the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the [CJEU] and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.”

Thus, any dispute resolution body set up by an international agreement to which the EU is party must respect the institutional relationship encapsulated by Article 267.

However, not all dispute resolution bodies can refer questions to the CJEU. According to the text of Article 267 TFEU, only a “court or tribunal of a Member State” can. Whether a given body falls within the scope of this phrase depends on whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether it procedure is adversarial, whether it applies rules of law and whether it is independent.

The orthodox position has been that arbitration tribunals do not meet this so-called “functional” standard.

This has very important ramifications for the principle of jurisdictional autonomy. If arbitral tribunals cannot refer questions to the CJEU, they are ‘outside’ the jurisdictional system of the EU. This carries attendant risks for the autonomy of EU law when the arbitral tribunal interprets, or may interpret, EU law.

Of course, the CJEU does not have to be the sole body to interpret EU law. Courts throughout the EU interpret EU law on a daily basis. Not all cases involving EU law are decided by the CJEU. But, in order to ensure the uniformity of EU law (and thus its

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40 The point is well put Eureko v the Slovak Republic Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010 PCA Case No. 2008-13, para. 282 “The argument that the ECJ has an “interpretative monopoly” and that the Tribunal therefore cannot consider and apply EU law, is incorrect. The ECJ has no such monopoly. Courts and arbitration 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: but that is quite different.”
normative autonomy) it must be possible for those courts to refer questions of EU law to the CJEU.

The CJEU, too, has recognized that the mere fact that an arbitral tribunal applies EU law is not necessarily incompatible with the autonomy of EU law. This is because the CJEU has accepted that the compatibility of a particular award rendered by an arbitral tribunal with EU law can be reviewed when a party seeks to enforce it before the national courts of a Member State.

Eco Swiss illustrates this approach. At issue was a commercial dispute where one party (Eco Swiss) argued that a trademark licensing agreement had been wrongfully terminated by the other party (Benetton). The agreement provided that all disputes were to be settled by arbitration in conformity with the rules of the Netherlands Institute of Arbitrators. The final award granted Eco Swiss damages, which Benetton sought to have set aside in the national courts on the ground (which was not raised in the arbitration) that the underlying agreement was void because it was contrary to Article 101 TFEU.

Dutch law, however, provided that an arbitration award can be annulled only on narrow grounds, including if it is contrary to public policy. The referring court was of the opinion that a breach of Article 101 TFEU did not necessarily entail a breach of public policy, such that it would not always be possible to set aside an award which gives effect to an anticompetitive (and hence void) contract. The CJEU, however, stressed that Article 101 TFEU is a “fundamental provision which is essential […] for the functioning of the internal market”, the breach of which should therefore be considered a breach of public policy. As a result, a court, faced with an application for annulment of an arbitral award, “must grant that application if it considers that the award in question is in fact contrary to Article [101 TFEU]”. The reason that lies behind the CJEU’s ‘indulgence’ is the fact that it is the national courts who bear the duty of ensuring any award they enforce is compatible with EU law.

As was crisply put by the Advocate General in Eco Swiss “the decision not to allow arbitrators to make references for a preliminary ruling under Article [267 TFEU] is in a sense 'offset' by the importance the CJEU attaches to judicial review of arbitration awards.”

Of course, when the national courts are tasked with reviewing the legality of an award in light of EU law, this also preserves the CJEU’s jurisdictional autonomy. Any doubt on

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42 Ibid., para. 7.
43 Ibid., para. 40. The foundations of this approach can be traced back to the judgment of 23 March 1982, Nordsee, 102/81, ECLI:EU:C:1982:107, para. 14: “if questions of [EU] law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award—which may be more or less extensive depending on the circumstances—and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.”
44 Ibid., para. 30. The foundations of this approach can be traced back to the judgment of 23 March 1982, Nordsee, 102/81, ECLI:EU:C:1982:107, para. 14: “if questions of [EU] law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award—which may be more or less extensive depending on the circumstances—and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.”
45 Judgment of 1 June 1999, Eco Swiss, C-126/97, ECLI:EU:C:1999:269, para. 40: “[EU law] requires that questions concerning the interpretation of the prohibition laid down in [Article 101 TFEU] should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the [CJEU] for a preliminary ruling” (emphasis ours).
the proper application of the substantive law of the EU to the award may require a reference to the CJEU, as on the facts of *Eco Swiss*. The CJEU is thus content with the possibility of the legality of an arbitral award being referred to them. This I will call “soft jurisdictional autonomy”.

*Achmea* involved an investment dispute in Slovakia. In 2004, Slovakia opened up the domestic market and allow operators to offer private sickness insurance services. Following a change in Slovak law which reversed that liberalisation, Achmea sued Slovakia for breach of the Bilateral Investment Treaty (BIT) between the Netherlands and what is now Slovakia. The BIT also provided for a dispute resolution mechanism, in Article 8. According to that provision, if amicable settlement was not possible, the case would be brought before an arbitral tribunal consisting of one judge appointed by each party, and a president appointed by both judges. Under Article 8, both the Netherlands and the Slovakia were deemed to have consented to cases being brought against them in that arbitral body. Significantly, Article 8(6) provided that “the arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned […] other relevant agreements between the Contracting Parties […] the general principles of international law” (emphasis ours).

The UNCITRAL arbitral tribunal, sitting in Frankfurt, concluded that “the imposition of the ban on profits and the ban on transfer of the portfolio were measures that self-evidently and unequivocally put [Achmea’s] investment into a situation that was incompatible with the most basic notions of what an investment is meant to be” and thus Slovakia was concluded to have breached the undertaking to ensure fair and equitable treatment. Damages were awarded in favour of Achmea.

Slovakia then argued that Article 8 of the BIT was contrary to EU law in the German courts. This question was referred to the CJEU. In particular, the German court asked whether Article 8 of the BIT was compatible with Article 267 TFEU and Article 344 TFEU which, as we have seen, provides that Member States will not submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. The CJEU concluded that Article 8 of the BIT “has an adverse effect on the autonomy of EU law”.

The CJEU began by recalling that an international agreement cannot affect the allocation of powers defined by the Treaties and hence the autonomy of the EU legal order. The EU legal order is autonomous from the law of the Member States and from international law. That principle of autonomy is enshrined in particular in the prohibition to submit a

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48 Ibid., para. 281. It is also worth noting that, independently of Achmea’s action, the Slovakian law had been the subject of a successful constitutional challenge.

49 There was another question on whether the BIT was discriminatory and thus contrary to Article 18 TFEU in that it required Slovakia to provide protection to Dutch investors that it was not obliged to provide to other EU investors, but the CJEU did not answer this question.

dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties, under Article 344 TFEU. In order to ensure that the autonomy of the EU legal order is preserved, the Treaties have established a particular system to ensure consistency and uniformity in the interpretation of EU law. The CJEU then noted that the arbitral tribunal was required to “take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties”. There was therefore a risk that it would be required to judge disputes of EU law, as EU is both “the law in force of the contracting party concerned” and a “relevant agreement between the contracting parties”. 51

Then, the CJEU went on to conclude that the arbitral tribunal was not able to refer questions of EU law to the CJEU. That was because the arbitral tribunal was not part of the judicial system of the Netherlands or Slovakia and lacked the relevant links to those Member States. 52

Moreover, the award of the arbitral tribunal was subject to limited review, based on the rules contained in the German Civil Code. 53 Article 8 of the BIT amounted to an agreement by the Member States to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law. 54

Consequently, EU law precluded a provision such as Article 8 of the BIT. Thus, the CJEU did not accept that the possibility of review by the national court of the arbitral award meant that the principle of jurisdictional autonomy was left unscathed. There is a limit to the curative power of referral to the CJEU. This I will call “hard jurisdictional autonomy”.

What lessons can one draw from this conclusion in light of the “reach” of jurisdictional autonomy?

First, Achmea shows that the autonomy of EU law is engaged in situations where a dispute resolution mechanism might apply or interpret EU law. 55

Second, Achmea deals with what one might call an intra-EU BIT—a BIT between two Member States. The reasoning does not necessarily extend to an extra-EU BIT, i.e. an agreement between a Member State and third countries or indeed between the EU and third countries which contains arbitral dispute resolution mechanism in an investment section. First, it must also be recalled that the CJEU relied on Article 344 TFEU, which, of course, only obtains between Member States and not between Member States and third countries, concluding that Article 8 was incompatible with EU law.

51 Ibid., paras 40 and 41.
52 Ibid., para. 45.
53 Ibid., para. 48.
54 Ibid., para. 53.
55 At para. 55, the CJEU distinguished commercial arbitration from arbitration under BITs on the basis that the parties have voluntarily consented to such commercial arbitration.
56 In addition, while the Tribunal stressed that “the Tribunal notes that its jurisdiction is confined to ruling upon alleged breaches of the BIT. The Tribunal does not have jurisdiction to rule upon alleged breaches of EU law as such “Award on Jurisdiction, Arbitrability, and Suspension of 26th October 2010 at para. 290, this is unlikely to be enough to dissipate any breaches of the principle of autonomy of EU law.
Second, reference was made, in paragraph 58, to “the possibility of submitting [investment] disputes to a body which is not part of the judicial system of the EU is provided for by an agreement which was concluded not by the EU but by Member States” (emphasis ours).

Third, the CJEU explained that Article 8 of the BIT offends the principles of “mutual trust between the Member States” and “of sincere cooperation” which obtains between the Member States and the EU. Neither of these applies to third countries.

The third and final point to address is the difference between Achmea and Eco Swiss. In Achmea the CJEU could have held, following Eco Swiss, that the BIT at issue was compatible with the autonomy of EU law because of the possibility of a national court referring a question of compatibility between an award and EU law when a party seeks to enforce such an award in a national court—in short, the autonomy of EU law is upheld because of the possibility “curative reference” to the CJEU. This was explicitly rejected.57

The explanation given was as follows:

“While the [arbitration clauses in Eco Swiss] originate in the freely expressed wishes of the parties, [the arbitral tribunals in BITs] derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU law […] disputes which may concern the application or interpretation of EU law.”

What provides the distinction between Achmea and Eco Swiss?

I suggest that what provides the distinguishing factor between the two is the institutional autonomy of EU law. It should be recalled that the “mutually interdependent legal relations binding the EU and its Member States” and the “binding [of] its Member States to each other” constitute the essential characteristics of the EU legal order.58

Autonomy can be squared with two private parties agreeing to submit to a commercial arbitration, where that arbitration which can subsequently be reviewed by the national courts which are part of the jurisdictional system of the EU. But the same cannot be said of an arbitration procedure, created between two Member States, who are in relationship of mutual trust and confidence, whose function is to remove disputes from the ordinary jurisdictional channels of EU law. That flies in the face of Member States bound by common values and whose jurisdictional systems insist on mutual trust and confidence. That balance of responsibilities that inheres in the EU system is upset by intra-EU BITs whose arbitration procedures supplant disputes otherwise brought before the judiciaries of the Member States of the EU.

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Cases

Court of Justice of the European Union


Jean Monnet Network LAwTTIP

The Jean Monnet Network LAwTTIP – Legal Ambiguities withstanding TTIP is based on a consortium consisting of the International Research Centre on European Law of the University of Bologna, the Centre of European Law of the King’s College London, and the Institut de l’Ouest Droit et Europe of the University of Rennes 1. It seeks to promote a broad-based legal discussion on existing EU free trade agreements of new generation, as well as on the ongoing negotiations on the Transatlantic Trade Investment Partnership (TTIP).

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