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Editorial: Opinion 2/13 – The End for Dispute Settlement in EU Trade and Investment Agreements?

Late last year, the Court of Justice of the European Union (CJEU) handed down its much-awaited Opinion 2/13.¹ In it, the Court held that the EU's accession to the European Convention on Human Rights (ECHR) pursuant to the so-called Draft Accession Agreement was contrary to EU constitutional law, in particular its principles of primacy and autonomy. The decision has generated intense discussion in EU law and human rights circles, where it was mostly criticized as building up Luxembourg into an excessively armored constitutional fortress.² International economic lawyers, by contrast, have been strikingly absent from the debate.

Yet, Opinion 2/13 is not specific to human rights adjudication. On the contrary, the CJEU's rejection of EU accession as foreseen by the Draft Accession Agreement is based on generic concerns about the relationship between EU law and international law and between the CJEU and other international courts and tribunals.³ This makes Opinion 2/13 a focal point also for

¹ CJEU, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (18 December 2014) <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CV0002&rid=1>> accessed 1 April 2015.

² For discussion of Opinion 2/13 see, inter alia, the contributions to the online symposium of the *Verfassungsblog* at <<http://www.verfassungsblog.de/category/schwerpunkte/die-eu-als-mitglied-der-menschenrechts-konvention/>> accessed 1 April 2015; Stian Øby Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences' (2015) 16 *German Law Journal* 169; Adam Lazowski and Ramses A Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 *German Law Journal* 179; Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 *German Law Journal* 213. For a more sympathetic reading of the Opinion see Daniel Halberstam, "'It's the Autonomy, Stupid!'" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105; Christoph Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13' (2015) 16 *German Law Journal* 147.

³ Cf the contributions in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014).

discussions about the limits of international dispute settlement in the EU's future trade and investment agreements, such as those being negotiated with Canada, Singapore, and the United States. Opinion 2/13 should thus also be of interest to anybody dealing with the integration of the EU in international economic governance.

Constitutional Limits to EU Accession to the ECHR

Opinion 2/13 voices a number of concerns regarding EU accession to the ECHR. All of them involve challenges to EU constitutional law and to the role of the CJEU as the EU's constitutional court.⁴

First, the CJEU stressed that submission to international dispute settlement must not undermine the primacy and autonomy of EU law and the exclusive competence of the CJEU to 'ensure that in the interpretation and application of the Treaties the law is observed.'⁵ The principle of autonomy requires that an international court, such as the European Court of Human Rights (ECtHR) 'must not have the effect of binding the EU and its institutions ... to a particular interpretation of the rules of EU law.'⁶ EU accession, however, would have given the ECtHR the power to review the CJEU's findings on the extent to which a Member State was bound by the EU's own human rights guarantees under the Charter of Fundamental Rights of the European Union (CFR) or could invoke the ECHR to avoid compliance with EU law under Article 53 CFR, which reads:

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

⁴ The CJEU expressly frames its concerns in a constitutional perspective; see Opinion 2/13 (n 1) paras 155–176.

⁵ Article 19(1)(2) of the Treaty on European Union (TEU). On this aspect see Opinion 2/13 (n 1) paras 179–200.

⁶ *ibid* para 184 (referring to CJEU, Opinion 1/91, *European Economic Area I* [1991] ECR I-6079 paras 30–35; Opinion 1/00, *European Common Aviation Area* [2002] ECR I-3493 para 13).

Although Article 53 ECHR itself provides that '[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party', the CJEU saw an insufficient coordination between the jurisprudence of both courts on how Convention and Charter rights inter-related, potentially giving Strasbourg room to claim the Convention's supremacy over EU law. The lack of coordination would be further aggravated by Protocol No. 16 to the ECHR, which would introduce a preliminary reference proceedings to the ECtHR, potentially undermining the preliminary reference proceeding to the CJEU under Article 267 of the Treaty on the Functioning of the European Union (TFEU). Finally, the CJEU was concerned that Member States' obligations under the ECtHR could require domestic courts in one Member State to review compliance of another Member State with its obligations under the ECHR when implementing EU law; this violated the EU law principle of mutual trust, undermining the CJEU's monopoly to review Member States compliance with EU law.

Second, the CJEU found a violation of Article 344 TFEU⁷ because the Draft Accession Agreement did not prevent Member States from bringing proceedings against each other for breach of the ECHR when implementing EU law.⁸ Since the ECHR would become an integral part of EU law upon accession, the CJEU considered that it 'has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR.'⁹ Article 33 ECHR, however, would allow the ECtHR to entertain precisely such disputes.

Third, the CJEU found the rules governing the co-respondent mechanism in ECHR proceedings to breach EU constitutional law.¹⁰ It criticized that the Draft Accession Agreement gave the ECtHR powers to rule on the respective competences of the EU and its Member States in making determinations on the distribution of responsibility for ECHR violations and reviewing the plausibility of either the EU or its Member States to serve as co-respondents. The CJEU found these powers to contravene its exclusive competence to rule on the distribution of competences within the EU.

⁷ Article 344 TFEU provides: '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.'

⁸ Opinion 2/13 (n 1) paras 215–235.

⁹ *ibid* para 204.

¹⁰ *ibid* paras 215–235.

Fourth, the CJEU took issue with deficiencies in its own involvement in cases concerning the implementation of EU law prior to the ECtHR's decision.¹¹ The CJEU criticized that the prior involvement procedure foreseen in the Draft Accession Agreement did not sufficiently ensure that the competent EU institutions could assess whether the CJEU had already ruled on the question at issue and, if necessary, initiate that procedure. Furthermore, the CJEU criticized that the procedure only required its involvement to determine the compatibility of EU law with the ECHR, but excluded its involvement to clarify the interpretation of secondary EU law.

Finally, the CJEU found EU accession to violate EU constitutional law because it would allow the ECtHR to review measures taken as part of the EU's Common Foreign and Security Policy (CFSP), a field where the CJEU only has limited competences. In the words of the CJEU:

Such a situation would effectively entrust the judicial review of those acts, actions or omissions on the part of the EU exclusively to a non-EU body, albeit that any such review would be limited to compliance with the rights guaranteed by the ECHR. The Court has already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU.¹²

All in all, EU accession as structured under the Draft Accession Agreement did not sufficiently protect against Member States' reliance on the ECHR to resist compliance with EU law obligations in intra-EU relations and against interference of the ECtHR with the interpretation of EU law. Both aspects called into question the constitutional structure of the EU and the role of the CJEU's as the EU's constitutional court.

Implications of Opinion 2/13 for Investor-State Dispute Settlement

With the CJEU's emphasis on the principle of mutual trust between Member States, the primacy of EU law, and the Court's own role in ensuring implementation and application of EU law in relations between EU Member States,

¹¹ *ibid* paras 236–248.

¹² *ibid* para 255–256 (referring to CJEU, Opinion 1/09, *European and Community Patents Courts* [2011] ECR I-1137 paras 78, 80 and 89).

Opinion 2/13 contains further ammunition against the continued existence of intra-EU investment treaties. The more interesting question for the EU's common commercial policy, however, is what Opinion 2/13 means for dispute settlement in future EU trade and investment agreements? While Opinion 2/13 does not raise novel aspects for dispute settlement between the EU and the other contracting party ('State-to-State') – they follow models accepted under several other international regimes, including the WTO and the UN Convention on the Law of the Sea¹³ – it reinforces concerns about investor-State dispute settlement (ISDS) in the EU's international investment agreements (IIAs) that have been raised in reaction to earlier decisions, most prominently Opinion 1/09 (*European and Community Patents Court*).¹⁴

Certainly, the rhetoric of Opinion 2/13 is harsher than that of earlier decisions. In substance, however, Opinion 2/13 adds few, if any, additional constitutional provisos for including dispute settlement mechanisms in EU agreements, be they mixed or EU-only. Instead, it reiterates concerns already expressed in Opinion 1/91 (*Economic Area Agreement I*),¹⁵ Opinion 1/00 (*European Common Aviation Area*),¹⁶ and Opinion 1/09 (*European and Community Patents Court*),¹⁷ and sharpens them. Whether the CJEU will use the same considerations to make ISDS, as we know it, impossible, is difficult to predict. Yet, I see sufficient room for keeping ISDS as part of EU IIAs, as currently included in EU IIA negotiations,

¹³ Note, however, that the CJEU's safety valve to safeguard the autonomy of EU law vis-à-vis WTO law has been the denial of direct effect of the latter. See Nikos Lavranos, 'The CJEU's Relationship with Other International Courts and Tribunals' in Karsten Hagem-Sørensen et al (eds), *Europe: The New Legal Realism - Essays in Honour of Hjalte Rasmussen* (Djøf Publ 2010), 393, 395 et seq.

¹⁴ Opinion 1/09 (n 12). On the implications of this opinion on ISDS see Markus Burgstaller, 'Investor-State Arbitration in EU International Investment Agreements with Third States' (2012) 39 *Legal Iss Econ Integration* 207 (2012); Matthew Parish, 'International Courts and the European Legal Order' (2012) 23 *EJIL* 141; Angelos Dimopoulos, 'The Compatibility of Future EU Investment Agreements with EU Law' (2012) 39 *Legal Iss Econ Integration* 447; Steffen Hindelang, 'The Autonomy of the European Legal Order: EU Constitutional Limits to Investor-State Arbitration on the Basis of Future Investment-related Agreements' in Marc Bungenberg and Christoph Herrmann (eds), *Common Commercial Policy of the EU after Lisbon* (Springer 2013) 187; Nikos Lavranos, 'Designing an International Investor-to-State Arbitration System After Opinion 1/09' in Bungenberg and Herrmann, *ibid*, 199; Stephan W Schill, 'Luxembourg Limits: Conditions for Investor-State Dispute Settlement Under Future EU Investment Agreements' (2013) 10(2) *TDM*.

¹⁵ Opinion 1/91 (n 6).

¹⁶ Opinion 1/00 (n 6).

¹⁷ Opinion 1/09 (n 12).

even if Opinion 2/13 tightens the CJEU's grip over other international courts and tribunals. Just as none of the earlier CJEU decisions, as I have argued elsewhere,¹⁸ make ISDS under future EU IIAs impossible, it is possible, through careful ISDS design, to meet the CJEU's concern to protect the primacy and autonomy of EU law and its own jurisdiction to apply and interpret EU law.

Two provisos that figured in Opinion 2/13 are relatively easy to handle in relation to ISDS. First, Article 344 TFEU should not cause further concern as it only applies to disputes between EU Member States, not to disputes between a private investor and a contracting party.¹⁹ Second, any dispute settlement mechanism under an EU IIA would need to make sure that the decision-making body does not, directly or indirectly, review the distribution of competences between the EU and Member States, for example by making determinations as to the proper respondent or the distribution of responsibility. Both these issues are addressed on an EU-internal level by the so-called Financial Responsibility Regulation²⁰; they need to be complemented through appropriate rules in mixed EU IIAs that preclude the ISDS mechanism to decide on the distribution of competences.²¹

Separating International Investment Law and EU Law

The more difficult issues concern the CJEU's first, fourth, and fifth objection in Opinion 2/13. To respond to concern No. 1, it is imperative to limit the jurisdiction of an ISDS mechanism to claims for breach of the applicable EU IIA, excluding breaches of EU law, whether by the EU or its Member States. Furthermore, it is necessary to prevent the ISDS mechanism from indirectly 'binding the EU and its institutions ... to a particular interpretation of ... EU law,' as the CJEU states.²² Two issues require consideration here: First, a

¹⁸ Schill (n 14) 11–16.

¹⁹ Article 344 TFEU would, however, prevent state-to-state dispute settlement between Member States about the scope of EU law under an investment agreement to which both the EU and Member States are parties.

²⁰ Regulation (EU) No 912/2014 of the European Parliament and of the Council of 23 July 2014 establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, OJ L 257, 121 (28 August 2014).

²¹ An example is contained in the Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Article 26(3)(b)(ii) of the Energy Charter Treaty, OJ L 69, 115 (9 March 1998).

²² Opinion 2/13 (n 1) para 184.

particular interpretation of EU law could be necessary in light of the ISDS mechanism's interpretation of investment treaty standards if the same, or essentially the same, standards also exist as norms of EU law and require identical interpretation. In the presence of such multi-sourced equivalent norms the interpretation by the ISDS mechanism could *de facto* bind the CJEU to a specific interpretation of EU law. Yet, unlike in the human rights context where Convention rights and Charter rights are equivalent and linked through Article 53 ECHR and Article 53 FRC, EU IIA standards and EU law are two entirely independent bodies of law.²³

Second, EU institutions could be bound to a specific interpretation of EU law, if EU IIAs were integrated into EU law. Yet, at least with the Canada-EU Comprehensive Economic and Trade Agreement (CETA),²⁴ this is not the case. Pursuant to Chapter 33 Article 14.15 of CETA:

Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly involved in the domestic legal systems of the Parties. No Party may provide a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

This provision excludes CETA from being integrated into EU law and thus becoming binding within the EU legal order on EU institutions. Moreover, it bears noting that the remedies an ISDS mechanism imposes are often limited to compensation and damages; specific performance, by contrast, is rare, and under recent EU IIAs even excluded.²⁵ Similar to the situation regarding WTO law, this permits to apply EU law internally at the expense of paying damages if contrary to an EU IIA. Only where the legality of a monetary payment is at issue, for example the repayment of a subsidy granted contrary to EU law, is the payment of damages economically equivalent to specific performance. Yet, whether this narrow case constitutes an infringement of the primacy of EU law

²³ EU law, for example, does not contain provisions on direct and indirect expropriation or the concept of fair and equitable treatment. Likewise, the national treatment standards or capital transfer provisions in investment treaties and EU law are not linked, but can be interpreted and applied independently from each other.

²⁴ The text of CETA is available at <<http://trade.ec.europa.eu/doclib/html/152806.htm>> accessed 1 April 2015.

²⁵ See CETA art X.36(1).

and the exclusive jurisdiction of the CJEU is still unresolved.²⁶ I doubt that this is the case though, not least because Member State law may grant, in certain circumstances, monetary compensation in case the implementation of EU law infringes rights protected under domestic constitutional law.²⁷

Need for Prior Involvement of the CJEU?

The fourth issue in Opinion 2/13 involves the CJEU's demand for prior involvement in the interpretation of EU law as a preliminary, or incidental, question. If the CJEU's exclusive jurisdiction requires that an ISDS mechanism could not decide such questions without submitting them to the CJEU first under a preliminary reference procedure, the EU's participation in ISDS would become difficult. After all, were the CJEU to demand such a prerogative for itself, it would also need to be granted to the constitutional or supreme courts of the EU's co-contracting parties. This would reintroduce domestic courts into ISDS, a result that IIAs usually want to avoid.

Politically, such a re-introduction of certain domestic remedies may even be welcomed. After all, if introducing a preliminary ruling procedure was necessary, granting the same privilege to the highest courts of the EU's treaty partners may be a way to strengthen the position of those courts in their respective domestic legal systems. Furthermore, if the problem with prior recourse to domestic courts lies principally with the lower courts, a preliminary reference system could forge a coalition between the ISDS mechanism and the highest courts of the respective host State in controlling government conduct. This could combine an effective implementation of investment treaty disciplines with protecting the ability of the host country's court system to interpret its domestic law.

There are, however, also counterarguments as to whether a preliminary reference procedure for incidental questions of EU law is necessary from the perspective of EU constitutional law. After all, it is questionable whether an ISDS

²⁶ This question is at stake regarding the enforcement of the award in *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, ICSID Case No ARB/05/20, Final Award (11 December 2013). Yet, the case arose under an intra-EU investment treaty, which raises somewhat different issues concerning the relation between international investment law to EU law. See further Christian Tietje and Clemens Wachernagel, 'Enforcement of Intra-EU ICSID Awards: Multilevel Governance, Investment Tribunals and the Lost Opportunity of the *Micula* Arbitration' (2015) 16 JWIT 205.

²⁷ See German Constitutional Court, Case No 2 BvR 2661/06, *Honeywell*, Order (6 July 2010) paras 66, 84–86 <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html> accessed 1 April 2015.

mechanism would ever need to interpret EU law or determine the conformity of a norm of EU law with the applicable EU IIA. Instead, the ISDS mechanism would principally assess whether a concrete measure, by the EU or a Member State, that affected the claimant-investor was contrary, or not, to the applicable IIA, independently of whether that measure was mandated by EU law, in conformity with EU law, or in breach of it. Compliance or non-compliance with EU law, in other words, is irrelevant for determining whether a concrete measure was in conformity with an investment treaty provision, even if the measure in question had some EU law background. Only the distribution of responsibility between a Member State and the EU depends on the interpretation of EU law. This matter, however, would be left to the EU courts to decide. From the perspective of EU constitutional law it therefore seems possible to establish an ISDS mechanism without the CJEU's prior involvement.

Judicial Review in Common Foreign and Security Policy

Finally, there is concern No. 5: the conferral of powers of judicial review in an area where the CJEU only has limited jurisdiction, namely CFSP matters. Such matters could also come under the scrutiny of an ISDS mechanism if foreign investors are affected. If the sweeping claim in Opinion 2/13 that 'jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU ... cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU'²⁸ is taken at face value, ISDS under EU IIAs in CFSP matters would indeed be difficult to sustain. Whether this statement can, however, be transposed to ISDS is questionable. After all, the CJEU here relied on Opinion 1/09, which dealt with the prospective Patents Court that would have had very distinctive features from ISDS. This court would have applied EU law routinely and bypassed the otherwise competent domestic courts. An ISDS mechanism, by contrast, would need to be excluded from applying EU law anyways. Moreover, the application of domestic and EU law by domestic courts would not be prevented despite the introduction of an ISDS mechanism. Finally, ISDS, as provided for under CETA, for example, would be limited to applying treaty standards that domestic courts would not have been able to apply in the first place because the agreement lacks direct effect.²⁹

²⁸ Opinion 2/13 (n 1) para 256.

²⁹ CETA, ch 33 art 14.15 (quoted supra following text after n 24).

Allowing Europe to Contribute Shaping the International Investment Regime

In sum, the core differences between human rights adjudication in the European legal space, on the one hand, and ISDS under investment treaties, on the other, prohibit drawing overly quick conclusions from the CJEU's pronouncements in Opinion 2/13 for dispute settlement under future EU IIAs. Certainly, the CJEU's stance does not simplify the EU's position in negotiating IIAs. It even creates further uncertainty among the EU's treaty partners, and their investors, as to the possibility of the EU to commit to an ISDS mechanism and to abide by its rulings. This uncertainty could be reduced by involving the CJEU through an advisory opinion and invite it to assess the compatibility of such a mechanism with EU constitutional law.

Yet, as I have argued in this Editorial, ISDS can be structured in a way that respects EU law and the role of the CJEU. Above all, it is important to remind the CJEU, time and again, of the principle it set out itself and repeated in Opinion 2/13: that 'an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law.'³⁰ Only an EU that is empowered to participate actively in, and fully submits to binding international dispute settlement, is able to demand the same of other countries, and thereby contribute to shaping the future world order according to its own values.

Stephan W. Schill

³⁰ Opinion 2/13 (n 1) para 182.