ISDS and the principle of autonomy of EU law following Opinion 2/13

1. The principle of autonomy of the EU legal order

1. The Court of Justice has repeatedly declared that an agreement providing for international dispute settlement is, in principle, compatible with EU law. Thus, most recently, in Opinion 2/13 the Court recalled 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; […] The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions [1].

2. Nevertheless, the Court has also declared that an international agreement providing for dispute settlement may affect the Court's own powers

> only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on effect on the autonomy of the EU legal order"[2].

3. According to the Court, the preservation of the autonomy of the EU legal order requires, in particular, that the decisions of the international dispute settlement body do not have "the effect of binding the EU and its institutions in the exercise of their internal powers, to a particular interpretation of the rules of EU law"[3].

4. More specifically, the case law of the Court shows that the limits resulting from the principle of autonomy on the possibility for the Union to become party to an international agreement providing for dispute settlement include the following:

- the agreement may not confer upon the international dispute settlement body jurisdiction to rule on who (the Union and/or a Member State) is to act as respondent in a given dispute, as this would imply an interpretation of their respective competences under the Treaties[4];

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1 Opinion 2/13, para. 182. See also Opinion 1/91, paras. 40 and 70; and Opinion 1/09, para. 74.

2 Opinion 2/13, para. 183. See also Opinion 1/00, paras 21,23 and 26; and Opinion 1/09, para. 76.

3 Opinion 2/13, para. 184. See also, Opinion 1/91, paras. 30-35; and Opinion 1/00, para. 13.

4 Opinion 1/91, paras. 31-35; Opinion 1/00, paras. 15-17; and Opinion 2/13, paras. 215-235.

- the agreement may not confer upon the international dispute settlement body exclusive jurisdiction to interpret or apply EU domestic law[5] ;

- the agreement may not confer upon the international dispute settlement body jurisdiction to review the legality of acts of the EU institutions under EU law;[6]

- where the agreement aims at extending an essential part of the EU *acquis* to non-EU countries by replicating provisions of domestic EU law, while ensuring the homogeneous interpretation of both sets of provisions, adequate safeguards must be put in place in order to guarantee that the dispute settlement mechanism established for the purpose of interpreting and applying the provisions of the agreement does not have 'spillover' effects on the interpretation of identically worded provisions of domestic EU law by the EU's own courts[7].

[redacted]

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5 Opinion 1/09, paras. 78 and 89.

6 Opinion 1/00, para. 24; Opinion 1/09, para. 78.

7 Opinions 1/91, 1/92 and 1/00.

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3. Implications of the Court's Opinion 2/2013 for ISDS

11. The draft protocol of accession of the EU to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provided for a so-called "procedure for the prior involvement of the Court". That procedure would have allowed the Court to rule on the interpretation of EU primary law or on the validity

[redacted]

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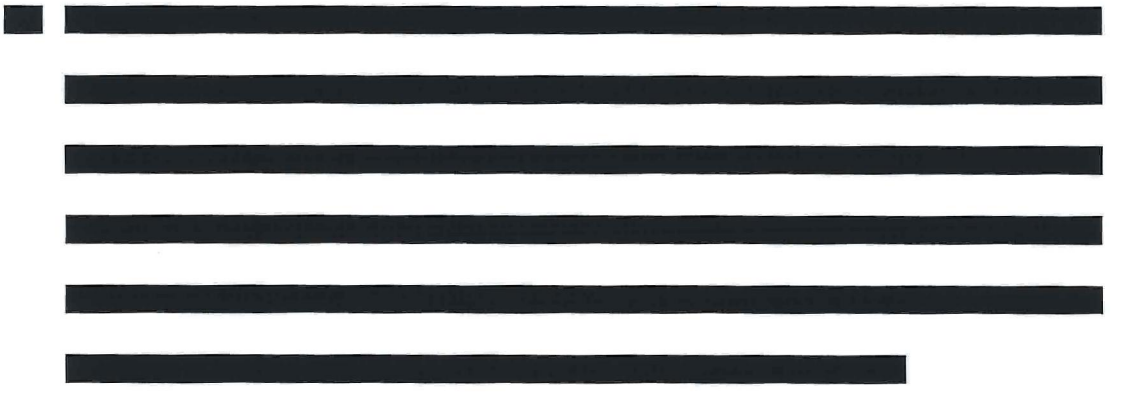
of EU secondary law before a case was decided by the ECtHR in the light of the ECHR. In Opinion 2/13 the Court held that such procedure should apply also in respect of the interpretation of secondary law. The Court's observed that:

> If the Court of Justice were not allowed to provide the definitive interpretation of secondary law, and if the ECtHR, in considering whether that law is consistent with the ECHR, had itself to provide a particular interpretation from among the plausible options, there would most certainly be a breach of the principle that the Court of Justice has exclusive jurisdiction over the definitive interpretation of EU law.
>
> Accordingly, limiting the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the Court of Justice in that it does not allow the Court to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the ECHR.



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