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The procedures of prior involvement and referral to the CJEU as means for judicial dialogue between the CJEU and international jurisdictions

by

Cristina Contartese*

Abstract

(French version below)

The procedures of prior involvement and referral to the Court of Justice of the European Union (hereafter CJEU or Court) are mechanisms that enable the CJEU to rule on the interpretation and/or validity of EU law when this latter is relevant for a case pending before an international court or tribunal. Current academic debate has widely focused on the prior involvement mechanism before the European Court of Human Rights (ECtHR). Nevertheless, this is certainly not the only example where these procedures have been proposed.

The purpose of this paper is to provide an analysis of the provisions that foresee the procedures of prior involvement and referral to the CJEU in order to investigate the legal features of these mechanisms. Although up to now there have been limited practice under EU bilateral and (draft) multilateral agreements, the paper will also discuss whether they can be an appropriate legal tool for a direct judicial dialogue between the CJEU and other international jurisdictions.

In fact, although these procedures are welcome from an EU perspective, as they are amongst those mechanisms whose purpose is to protect the autonomy of the EU legal order in international dispute settlement, their application may raise several legal issues. Do prior involvement and referral procedures require an amendment to the EU Treaties? Under these procedures, what is the extent of the CJEU's competence and are its rulings binding? Are prior involvement and referral to the CJEU limited to specific international agreements or could they be extended to any other treaty foreseeing an international dispute settlement mechanism?

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As for the EU practice under bilateral and (draft) multilateral agreements, attention will be paid to the recent Association Agreements with Georgia, Moldova and Ukraine (2014), to the Draft Agreement on the European and Community Patents Court (2009) as well as to the Draft Agreement on the EU accession to the ECHR (2013).

Keywords: Prior involvement, Referral to the CJEU, Judicial dialogue, Autonomy of the EU legal order

Résumé

Les procédures de l'implication préalable et la saisine de la Cour de justice de l'Union européenne (CJUE) sont des mécanismes qui permettent à la CJUE de statuer sur l'interprétation et la validité du droit de l'UE lorsqu'elles relèvent dans l'affaire devant une cour ou un tribunal international. Le débat académique actuel s'est particulièrement focalisé sur la procédure de l'implication préalable devant la Cour européenne des droits de l'homme (CrEDH). Toutefois, ce n'est certainement pas le seul exemple où ces mécanismes ont été proposés.

Même si la pratique de l'UE est encore limitée, le but de cet article est de présenter une analyse des accords internationaux qui prévoient les procédures de l'implication préalable et de la saisine de la CJUE, afin d'identifier leur caractéristiques juridiques ainsi que de savoir si ces mécanismes sont des moyens appropriés pour un dialogue direct entre la Cour de Luxembourg et d'autres juridictions internationales. En effet, même si, du point de vue de l'UE, les deux procédures ont pour but de protéger l'autonomie de l'ordre juridique de l'Union dans le contexte de la résolution des différends internationaux, leur application soulève plusieurs questions de nature juridique.

Est-ce que l'implication préalable et la saisine de la CJUE nécessitent un amendement des Traités de l'UE ? Dans le cadre de ces procédures, quelles sont les compétences de la CJEU et quelle est la nature de ses décisions? Est-ce que l'implication préalable et la saisine de la CJUE se limitent à des accords internationaux spécifiques ou pourraient-elles être étendues à tout traité prévoyant une procédure de résolution des différends ?

Quant à la pratique de l'Union concernant les traités bilatéraux et internationaux, l'analyse se focalisera sur les récents Accords d'Association avec la Géorgie, la Moldavie et l'Ukraine (2014), sur le projet d'accord visant à la création d'une juridiction du brevet européen et communautaire (2009) ainsi que le projet d'accord concernant l'adhésion de l'UE à la CEDH (2013).

Mots-clés : Implication préalable, Saisine de la CJUE; Dialogue des juges, Autonomie de l'ordre juridique de l'UE

The procedures of prior involvement and referral to the CJEU as means for judicial dialogue between the CJEU and international jurisdictions

I. Introduction

The procedures of prior involvement and referral to the Court of Justice of the European Union (hereafter CJEU or Court) are mechanisms that enable the Court to rule on the interpretation and/or validity of EU law when this latter is relevant for a case pending before an international court or tribunal. Although both procedures were born out of the debate on the autonomy of the Union legal order and aim at establishing a *direct* judicial dialogue between the CJEU and an international jurisdiction, a distinction can be drawn between referral as such and prior involvement. This latter, as foreseen under the Draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter 'Draft EU Accession Agreement'),[1] is linked to the co-respondent mechanism, while referral is triggered *directly* by the international jurisdiction at issue. Therefore, the use of the different terminology – 'prior involvement' instead of 'referral' –reflects the specificity of the ECHR judicial system in which this procedure is embedded. Current academic debate has widely focused on the prior involvement procedure under the Draft EU Accession Agreement. Nevertheless, this is certainly not the only example where an international jurisdiction is allowed to formally address the CJEU so far as EU law is concerned. While the practice under EU bilateral and (draft) multilateral agreements is limited, the purpose of this paper is to provide an analysis of the provisions that foresee the procedures of prior involvement and referral to the CJEU, to inquire about the legal features of these mechanisms, and to discuss whether they can be an appropriate legal tool for a *direct* judicial dialogue between the CJEU and other international jurisdictions. In fact, although these procedures are welcome from an EU perspective, as they are among those mechanisms whose purpose is to protect the autonomy of the

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[1] Draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, CDDH, 47+1(2013)008rev2, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp.

EU legal order in international dispute settlement, their application may raise several legal issues. Do they require an amendment to the EU Treaties? What is the extent of the CJEU's competence in such procedures? Are the Court's rulings binding? Are prior involvement and referral to the CJEU limited to specific international agreements or could they be extended to *any* other treaty foreseeing an international dispute settlement mechanism?

In order to answer these questions, the article is divided into three parts. The first one aims at clarifying the rationale behind prior involvement and referral procedures, setting the scene on the principle of autonomy of the EU legal order. The second part describes those EU bilateral and (draft) multilateral agreements that foresee such procedures, that is, respectively, the recent Association Agreements with Georgia, Moldova and Ukraine (2014)[2], the Draft Agreements on the European and Community Patents Court (2009), and on the EU accession to the ECHR (2013). The third part will raise some questions on the legal features of the procedures of prior involvement and referral, and will endeavour to provide some answers.

II. Why are the procedures of prior involvement and referral to the CJEU necessary? The principle of autonomy of the EU legal order s

When becoming Contracting Parties to treaties establishing dispute settlement mechanisms, the Union and/or its Member States propose different instruments and mechanisms in order to protect the autonomy of the EU legal order. Amongst them, there can be listed disconnection clauses, *ad hoc* rules of interpretation, rules of proceduralisation, referral to the CJEU and, with specific regard to the Union's accession to the ECHR, the co-respondent mechanism and the CJEU's prior involvement procedure. Our focus, as afore mentioned, is on the procedures of prior involvement and referral to the CJEU from an international court or tribunal, whose purpose is to guarantee that interpretation and review of the validity of EU law remain an exclusive competence of the CJEU, as established under Article 19(1) TEU. Under this provision, the CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed'.

Against this background, it is not controversial that the procedure of prior involvement and referral are instrumental to the need to protect the competence of the CJEU. Nevertheless, identifying what autonomy is does not present an easy task. In fact, autonomy 'is not a term of art, but a rather nebulous concept susceptible of many applications' under national legal

[2] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (OJ L 161/3, 29/05/2014); Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part (OJ L 260/4, 30/08/2014); and Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part (OJ L 261/4, 30/08/2014).

systems, international law, as well as international institutional law.[3] As for international organizations (IOs), the concept of autonomy may refer to the relationship between the organs of the organization, the organization and its member states, different international organizations, and IOs and the international law order. Autonomy, therefore, displays both an 'internal' and an 'external' dimension.

As for the 'internal' dimension of the principle of autonomy under EU law,[4] the CJEU has identified the relationship of the Union with the Member States since its early case-law in the 1960s. As is very well known, the CJEU stated for the first time, in *Van Gend en Loos* (1963), that the then European Economic Community (EEC) was a 'new legal order of international law',[5] while a year later in *Costa v. Enel*, the Court ruled that, in contrast with ordinary international treaties, 'the EEC Treaty has created its own legal system'.[6]

The CJEU later clarified the Union's relationship *vis-à-vis* international law and therefore, the role of the 'external' dimension of autonomy was examined when the EU interacts with other international legal orders.[7]As for the relationship between the EU legal order and international dispute settlement, the Court stated that establishing or acceding to an international court or tribunal is in general compatible with EU Treaties explaining that

> «An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions».[8]

Although this statement was further held in subsequent Opinions dealing with the proposed establishment of international dispute settlement mechanisms under international agreements,[9] the Court has also declared that 'an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those

[3] See GAZZINI Tarcisio, *The Relationship between International Legal Personality and the Autonomy of International Organizations*, Collins Richard, White Nigel D. (eds.), « International organizations and the idea of autonomy. Institutional independence in the international legal order », Routledge, 2011, p. 196.

[4] See, amongst the others, RUIZ FABRI Hélène, SINCLAIR Guy F., ROSEN Arie, *Revisiting Van Gend En Loos,* Paris : Société de législation comparée, 2014; TIZZANO Antonio, KOKOTT Juliane, PRECHAL Sacha (eds), *50th anniversary of the judgment in Van Gend en Loos, 1963–2013, Actes du Colloque, Luxembourg, 13 mai 2013*, Luxembourg : Office des publications de l'Union européenne, 2013; MICKLITZ Hans-W., *The European Court of Justice and the Autonomy of the Member States,* Intersentia, 2012; BARENTS René, *The Autonomy of Community Law*, Kluwer, 2004; and the debate between SCHILLING Theodor, *The Autonomy of the Community Legal Order*, Harvard international law journal 1996, pp. 389-409 and WEILER Joseph H.H., HALTERN Ulrich H., *The Autonomy of the Community Legal Order – Through the Looking Glass*, Harvard international law journal 1996, pp. 411-448.

[5] Case 26/62, *Van Gen den Loos* [1963] ECR, at 12.

[6] Case 6/64, *Costa v. Enel* [1964] ECR, at 593.

[7] See, *inter alia*, VEZZANI Simone, *L'autonomia dell'ordinamento giuridico dell'Unione europea. Riflessioni all'indomani del parere della Corte di giustizia n. 2/13*, Rivista di diritto internazionale 2016, pp. 141-155; DE WITTE Bruno, *European Union Law. How Autonomous is its Legal Order?*, Zeitschrift für öffentliches Recht 2010, pp. 141-155.

[8] Opinion 1/91, para. 40, see also para. 70.

[9] See Opinion 1/09, para. 74; and Opinion 2/13, para. 182.

powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order'.[10]

Therefore, the fact that the EU is a new kind of legal order brings consequences on the relationship between the Union and other international legal systems. In its Opinions on EU autonomy in the context of international dispute settlement mechanisms, the Court, recalling the elements that constitute the specific and essential characteristics of the Union, does not state anything new, as they constitute, as Jacqué rightly observes, 'un résumé de tout ce que l'on a trouvé développé dans un manuel de droit de l'Union',[11] that is, the primacy of EU law, the division of competences between the Union and its Member States, the powers of the EU institutions as well as the role of the Member States' national judges in the framework of the Union's judicial system.[12]

The need to protect the autonomy of the EU legal order in the specific context of the EU accession to the ECHR was codified under the EU Treaties. Article 6(2)TEU establishes that 'Such accession shall not affect the Union's competences as defined in the Treaties', while Protocol 8, having the same legal value as the EU Treaties, states that the accession agreement 'shall make provision for preserving the specific characteristics of the Union and Union law'.[13]As is well known, the CJEU ruled on the impact of autonomy in the EU's accession to the ECHR in Opinion 2/13.[14]

In sum, from an EU law perspective, autonomy is the principle that aims at safeguarding the Union's peculiar legal order, and that requires the setting up of *ad hoc* mechanisms and instruments in order to pursue such a purpose.

[10] Opinion 2/13, para. 183. See also Opinion 1/00, EU:C:2002:231, paras 21, 23 and 26, and Opinion 1/09, EU:C:2011:123, para. 76; and, to that effect, judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, EU:C:2008:461, para. 282.

[11] JACQUE Jean Paul, *Pride and/or Prejudice? Les lectures possibles de l'Avis 2/13 de la Cour de Justice*, Cahiers de droit européen 2015, p. 31. The author, in his analysis, specifically refers to Opinion 2/13.

[12] See *Opinion 1/76*, Draft agreement establishing a European laying-up fund for inland waterway vessels; *Opinion 1/91* and *Opinion 1/92*, Agreement on the European Economic Area; *Opinion 2/94*, Accession by the Community to the European Convention on Human Right; *Opinion 1/09*, Agreement on a European and Community Patents Court; and *Opinion 2/13*, Accession by the European Union to the European Convention on Human Right. For a critique of such Opinions, see DE WITTE Bruno, *A selfish Court? The Court of Justice and the Design of International Dispute Settlement beyond the European Union*, in Cremona Marisa, Thies Anne (eds), « The European Court of Justice and external relations law. Constitutional challenges », Hart Publishing, 2013, pp. 33-46.

[13] In similar terms, Declaration on Art. 6, par. 2 TEU states that: 'The Conference agrees that the *Union's accession* to the European Convention for the Protection of Human Rights and Fundamental Freedoms *should be arranged in such a way as to preserve the specific features of Union law*. In this connection, the Conference notes the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights; such dialogue could be reinforced when the Union accedes to that Convention'. (emphasis added)

[14] In Opinion 2/13, the CJEU, after recalling what makes the Union a new legal order, 'the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation' (Opinion 2/13, para. 158), mentions, amongst the others, the principle of conferral of powers, the institutional framework, EU law primacy over the laws of the Member States, and direct effect (Opinion 2/13, paras 165-166). The CJEU also specifies that 'These essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe' (Opinion 2/13, paras 165-173).

III. The procedures of prior involvement and referral to the CJEU from an international court and tribunal under EU bilateral and (draft) multilateral agreements

The first international treaty, to our knowledge, where a procedure of referral has been proposed to the CJEU from an international court was the Draft Agreement on the European and Community Patents Court and Draft Statute, in 2009.[15] This Draft agreement, meant to be concluded between the Member States, the European Union, and the third countries party to the European Patent Convention, aimed at establishing, amongst its institutions, a court with jurisdiction to hear actions related to European and Community patents. The proposed judicial system was named European and Community Patents Court ('the PC'), and was to be composed of a Court of First Instance, comprising a central, local, and regional divisions, and a Court of Appeal, having jurisdiction to hear appeals brought against the Court of First Instance's decisions. Under Article 48, the Draft Agreement established a procedure of referral from the Court of First Instance and the Court of Appeal to enable the CJEU to decide on questions of interpretation regarding primary and secondary law as well as validity of secondary law. Such a procedure was optional for the Court of First Instance, while it was compulsory for the Court of Appeals, as the terms 'may' and 'shall' clearly suggest in the provision. In both cases, the decisions of the CJEU would have been binding on the two Courts. Article 48 of the Draft Agreement, which is worthwhile to cite in its integrity, reads as follows:

> « (1) When a question of *interpretation of the Treaty establishing the European Community* or the *validity and interpretation of acts of the institutions of the European Community* is raised before the *Court of First Instance*, it *may*, if it considers this necessary to enable it to give a decision, *request* the Court of Justice of the European Communities to decide on the question. Where such question is raised before the *Court of Appeal*, it *shall request* the Court of Justice of the European Communities to decide on the question.(2) The decision of the Court of Justice of the European Communities on the interpretation of the Treaty establishing the European Community or the validity and interpretation of acts of the institutions of the European Community shall be *binding* on the Court of First Instance and the Court of Appeal ». (emphasis added)

The Draft agreement was declared incompatible with the EU Treaties by the CJEU in Opinion 1/09 mainly because of the impact it would have on the role of EU Member States domestic courts and tribunals as 'ordinary' judges within the EU legal order.[16] In particular, as for referral, the CJEU pointed out that 'The draft agreement provides for a preliminary ruling mechanism which reserves, within the scope of that agreement, the power to refer

[15] Council Document 8588/09 of 7 April 2009 on a revised proposal for a Council Regulation on the Community patent, drawn up by the Council Presidency and addressed to the working party on Intellectual Property (Patents); Council Document 7928/09 of 23 March 2009 on a revised Presidency text of the draft agreement on the European and Community Patents Court and the draft Statute of that court.

[16] Opinion 1/09, para. 80. For comments on Opinion 1/09, see ROSAS Allan, *The National Judge as EU Judge: Opinion 1/09*, in Cardonnel Pascal *et al.* (eds), « Constitutionalising the EU judicial system : essays in honour of Pernilla Lindh », Oxford, 2012, pp. 105-121; BARATTA Roberto, *National Courts as 'Guardians' and 'Ordinary Courts' of EU Law: Opinion 1/09 of the ECJ*, Legal Issues of Economic Integration 2011, pp. 297-320; ADAM Stanislas, *Le mécanisme préjudiciel, limite fonctionnelle à la compétence externe de l'Union. Note sur l'avis 1/09 de la Cour de Justice*, Cahiers de droit européen 2015, pp. 277-302.

questions for a preliminary ruling to the PC while removing that power from the national courts'.[17]

The proposal for a European and Community Patents Court was substituted, in 2013, by the Agreement on a Unified Patent Court, whose Contracting Parties are exclusively EU Member States. As a consequence, such a Court would seem to fall under the typology of judicial institutions which are common to a number of EU Member States and are, therefore, situated within the judicial system of the Union - the Benelux Court is among the examples that belong to this typology.[18] The fact that the Unified Patent Court was meant to operate as part of the EU judicial system is also reflected in its relationship with the CJEU and its requests for preliminary rulings. Under Article 21, it is in fact established that 'As a court common to the Contracting Member States and as part of their judicial system, the Court *shall cooperate* with the Court of Justice of the European Union to ensure the correct application and uniform interpretation of Union law, *as any national court*, in accordance with *Article 267 TFEU* in particular. Decisions of the Court of Justice of the European Union shall be binding on the Court' (emphasis added). Nevertheless, although the new provision aims at creating a court that is integrally part of the EU judicial system as much as the EU Member States' domestic jurisdictions, it is still questionable whether the Unified Patent Court correctly falls under the requirements of Article 267 TFEU.[19]

In 2013, another (draft) multilateral agreement foresaw the entitlement of the CJEU to rule on the interpretation and validity of EU law[20] in relation to a case before an international court, that being the Draft agreement on the EU accession to the ECHR. The proposed mechanism at issue, known as 'prior involvement procedure' or 'prior internal review procedure', is an internal EU procedure whose purpose is to ensure that the CJEU assesses the

[17] Opinion 1/09, para. 81. The CJEU specifies that 'It is clear that if a decision of the PC were to be in breach of European Union law, that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member States (para. 88). Consequently, the envisaged agreement, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law' (para. 89).

[18] See footnote 19.

[19] The CJEU identified the Benelux Court as a common jurisdiction that can refer preliminary rulings. In Opinion 1/09, the CJEU recalled the difference between the Benelux Court and the Patent Court, explaining that 'It must be emphasised that the situation of the PC envisaged by the draft agreement would differ from that of the Benelux Court of Justice which was the subject of Case C-337/95 *Parfums Christian Dior* [1997] ECR I-6013, paragraphs 21 to 23. Since the Benelux Court is a court common to a number of Member States, situated, consequently, within the judicial system of the European Union, its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union' (Opinion 1/09, para. 82). Moreover, in the *European School* case (CJEU, case C-196/09), the CJEU pointed out that 'the procedure before the Benelux Court is a step in the proceedings before the national courts' (para. 41), and rejected the possibility for an international jurisdiction to refer a preliminary ruling under art. 267 TFEU as this latter refers to 'a court or tribunal of a Member State'. On the controversial issues related to the (future) relationship between the Unified Patent Court and the CJEU, see see ALBERTI Jacopo, *When Judicial Dialogue Needs Strong Institutional Commitments: The Peculiar Case of the Creation of the Unified Patent Court*, Geneva Jean Monnet Working Paper, No 15/2016, pp. 1-34.

[20] For the debate on the distinction between the interpretation of primary and secondary EU law, under the Draft EU Accession Agreement, see below Section IV B.

compatibility of the provision of EU law with the rights at issue defined in the Convention. In particular, this procedure would take place where a case initiated before national courts and tribunals has never been the subject of a preliminary ruling procedure under Article 267 TFEU, before the ECtHR reaches a decision in the case.[21] The rationale of the procedure is twofold. Firstly, from an ECHR's perspective, as explained under the Draft explanatory report (Appendix V) to the Draft Agreement, its purpose lies in the link with the respect for the subsidiary nature of the control mechanism established by the ECHR.[22] Secondly, from an EU law perspective, it protects the proper functioning of the judicial system of the Union. The initial promoter and supporter of this procedure was the CJEU, which suggested the need for it in a 'Discussion document',[23] and later reiterated its position in the 'Joint communication' from the Presidents of the Court and the ECtHR.[24] Interestingly, while some legal scholars have been particularly critical of prior involvement, pointing out that this procedure is not justified on the basis of the principles of autonomy or subsidiarity and that it grants the CJEU a privileged role when compared to the constitutional courts of the other Contracting Parties,[25] the Court, in Opinion 2/13, clearly confirms the relevance of the procedure in the context of the EU accession to the ECHR. Currently, the procedure provision does not seem re-negotiable and, consequently, the debate on the (necessary or unnecessary) role of prior involvement does not appear open.

Under the Draft EU Accession Agreement, prior involvement procedure is closely related to the co-respondent mechanism as it takes place in cases that trigger the participation of

[21] On the functioning of the prior involvement procedure, see, in particular, BARATTA Roberto, *Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism*, Common Market Law Review 2013, pp. 1305-1332; HELISKOSKI Joni, *The Arrangement Governing the Relationship between the ECtHR and the CJEU in the Draft Treaty on the Accession of the EU to the ECHR*, in Cremona Marise, Thies Anne (eds), « The European Court of Justice and External Relations Law », Oxford : Hart Publishing, 2014, pp. 223-248. For different proposals on the CJEU's prior internal review formulated before the final Draft of 2013, see LOCK Tobias, *Walking on a Tightrope: The Draft Accession Agreement and the Autonomy of the EU Legal Order*, Common Market Law Review 2011, p. 1047.

[22] Draft explanatory report: 'Cases in which the EU may be a co-respondent arise from individual applications concerning acts or omissions of EU member States. The applicant will first have to exhaust domestic remedies available in the national courts of the respondent member State. These national courts may or, in certain cases, must refer a question to the CJEU for a preliminary ruling on the interpretation and/or validity of the EU act at issue (Article 267 TFEU). Since the parties to the proceedings before the national courts may only suggest such a reference, this procedure cannot be considered as a legal remedy that an applicant must exhaust before making an application to the Court. However, without such a preliminary ruling, the Court would be required to adjudicate on the conformity of an EU act with human rights, without the CJEU having had the opportunity to do so, by ruling on, as the case may be, the validity of a provision of secondary law or the interpretation of a provision of primary law' (para. 65).

[23] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European convention for the protection of human rights and fundamental freedoms, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf>, para. 12.

[24] Joint communication from Presidents Costa and Skouris, Strasbourg and Luxembourg, 24 January 2011, para. 2 (available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf).

[25] See, *inter alia*, TORRES PÉREZ Aida, *Too Many Voices? The Prior Involvement of the Court of Justice of the European Union*, in Kosta Vasiliki *et al.* (eds), « The EU Accession to the ECHR », Hart Publishing, 2014, pp. 29-44; VEZZANI Simone, *The EU and its Member States before the Strasburg Court: A Critical Appraisal of the Co-respondent Mechanism*, in Repetto Giorgio (ed.), « The Constitutional Relevance of the ECHR in Domestic and European Law. An Italian Perspective », Intersentia, Cambridge/Antwerp/Portland, 2013, pp. 232-235; GAJA Giorgio, *Accession to the ECHR*, in Biondi Andrea, Eeckhout Piet, Ripley Stefanie (eds.), *EU after Lisbon*, Oxford, 2011, pp. 180-194; JACQUÉ Jean Paul, *The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms*, Common Market Law Review 2011, pp. 1019 ff.

the EU as a co-respondent.[26] Moreover, it specifies that such a procedure shall affect neither the proceedings before the ECtHR, causing unduly delay, nor the powers of the Court. Under Article 3(6) of the Draft agreement, this procedure reads as follows:

> « In proceedings to which the *European Union* is *a co- respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue* defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this Article, sufficient time shall be afforded for the *Court of Justice of the European Union to make such an assessment*, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. *The provisions of this paragraph shall not affect the powers of the Court* ».(emphasis added)

According to the CJEU, however, prior involvement is not compatible with the EU Treaties.[27] After strongly highlighting that this procedure is 'also necessary for the purpose of ensuring the proper functioning of the judicial system of the EU',[28] the CJEU explained that this means that 'the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice, [must] be preserved, as required by Article 2 of Protocol 8 EU'.[29]

As already mentioned, the Draft Agreement on the European and Community Patents Court and Draft accession agreement to the ECHR – both rejected by the CJEU as incompatible with the EU Treaties - are not the only international texts where a *direct* dialogue between the CJEU and an international jurisdiction has been proposed. The procedure of referral is in fact laid down under the Association Agreements between the European Union and its Member States, and Ukraine,[30] Moldova,[31]and Georgia,[32] concluded in 2014.[33] These three treaties, which are part of a new generation of EU Association Agreements (AAs) with Eastern European countries aiming at substituting previous partnership and association agreements, are 'the most voluminous and ambitious among all the EU AAs with third countries',[34] and belong to the category of the so-called "integration-oriented agreements". These are treaties that allow for "integration without membership", aiming at

[26] Advocate General summarizes the three conditions for the prior involvement procedure as follows: ' [1] The scope of application of the prior involvement procedure is indissociably linked to the status of the co-respondent, so that the question of this Court's prior involvement necessarily arises only where the EU is a co-respondent before the ECtHR. [2] Prior involvement is envisaged only where this Court has not yet made an assessment of the compatibility with the ECHR of the provision of EU law at issue. [3] The subject-matter of the prior involvement is the compatibility of that EU law with fundamental rights under the ECHR the violation of which is alleged in the proceedings before the ECtHR' (para. 126).

[27] See infra, Section IV. B.

[28] Opinion 2/13, para. 236.

[29] *Ibid*., para. 237.

[30] OJ L 161/3, 29/05/2014.

[31] OJ L 260/4, 30/08/2014.

[32] OJ L 261/4, 30/08/2014.

[33] For an analysis of the Association Agreement with Ukraine, which served to a large extent as a template for the agreements with Moldova and Ukraine, see SISKOVA Nadezda, *The EU-Ukraine Association Agreement as an Instrument of a New Generation of so called "Tailored" Association Agreements: The Comparative View*, in Siskova Nadezda (ed.), « From Eastern Partnership to the Association. A Legal and Political Analysis », Cambridge Scholars Publishing, 2014, pp. 106-134 ; VAN DER LOO Guillaume, VAN ELSUWEGE Peter, PETROV Roman, *The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument*, EUI Working Paper, No 09/2014, pp. 1-28; VAN DER LOO Guillaume, *The EU-Ukraine Deep and Comprehensive Free Trade Area: a Coherent Mechanism for Legislative Approximation?*, in Van Elsuwege Peter, Petrov Roman A. (eds.), « Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union. Towards a Common Regulatory Space? », Routledge, 2014, pp. 63-88.

[34] PETROV Roman, *Constitutional Challenges for the Implementation of Association Agreements between the EU and Ukraine, Moldova and Georgia*, European Public Law 2015, p. 242.

'including principles, concepts and provisions which are to be interpreted and applied as if the third country is part of the EU'.[35]

As for dispute settlement provisions, disagreements related to the treaty have to be solved generally through diplomatic means. It is in fact the Association Council, established under the AA that can settle disagreements by a binding decision.[36] Differently, for disputes concerning the application or interpretation of provisions on trade and trade-related matters, a more sophisticated set of norms is established.[37] This latter, as is generally the case under the EU Free Trade Agreements (FTAs), is based on the WTO Dispute Settlement Understanding.[38] Nevertheless, under the AAs with Georgia, Moldova, and Ukraine, the dispute settlement clauses on free trade stand in striking contrast to the provisions under FTAs concluded by the EU as far as application or interpretation of law is concerned. As for the general rule, the arbitration panel shall interpret the provisions 'in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention of 1969 on the Law of Treaties'. Furthermore, as for the WTO, the arbitration panel *'shall also take into account* relevant interpretation established in reports of panels and of the Appellate Body adopted by the WTO Dispute Settlement Body'.[39] Should a provision of the AAs impose an obligation defined by reference to Union law, the referral to the CJEU is foreseen.[40] Accordingly, where a dispute raises a question of interpretation of an

[35] *Ibid.*, p. 243. On the 'integration-oriented agreements', see MARESCEAU Marc, *Les accords d'intégration dans les relations de proximité de l'Union européenne*, in Blumann Claude (ed.), « Les frontières de l'Union européenne », Bruylant, 2013, pp. 151-192; MAIANI Francesco, PETROV Roman, MOULIAROVA Ekaterina (eds), *European Integration without EU Membership: Models, Experiences, Perspectives*, European University Institute Working Papers, No 10/2009, pp. 81-89.

[36] See for all Art. 477 EU-Ukraine AA.

[37] See Chapter 14 of the three AAs in point.

[38] As for the EU FTAs dispute settlement modelled upon the WTO Dispute Settlement Understanding and their evolution, see GARCIA BERCERO Ignacio, *Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?*, in BARTELS Lorand, ORTINO Federico (eds), « Regional Trade Agreements and the WTO Legal System », OUP, 2006, pp. 383-405; SZEPESI Stefan, *Comparing EU Free Trade Agreements. Dispute Settlement*, InBrief 2004, pp. 1-8; RAMIREZ Robles E., *Political and Quasi-adjudicative Dispute Settlement Models in European Union Free Trade Agreements. Is Adjudication a Trend or is it just Another Model?*, Rivista electronica de estudios internacionales 2006, pp. 1-34; KARLI Mehmet, *Assessing the Development Friendliness of Dispute Settlement Mechanisms in the Economic Partnership Agreements and an Analytical and Comparative Guide to the Dispute Settlement Provisions in the EU's FTAs*, Occasional Paper, European Studies Centre, University of Oxford, The Global Trade Ethics Programme 2008, pp. 2-68, available at http://ssrn.com/abstract=1270111 (consulted on 13 November 2016); CHASE Claude, YANOVICH Alan, CRAWFORD Jo-Ann, UGAZ Pamela, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, World Trade Organization, Staff Working Paper ERSD, No 07/2013, pp. 1-58.

[39] EU-Ukraine Agreement (Art. 320), EU-Moldova Agreement (Art. 401); EU-Georgia Agreement (Art. 265) (emphasis added).

[40] EU-Moldova Agreement (Art. 403) - Referrals to the Court of Justice of the European Union - '1.The procedures set out in this Article shall apply to disputes concerning the interpretation and application of a provision of this Agreement relating to gradual approximation contained in Chapter 3 (Technical Barriers to Trade), Chapter 4 (Sanitary and Phytosanitary Measures), Chapter 5 (Customs and Trade Facilitation), Chapter 6 (Establishment, Trade in Services and Electronic Commerce), Chapter 8 (Public Procurement) or Chapter 10 (Competition) of Title V (Trade and Trade-related Matters) of this Agreement, or which otherwise imposes upon a Party an obligation defined by reference to a provision of Union law. 2.Where a dispute raises a question of interpretation of a provision of Union law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel'.
EU-Georgia Agreement (Art. 267) - Referrals to the Court of Justice of the European Union– '1. The procedures set out in this Article shall apply to disputes concerning the interpretation and application of a provision of this Agreement which imposes upon a Party an obligation defined by reference to a provision of Union law. 2. Where a dispute raises a question of interpretation of a provision of Union law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel'.

EU law provision, the arbitration panel shall not decide the question, but suspend the proceedings and request the CJEU to provide a ruling on it. This latter is binding on the arbitration panel.[41]The provision at issue reads as follows:

> « Where a dispute raises *a question of interpretation of a provision of Union law* referred to in paragraph 1, *the arbitration panel shall* not decide the question, but *request the Court of Justice of the European Union to give a ruling on the question*. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. *The ruling of the Court of Justice of the European Union* shall be *binding* on the arbitration panel ».[42] (emphasis added)

As already stated, this dispute settlement clause only applies to free trade provisions and does not extend to the entire agreement. Interestingly, such a provision is also innovative if compared to the chapters on free trade dispute settlement under the previous EU bilateral agreements aiming at extending the *acquis communautaire* to a third country. The recent Stabilisation and Association Agreements with Montenegro[43] and Serbia,[44] respectively concluded in 2010 and 2013, lay down that the arbitration panels, established to settle disputes between the Contracting Parties, 'shall not give an interpretation of the *acquis communautaire*. The fact that a provision is identical in substance to a provision of the Treaty establishing the European Communities shall not be decisive in the interpretation of that provision'.[45]A previous example of a similar norm is laid down under the EEA Agreement, where if the Joint Committee is unable to deal with disputes within a period of three months, they are to be solved through arbitration. In this scenario, 'no question of interpretation of provisions of the agreement which are identical in substance to corresponding rules of Community law may be dealt with in such procedures'.[46] The procedure of referral under the AAs with Georgia, Moldova and Ukraine is to be preferred to the provisions of the Agreements with Montenegro and Serbia that prevent an international tribunal ruling on EU law. These latter, in fact, seem to reproduce an approach similar to the *Iron Rhine* case[47] and the *MOX*

EU-Ukraine Agreement(Art. 322) - Dispute settlement relating to regulatory approximation –'1. The procedures set out in this Article shall apply to disputes concerning the interpretation and application of a provision of this Agreement relating to regulatory approximation contained in Chapter 3 (Technical Barriers to Trade), Chapter 4 (Sanitary and Phytosanitary Measures), Chapter 5 (Customs and Trade Facilitation), Chapter 6 (Establishment, Trade in Services and Electronic Commerce), Chapter 8 (Public Procurement) or Chapter 10 (Competition), or which otherwise imposes upon a Party an obligation defined by reference to a provision of EU law. 2. Where a dispute raises a question of interpretation of a provision of EU law referred to in paragraph 1, the arbitration panel shall not decide the question, but request the Court of Justice of the European Union to give a ruling on the question. In such cases, the deadlines applying to the rulings of the arbitration panel shall be suspended until the Court of Justice of the European Union has given its ruling. The ruling of the Court of Justice of the European Union shall be binding on the arbitration panel'.

[41] EU-Ukraine Agreement (Art. 322(2); EU-Georgia Agreement (Art. 267(2); EU-Moldova Agreement (Art. 403(2).

[42] *Idem.*

[43] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part (OJ L 108, p. 0003 - 0354, 29/04/2010).

[44] Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part (OJ L 278 , p. 0016 - 0473, 18/10/2013).

[45] EU-Montenegro Agreement (Protocol 7, Art. 13); EU-Serbia Agreement (Protocol 7, Art. 13) (emphasis added).

[46] Arbitration (Art. 111, par. 4 EEA Agreement): 'If a dispute concerns the scope or duration of safeguard measures taken in accordance with Article 111(3) or Article 112, or the proportionality of rebalancing measures taken in accordance with Article 114, and if the EEA Joint Committee after three months from the date when the matter has been brought before it has not succeeded to resolve the dispute, any Contracting Party may refer the dispute to arbitration under the procedures laid down in Protocol 33. No question of interpretation of the provisions of this Agreement referred to in paragraph 3 may be dealt with in such procedures. The arbitration award shall be binding on the parties to the dispute'.

[47] The Iron Rhine ("Ijzeren Rijn") Railway case**,** Belgium v. Netherlands (24 May 2005), available at www.pca-cpa.org.

Plant case before the OSPAR Tribunal.[48] These two cases deeply differ from the circumstances in point as both concern disputes between EU Member States that specifically raise the issues as to whether the CJEU enjoys exclusive jurisdiction to rule on the case (Article 344 TFEU), and whether any other action of the EU Member States would infringe EU law (Article 10 TEU, principle of loyal cooperation). Nevertheless, what is relevant for the purpose of the present analysis is that the two arbitral tribunals decided the cases without taking EU law into account.[49] This solution would satisfy the safeguarding of the autonomy of the EU legal order. From an international law perspective, the question that arises is whether such an approach undermines the legal reasoning of the arbitral tribunal and the systematic interpretation of international norms when EU law is potentially applicable to the dispute.[50]

IV. Legal issues on prior involvement and referral procedures

In this section, the aim is to identify some legal questions raised by the procedures of prior involvement and referral. Observations and conclusions will be drawn, mainly relying on the CJEU's rulings, on the following issues: 1. the legal basis of the procedures and the requirement to amend the EU Treaties (section A); 2. the extent of the CJEU's competence in the context of these procedures (section B); 3. the binding nature of the Court's rulings (section C); 4. the specificity of international agreements under which these procedures have been laid down or proposed (section D).

[48] *MOX Plant (Ireland v. UK)*, (2003) 42 ILM 1187 (hereafter OSPAR Award) - OSPAR Convention (Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 Sept. 1992, (1992) 2 ILM 1069 (hereafter OSPAR)

[49] In the *Iron Rhine* case, the arbitral tribunal initially referred to the so-called CILFIT criteria in order to deal with EU law (paras 97-106), while it then concluded that the interpretation of EU law was not necessary to render its Award (Award, paras 107-137). In the *MOX Plant* case, the OSPAR tribunal refused to apply EU law stating that the OSPAR Convention and EU law are 'independent legal source that established a distinct legal regime and provided for different legal remedies' (OSPAR Award, para. 142-143). The case was later brought before the UNCLOS arbitral tribunal that stayed the proceedings and asked the parties to verify whether the CJEU had jurisdiction. This latter ruled in favour of its exclusive jurisdiction on the dispute. See BLADEL Ineke van, *The Iron Rhine Arbitration Case: on the Right Legal Track?: an Analysis of the Award and of its Relation to the Law of the European Community*, Hague Yearbook of International Law 2006, pp. 3-22; D'ARGENT Pierre, *De la fragmentation à la cohésion systémique: la sentence arbitrale du 24 mai 2005 relative au "Rhin de Fer" (IJzeren Rijn)*, in Salmon Jean J.-A. (ed.), « Droit du pouvoir, pouvoir du droit: mélanges offerts à Jean Salmon », Bruylant, 2007, pp. 1113-11137 ; SHANY Yuval, *The first MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures*, Leiden Journal of International Law 2004, pp. 824; LAVRANOS Nikolaos, *The* MOX Plant *and* IJzeren Rijn *Disputes: Which Court Is the Supreme Arbiter?*, Leiden Journal of International Law 2006, pp. 223-246.

[50] Lavranos interestingly observes that 'from the point of view of preserving the unity and consistency of law, the preferred option is that courts and arbitral tribunals interpret and apply relevant EC law provisions in the light of the existing ECJ jurisprudence. In this way, courts and tribunals are able to exercise their jurisdiction, while at the same time ensuring consistency between the international and Community law obligations of the EC Member States involved in a dispute' (LAVRANOS Nikolaos, *On the Need to Regulate Competing Jurisdictions between International Courts and Tribunals*, EUI working papers, No 14/2009, p. 22). Similar observations are expressed by Shany with regard to the *MOX Plant* case before the OSPAR Tribunal, who concludes that 'there are strong policy considerations that support a presumption in favour of normative harmonization – that is, that substantive provisions applied by specialized tribunals be construed in the light of all relevant international law norms on the matter. This approach is supported by the case law of several international courts and tribunals. Further, this outcome is warranted by Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (SHANY, *The first MOX Plant Award*, *op. cit.*, pp. 824).

A. The legal basis: Do prior involvement and referral procedures require an amendment to the EU Treaties?

Amongst the questions that prior involvement and referral raise, one may wonder whether these procedures require an amendment to the EU Treaties in order to enable the CJEU's participation in them. As is known, the EU Treaties are silent on this subject matter. The CJEU already had the opportunity to decide on this issue in Opinions 1/91, 1/92[51], and Opinion 1/00,[52] where, as for referral from a non-EU Member State jurisdiction, it held that 'an international agreement concluded by the Community may confer *new powers on the Court*, *provided that* in so doing *it does not change the nature of the function of the Court* as conceived in the EEC Treaty'.[53] On the legal basis for the request of a preliminary ruling from the Patent Court to the CJEU, the Advocates General (AG) in their Statement of position in Opinion 1/09 pointed out that it is not Article 267 TFEU as some Member States asserted. The procedure would be based directly on the provision of the agreement at issue, as the effects of such an international treaty would extend the preliminary competences of the CJEU.[54]

The need to amend the EU Treaties in the absence of a legal basis for the prior involvement procedure was raised during the proceedings of Opinion 2/13. Some Member States, in their submissions, stated that prior involvement is not compatible with the EU Treaties, suggesting therefore that an amendment is necessary before putting in place such a procedure.[55] While the CJEU's Opinion is silent on this subject matter, the AG Kokott in her view extensively dealt with this question concluding that there is no need to transfer additional competences to the CJEU for the accession to be compatible with the EU Treaties.[56] The Advocate General recognizes that the prior involvement is not amongst those judicial procedures that Article 19 TEU expressly provides as falling under the CJEU's competences. Nevertheless, according to the AG Kokott, this does not lead to the conclusion that the procedure is precluded under the EU Treaties.[57] In particular, the Advocate General

[51] Opinion 1/91, paras 59 and 61-65; Opinion 1/92, para. 32.
[52] Opinion 1/00, para. 33.
[53] Opinion 1/92, para. 32 (emphasis added).
[54] Advocates General on Opinion 1/09, para. 98, who exactly stated that 'This objection should be ruled out. According to its wording, Article 267 TFEU certainly only contemplates a reference to the Court of Justice by national courts of Member States. This provision will not form the legal basis for petitions for a preliminary ruling that the future PC may address to the Court of Justice. References of preliminary questions made by the CP will be based directly on Article 48 of the agreement contemplated. The preliminary competences of the Court of Justice will therefore be extended by the effects of an international agreement and will now include a category of petitions for a preliminary judgment net yet provided for by the treaties' (para. 98). Moreover, the Advocates General further recall (para. 99) that the extension of the preliminary proceedings based on an international agreement took place also in the Luxembourg Protocol (Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 concerning judicial competence and the execution of judgments in civil and commercial matters, signed in Luxembourg on 3 June 1971 (OJ 1975, L 204, p. 28), whose purpose was to allow the preliminary competences of the CJEU to cases brought under the Brussels Convention.
[55] Advocate General, View on Opinion 2/13, para. 63.
[56] In assessing whether the accession to the ECHR requires additional competences to be transferred to the EU by its Member States, the Advocate General examines three aspects of the proposed agreement: first, the prior involvement procedure; secondly, the duty to implement judgments of the ECtHR in which a violation of the ECHR is found; and, thirdly, the issue of legal protection in the CFSP (see paras 61-104).
[57] Advocate General, para. 64.

analyses whether the procedure at issue can be considered as a new competence, and if not, whether it changes the essence of the Court's function.[58] She further adds that

> « Even if it were to be assumed, however, that the prior involvement procedure represented the creation of a new competence for this Court, it would not in any event be a competence that would *change* the *essence* of the function of the Court provided for in the Treaties. On the contrary, the prior involvement procedure helps to ensure that the Court is better able to fulfil the task that has always been entrusted to it, and that, moreover, its monopoly — at least in the field of communitarised policies — of reviewing the legality of acts of the institutions, bodies, offices or agencies of the EU is preserved ».[59]

Although the procedural framework for prior involvement differs from the procedures under Articles 263 and 267 TFEU - differences may concern entitlement to bring an action, the conduct of proceedings, any time-limits to be observed and the effects of the Court's decision - 'in essence', the Court is responsible for ensuring the interpretation and application of EU law under the EU Treaties (Article 19(1) TEU) as much as under the prior involvement procedure.[60] The Advocate General therefore concludes that 'Such differences alone do not serve to change the essential character of the powers of the Court or of other EU institutions that may be involved in the prior involvement procedure; in any event, it is not affected to such an extent as would justify declaring the accession agreement incompatible with the Treaties'.[61]

Nevertheless, another necessary requirement, according to AG Kokott, is 'an amendment supplementing the Statute of the Court of Justice, which will not, however, be in the nature of a 'constitutional change' and can therefore be effected through the ordinary legislative procedure (second paragraph of Article 281 TFEU), without the need for a formal Treaty revision procedure (Article 48 TEU)'.[62] The Advocate General stated that 'Only when the requisite provisions — particularly those relating to the entitlement to bring an action, the conduct of proceedings and the effect of the Court's decision — are incorporated in the Statute of the Court of Justice will the prior involvement procedure be fully operational and, in accordance with Article 19(3)(c) TEU, in conjunction with the first paragraph of Article 281 TFEU and Article 51 TEU, be among the 'cases provided for in the Treaties' which the Court of Justice is called upon to determine'.[63]

Comparing the two perspectives of the Advocates General in Opinion 1/09 and Opinion 2/13, one may note that while the first ones emphasize that this competence of the Court originates from an international treaty, according to AG Kokott it is Article 19 TEU that already assigns such a power to the CJEU. Both agree on the fact that an amendment to

[58] *Ibid*., para. 66. It is worthwhile referring to the statement of the AG Kokott who points out that 'It is doubtful whether the prior involvement provided for in Article 3(6) of the draft agreement does in fact constitute a *new competence* of the Court of Justice at all; it is certainly arguable that the prior involvement of the Court in proceedings pending before the ECtHR merely represents a new means of exercising the existing judicial powers of the Courts of the EU in accordance with the second sentence of Article 19(1) and Article 19(3) TEU'.

[59] Advocate General, para. 67.

[60] *Ibid*., paras 68-70.

[61] *Ibid*., para. 71.

[62] *Ibid*., para. 74.

[63] *Ibid*., para. 76.

the EU Treaties is not needed. In the academic debate, different views have been expressed on the need for an amendment to the EU Treaties. Baratta states that 'Arguably, the prior involvement mechanism is a simple means of resuming a power originally attributed to the ECJ, […] the different manner of seizing it does not entail the prior involvement mechanism altering the essential character of the powers attributed to the ECJ by the Treaties'.[64] Differently, other scholars expressed a more cautious approach.[65]

B. The extent of the CJEU's competence

In Opinion 2/13, the CJEU focused on two aspects of the prior involvement under the Draft EU Accession Agreement. First of all, it identified whether the ECtHR or an EU institution should be competent to assess whether the Court of Justice has already given a ruling on the same question of law raised in the case before the ECtHR. Secondly, the Court clarified what EU provisions – first, secondary norms or both? - should be subject to the CJEU's interpretation together with the review on the validity of EU secondary norms.[66]

For the first of the two issues, the CJEU holds that establishing whether the Court has already given a ruling is a competence belonging to the EU. If this was not the case, it explains, 'to permit the ECtHR to rule on such a question would be tantamount to conferring on it jurisdiction to interpret the case-law of the Court of Justice'.[67] The Court observed that the possibility of the ECtHR having this competence is not excluded as the draft agreement nor its draft explanatory report clarify it.[68] As a consequence, according to the CJEU, the prior involvement procedure 'should be set up in such a way as to ensure that, in any case pending before the ECtHR, the EU is fully and systematically informed, so that the competent EU institution is able to assess whether the Court of Justice has already given a ruling on the question at issue in that case and, if it has not, to arrange for a prior involvement procedure to be initiated'.[69] In sum, the implication of the Court's statement is to prevent the ECtHR from even establishing whether a CJEU's case-law exists on the subject-matter under consideration. What emerges is, therefore, a notion of autonomy so broad that any form of interpretation of EU law risks undermining it.

[64] BARATTA, *Accession of the EU to the ECHR*, *op. cit.*, pp. 25-26.

[65] See GAJA, *Accession to the ECHR*, *op. cit.*, p. 194; RANGEL DE MESQUITA M. J., *Remarques sur la « valeur ajouté » de l'adhésion de l'Union européenne à la Convention européenne des Droits de l'Homme pour la protection des droits fondamentaux des particuliers en Europe*, in J. Iliopuoulos-Strangas, V. Pereira Da Silva, M. Potacs (eds), « Der Beitrit der Europäischen Union zur EMRK/The Accession of the European Union to the Echr/L'adhésion de l'Union européenne à la CEDH », Baden-Baden, 2013, p. 290.

[66] For comments on the prior involvement procedure and solutions on appropriate modifications to the Draft Accession Agreement in the light of Opinion 2/13, see LOCK Tobias, *The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: is it still Possible and is it still Desirable?*, European Constitutional Law Review 2015, pp. 250-253; JACQUÉ, *Pride and/or Prejudice?*, *op. cit.*, pp. 67-68.

[67] Opinion 2/13, para. 239.

[68] *Ibid.*, para. 240.

[69] *Ibid.*, para. 241.

The second issue is related to the extent of the Court of Justice's competence in the prior involvement procedure. The CJEU observes that under the Draft Explanatory Report the words 'assessing the compatibility of the provision' means 'to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law'.[70] The possibility for the CJEU to rule on a question of interpretation of secondary law seems, therefore, excluded.[71] The CJEU points out that the interpretation of both primary and secondary law 'requires, in principle, a decision of the Court of Justice where that provision is open to more than one plausible interpretation'.[72]

The Court further clarifies 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 ».[73]

In the light of these observations, the CJEU concludes that arrangements for prior involvement procedure 'do not enable the specific characteristics of the EU and EU law to be preserved'.[74] Keeping in mind that the purpose of the prior involvement is the safeguarding of the specific characteristics of the EU judicial system and, in particular, of the Court's competence as its interpretation and validity of EU law are concerned, one cannot but agree with the CJEU on the need to extend EU law interpretation from primary to secondary norms as well.[75] Nevertheless, one cannot avoid noting that in the documents delivered by the CJEU to express some observations on the accession process, reference to the prior involvement procedure is *loosely* formulated when compared with the *strict* requirements in Opinion 2/13. In its 2010 'Discussion document', the CJEU simply referred to the issue of validity supporting the establishment of a mechanism that 'is capable of ensuring that *the question of the validity* of a Union act can be brought effectively before the Court of Justice before the European Court of Human Rights rules on the compatibility of that act with the Convention' (emphasis added).[76] In the 'Joint communication from Presidents Costa and Skouris', in 2011, reference is generically addressed to a procedure 'which is flexible and

[70] Draft explanatory report, para. 68.
[71] Opinion 2/13, paras242-243.
[72] *Ibid*., para. 245.
[73] *Ibid*., paras246-247.
[74] *Ibid*., para. 248.
[75] JACQUE, *Pride and/or Prejudice?, op. cit*., p. 38, seems to blame 'une formulation malencontreuse du rapport explicatif […as] 'Ce qu'a voulu maladroitement dire le rapport est que, s'agissant du droit primaire, la Cour ne peut intervenir que par la voie de l'interprétation puisqu'elle ne peut apprécier sa validité. Par contre, s'agissant du droit dérivé, elle retrouve le droit de juger de sa validité, ce qui ne peut exclure l'interprétation puisque celle-ci est consubstantielle à l'appréciation de la validité'.
[76] Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European convention for the protection of human rights and fundamental freedoms, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf>, para. 12.

would ensure that the CJEU may carry out an internal review before the ECHR carries out external review'.[77] To a certain extent, Article3(6) of the Draft agreement, therefore, seems to simply reflect the content of these documents. It is hard to otherwise explain the different approach between the texts elaborated by the Court, in 2010 and 2011, and the wording of its Opinion's statement on the incompatibility of this procedure with the EU Treaties, in 2014.

As for the extension of competence of the CJEU to interpret primary as well as secondary law in the context of a referral procedure, the European and Community Patents Court Draft Agreement is in line with the Court's requirements, as it expressly refers to 'a question of interpretation of the Treaty establishing the European Community or the validity and interpretation of acts of the institutions of the European Community'.[78] In contrast, under the AAs with Ukraine, Moldova and Georgia, the competence of the CJEU is limited to questions of interpretation of a provision of Union law - referred to in the first paragraph of the same provision -, while no reference to the validity of EU law is addressed.

The possibility for the CJEU to be the first court to assess the compatibility between Union law and the ECHR faces some limits when the Court is not competent under the EU Treaties to review the Union's acts at issue. In Opinion 2/13, this emerges in the context of the Common Foreign and Security Policy (CFSP), where certain acts fall outside the ambit of judicial review by the CJEU.[79] On this matter, the Court concludes that it is not compatible with the EU Treaties to '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'.[80] As Jacqué rightly pointed out, Opinion 2/13 implies that 'Le caractère autonome du droit de l'Union impose que l'interprétation de celui-ci ne puisse être confiée qu'à la Cour de justice, mais aussi, et c'est plus surprenant, que, même lorsque la Cour de justice n'est pas compétente, aucune juridiction externe à l'Union ne puisse apprécier la légalité des actes imputables à l'Union'.[81] In this sense, a similar conclusion can be drawn from the CJEU's assessment of the Draft Agreement on European and Community Patents Court. In Opinion 1/09, as recalled above, although the Court emphasized the role of the domestic jurisdictions as 'ordinary' courts within the EU legal order, another reading of the Opinion would suggest

[77] Joint communication from Presidents Costa and Skouris, Strasbourg and Luxembourg, 24 January 2011, para. 2 (available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf).
[78] Art. 48, Interpretation of Community law, European and Community Patents Court Draft Agreement.
[79] Art. 24, para. 1 TEU and Art. 275 TFEU.
[80] Opinion 2/13, para. 255. A different outcome is reached by the AG Kokott, who concludes the analysis stating that 'For all these reasons, it must be stated, with regard to the CFSP, that the proposed accession of the EU to the ECHR can be completed without the creation of new competences for the Court of Justice of the EU, since, in matters relating to the CFSP, effective legal protection for individuals is afforded partly by the Courts of the EU (second paragraph of Article 275 TFEU) and partly by national courts and tribunals (second subparagraph of Article 19(1) TEU and Article 274 TFEU)' (para. 103).
[81] JACQUÉ, *Pride and/or Prejudice?*, *op. cit.*, p. 36.

that the CJEU's notion of autonomy is so broad as to prevent any other jurisdiction, external to the Union, from reviewing those Union's acts for which the CJEU is not competent.[82] Interestingly, it is the same Court that recalls Opinion 1/09 to reach such a conclusion,[83] even if the two cases are deeply different. As already emphasized, the European and Community Patents Court was supposed to be the only (international) jurisdiction competent to rule on the patent agreement – depriving of this role the CJEU as well as the Union's domestic judges -,[84] while for the CFSP, the Court does not have jurisdiction, as the EU Treaties expressly establish, but domestic courts are still competent to apply it. To a certain extent, the Court's approach may be appropriately summarized by the title of Michl's article 'Thou shalt have no other courts before me'.[85] Nevertheless, another reading of the statement on CFSP is also possible if attention is instead focused on the consequences of the CJEU's exclusion. As Halberstam observes, 'Member State courts might well have taken Strasbourg's decisions on the conventionality of CFSP mandates beyond the purview of the CJEU as a final decision on the legality of the action under EU law. If this is right, accession on Draft Agreement terms would have meant that in CFSP matters beyond Luxembourg's jurisdiction, Strasbourg would effectively have become the European Union's constitutional court'.[86] Whatever may be the (legal or political?) rationale beyond the CJEU's approach, the impact of Opinion 2/13 is the impossibility to trigger the referral procedure when the CJEU is not competent to decide on the issue at stake.

[82] On this aspect, see KOUTRAKOS Panos, *The European Court of Justice as the Guardian of National Courts – or not?*, E.L. Rev. 2011, p. 320, who observes that 'The fervor with which it guards the role of national courts is all the more noteworthy in the light of the Court's manifest eagerness to guard its own jurisdiction from actual or potential intrusions from other international tribunals. And yet, it may appear somewhat disingenuous. At no point in the Opinion is there any reference to the implications of the draft agreement for the jurisdiction of the Court itself'; and DE WITTE, *A selfish Court?, op. cit.,* p. 41, who refers to Opinion 1/09 as 'The [then] most recent of the Court's diffident rulings in relation to international dispute settlement is also one of the most striking (and arguably selfish) of them all'.

[83] The CJEU states that '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 (see, to that effect, Opinion 1/09, EU:C:2011:123, paragraphs 78, 80 and 89)' (para. 256).

[84] In Opinion 1/09, the CJEU concludes that 'Consequently, *the envisaged agreement*, by conferring on an international court which is outside the institutional and judicial framework of the European Union an exclusive jurisdiction to hear a significant number of actions brought by individuals in the field of the Community patent and to interpret and apply European Union law in that field, *would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts* and, consequently, would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law' (para. 89) (emphasis added). A different conclusion on the role of the CJEU is reached by the Advocates General that, in their Statement of Position on Opinion 1/09, hold that 'Given that the Union courts are not competent to hear disputes between individuals, the creation of the PC as an international body would not be perceived as an infringement of the competences of the European Court of Justice. One cannot take away from the Union judge competence which he does not have' (para. 64). For a comment on the Advocates General's View on the Opinion, see TILMANN Winfried, *Comments on the Statement of Position by the Advocates General regarding Requested Opinion 1/09 of the Council on the European Patent and Community Patent Court*, Festschrift 50 Jahre Bundespatentgericht (Ed. Carl HeymannsVerlag), 2011, pp. 931-943.

[85] MICHL Walther, *Thou shalt have no other Courts before me*, *Verfassungsblog* 2014, available at http://verfassungsblog.de/thou-shalt-no-courts/ (consulted on 13 November 2016).

[86] HALBERSTAM Daniel, "*It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, German Law Journal 2015, p. 142. For a different perspective, PERNICE Ingolf, *L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme est suspendue. Remarques à propos d'un avis surprenant de la Cour de justice de l'Union européenne du 18 décembre 2014*, Cahiers de droit européen 2015, p. 70, who, as for the role that autonomy plays in this specific context, emphasizes that, 'Il est difficile de voir, dans ces conditions, quelles seraient les « caractéristiques spécifiques du droit de l'Union concernant le contrôle juridictionnel des actes, actions ou omissions de l'Union en matière de PESC » mises en cause par l'accord d'adhésion à la CEDH permettant à la Cour de Strasbourg de juger des cas où un acte relevant de la PESC est accusé de violer des droits de l'homme garantis par la Convention'.

What general lessons can be learnt from Opinion 2/13 as far as the competence of the CJEU is concerned, and what are the consequences for the procedure of referral? Under the AAs with Georgia, Moldova and Ukraine, it is up to the arbitral tribunal to request a ruling to the CJEU. This may mean that the former should be considered under the obligation to initiate a procedure of referral *any time* that EU law is even only potentially relevant to the case before it. Engaging in the task of establishing whether Union law is at issue would undermine the autonomy of EU law if this implies an even low degree of interpretation.

Unlike prior involvement, there is no role for an EU institution in triggering the procedure of referral, as this appears to be a specific requirement of the Draft Accession Agreement. As already recalled, this is related to the condition to assess whether the Court of Justice has already given a ruling on the question at issue in that case.

C. The binding nature of the CJEU's rulings

The role of the CJEU in the procedures of prior involvement and referral also raises the issue of the nature of its rulings in the perspective of an international court or tribunal's request to that purpose, that is, are they binding? If one compares the provisions of the agreements foreseeing the procedure of referral and prior involvement, there seems to be a striking difference between the wording of the draft agreement on the European and Community Patents Court and the AAs with Ukraine, Moldova and Georgia, on the one hand, and the Draft agreement on the EU accession to the ECHR, on the other. Under the first group of agreements, the binding nature of the rulings of the CJEU is expressly mentioned, respectively, as follows: 'The decision of the Court of Justice of the European Communities on the interpretation of the Treaty establishing the European Community or the validity and interpretation of acts of the institutions of the European Community shall be *binding* on the Court of First Instance and the Court of Appeal'; 'The ruling of the Court of Justice of the European Union shall be *binding* on the arbitration panel' (emphasis added). No room is therefore left for ambiguity. Their nature is in line with the requirements indicated in Opinion 1/91 and Opinion 1/00, where the CJEU stated that 'it is unacceptable that the answers which the Court of Justice gives to the courts and tribunals in the EFTA States are to be purely advisory and without any binding effects. Such a situation would change the nature of the function of the Court of Justice as it is conceived by the EEC Treaty, namely to that of a court whose judgments are binding'.[87]

In a different way, Article 3(6) of the Draft agreement on the EU accession to the ECHR provides that the prior involvement procedure 'shall not affect the powers of the Court'. The Draft explanatory report clearly explains that 'The prior involvement of the CJEU will

[87] Opinion 1/91, para. 61, and paras 59, 60-65.

not affect the powers and jurisdiction of the Court. The assessment of the CJEU will not bind the Court'.[88] In spite of the different wording of the provisions of the Draft EU Accession Agreement, on the one hand, and the Draft agreement on the European and Community Patents Court and the AAs with Ukraine, Moldova and Georgia, on the other, a closer look rather suggests that there is no contradiction between them. In fact, under the Draft EU Accession Agreement, the reading of the expression 'The assessment of the CJEU will not bind the Court' means that what is *not* binding is the CJEU's assessment of the compatibility between EU law and the ECHR. As noted by the CJEU, 'The same would not apply, however, with regard to the interpretation by the Court of Justice of EU law, including the Charter. In particular, it should not be possible for the ECtHR to call into question the Court's findings in relation to the scope *ratione materiae* of EU law, especially for the purposes of determining whether a Member State is bound by fundamental rights of the EU'.[89]

As already emphasized, this difference between the Draft EU Accession Agreement, on one the one hand, and the draft agreement on the European and Community Patents Court and the AAs with Ukraine, Moldova and Georgia, on the other, reflects the distinction between the prior involvement before the ECtHR and referral. With regard to the competence of the Court, prior involvement, as much as referral, allows the CJEU to pass a ruling that is binding on an international court or tribunal. In fact, the ECtHR, while remaining competent to rule on the alleged breaches of the ECHR, is bound to the CJEU's interpretation of EU law. The CJEU's review of validity of EU acts, in the context of the prior involvement procedure, has to be appreciated as its rationale is to allow the Union to remedy on an alleged violation. The review of validity is functional, in short, at the EU 'internal' level. As Baratta pointed out, 'The prior involvement rule does not aim at safeguarding the ECJ's monopoly to rule on the invalidity of the EU acts. This perspective would hardly be conclusive. For it is clearly not in the remit of the ECtHR to declare an act of the Contracting Parties void'.[90]

D. The specific nature of the international agreements foreseeing prior involvement and referral procedures to the CJEU

As for the nature of the agreements, so far concluded or negotiated, one may see that the procedures of prior involvement and referral to the CJEU are easily recognizable and, from an EU law perspective, fall under two different and specific categories of treaties. The first typology is represented by those international treaties where EU law is part of the applicable

[88] Draft explanatory report, para. 68.
[89] Opinion 2/13, para. 186. The fact that the non-binding nature of the CJEU's assessment does not put into question the binding nature of its interpretation of EU law had already been outlined by BARATTA, *Accession of the EU to the ECHR*, *op. cit.*, pp. 21-22.
[90] *Ibid.,* p. 21.

law. The AAs with Georgia, Moldova, and Ukraine as well as the Draft European and Community Patents Court Agreement[91] are examples of this category. Specifically, the AAs with Georgia, Moldova, and Ukraine belong to the so-called "integration-oriented agreements", defined as agreements including principles, concepts, and provisions of EU law that are to be interpreted and applied as if the third State is part of the EU.[92] If one recalls that the EU has so far concluded around 800 bilateral agreements and almost 300 multilateral agreements,[93] it clearly emerges that the treaties allowing for "integration without membership" constitute an exceptional practice.[94]

The second category represented by the ECHR is a treaty that plays a special role in the EU legal order. This is due to historical reasons as well as legal ties that deeply link the Union to the ECHR.[95] The fact that, for the EU, the ECHR is not like any other international agreement has also been emphasized by the CJEU in Opinion 2/94, where it held that the then European Community had no competence to accede to the Convention and that a Treaty amendment would have been necessary. The CJEU pointed out that 'Accession to the Convention would […] entail a *substantial change* in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order'.[96] It comes as no surprise, therefore,

[91] Art. 14a, Applicable law: '(1) When hearing a case brought before it under this Agreement, the Court shall respect Community law and base its decisions on: (a) this Agreement; (b) *directly applicable Community law*, in particular Council Regulation (EC) No … on the Community patent, and national law of the Contracting States implementing Community law […]; (c) the European Patent Convention and national law which has been adopted by the ContractingStates in accordance with the European Patent Convention; and (d) any provision of international agreements applicable to patents and binding on all the Contracting Parties' (emphasis added).

[92] For the definition of "integration-oriented agreements", see MARESCEAU, *Les accords d'intégration*, *op. cit*., pp. 151-192. The Draft European and Community Patents Court Agreement seems to potentially fall under the category of 'integration-oriented agreement' if attention is paid to its Art. 14a, par. 3 of the draft agreement on the European and Community Patents Court, requiring that: 'A Contracting State which is not a party to the Agreement on the European Economic Area shall bring into force the laws, regulations and administrative provisions necessary to comply with Community law relating to substantive patent law.' Moreover, Art. 14a, par. 2 further clarifies that: 'To the extent that the Court shall base its decisions on national law of the Contracting States, the applicable law shall be determined: (a) by directly applicable provisions of Community law, or (b) in the absence of directly applicable provisions of Community law, by international instruments on private international law to which all Contracting Parties are parties; or (c) in the absence of provisions referred to in (a) and (b), by national provisions on international private law as determined by the Court'. Nevertheless, given that the Agreement between the EU, its Member States and Contracting parties to the European Patent Convention as well as the EU patent regulation were to be negotiated at the time Opinion 1/09 was before the CJEU, no conclusions can be reached on this subject-matter.

[93] See the web site of Treaties Office Database of the European External Action Service, according to which the number of bilateral agreements amounts to 853, while multilateral agreements are 258 (available at http://ec.europa.eu/world/agreements/default.home.do) (20 October 2015).

[94] Amongst the limited number of agreements belonging to this category, there can be listed: as for multilateral agreements, the European Economic Area agreement, the Energy Community Treaty and the European Common Aviation Area Agreement; as for bilateral agreements, the Association Agreement with Turkey, Agreements establishing a custom union with Andorra and San Marino, some agreements with Switzerland, some bilateral common aviation area agreements, monetary agreements on euro with Vatican City State, Monaco, San Marino, and Andorra, and some agreements with Andorra and Monaco. See MARESCEAU, *Les accords d'intégration, op. cit.,* pp. 151-192 ; BAUDENBACHER Carl, *The Judicial Dimension of the European Neighbourhood Policy*, EU Diplomacy Paper, College of Europe, No 08/2013, pp. 1-31; ŁAZOWSKI Adam, *Enhanced Multilateralism and Enhanced Bilateralism: Integration without Membership in the European Union***,** Common Market Law Review 2008, pp. 1433-1458; KADDOUS Christine, JAMETTI GREINER Monique (eds), *Accords bilatéraux II Suisse-UE et autres accords récents*, Dossier de droit européen 16, Genève: Helbing & Lichtenhahn; Bruxelles: Bruylant ; Paris: Librairie générale de droit et de jurisprudence, 2006.

[95] See, for all, LOCK T., *The European Court of Justice and International Courts*, OUP, 2015, pp. 167-217.

[96] Opinion 2/94, para. 35.

that the EU owns a clear interest in deepening its legal ties with the contracting parties and the legal order of these two categories of agreements.

Moving from an EU perspective to a third party point of view, Contracting Parties to the "integration-oriented agreements" are generally willing to accept strong ties.[97] What makes the role of the CJEU 'special' under these agreements is not the recognition of a *sui generis* nature of the EU as such, but rather the *special role that EU law plays* in the specific context of that agreement. Under these treaties, the approximation of laws - defined as 'a process of adaptation and transformation of legal systems of Associate States, in order to reach the full compatibility thereof with the European law in the fields which correspond to the material scope of the norms of EU law' - [98] also requires assigning a role to the CJEU by taking into account its case-law. This is also confirmed in those "integration-oriented agreements" foreseeing referral to the CJEU from a non-EU domestic court or tribunal, such as the EEA Agreement,[99]and the ECAA Agreement.[100]

This scenario varies in the context of the EU-ECHR relationship. In fact, pragmatic reasons may lie behind the acceptance of non-EU contracting parties of the special role of the EU before the ECtHR. Amongst them, one may list the membership of the Council of Europe as 28 Contracting Parties to the ECHR – out of 45 - are also EU Member States.[101] Obviously, a relevant role has to be played by the EU diplomacy in making non-EU contracting parties understand and accept the special role of the CJEU *vis-à-vis* the ECtHR.[102] Interestingly, in the academic debate, as already mentioned, the prior involvement has attracted

[97] From this perspective, Switzerland seems to represent an exception, and it is often defined as a special case. As for the debate on the international dispute settlement mechanisms under the EU-Switzerland Agreements, see BAUDENBACHER, *The Judicial Dimension*, *op. cit.*, pp. 1-31.

[98] SISKOVA Nadezda, *The EU-Ukraine Association Agreement, op. cit.,* p. 118.

[99] Art. 107 and Art. 111, para. 3, and Protocol 34 EEA Agreement. Under Art. 107 EEA, it is established the 'possibility for an EFTA State to allow a court or tribunal to ask the Court of Justice of the European Communities to decide on the interpretation of an EEA rule'. This happens under the provisions of Protocol 34, according to which a court or tribunal of an EFTA State may ask, if it considers this necessary, the Court of Justice of the European Union to decide a question of interpretation of provisions of the Agreement, which are identical in substance to the provisions of the EU treaties or of acts adopted in pursuance thereof. An EFTA State shall notify the Depositary and the Court of Justice of the EU to what extent and according to what modalities the Protocol will apply to its courts and tribunals. The Depositary shall notify the Contracting Parties of any notification under such a Protocol. Under Art. 111, para. 3, the EEA also authorize the EEA Joint Committee to request the Court of Justice of the European Union to give a preliminary ruling on the interpretation of the relevant rules. This may happen when a dispute among the contracting parties concerns the interpretation of provisions of the EEA Agreement, which are identical in substance to corresponding rules of the EU Treaties and to acts adopted in application of these two treaties and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee. Such mechanisms have never been used so far.

[100] Art. 16, par. 2 and Annex IV ECAA.

[101] In this sense, see ODERMATT Jed, *The EU's Accession to the European Convention on Human Rights: An International Law Perspective*, New York University Journal of Int. Law & Politics 2015, pp. 59-120, according to whom, 'the EU was able to attain concession that it would not have otherwise attained had it been negotiating with another international organization with a *more global membership'*.

[102] As for the difficulties in re-negotiating the Draft Accession Agreement, ŁAZOWSKI Adam, WESSEL Ramses A., *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, German Law Journal 2015, p. 210, rightly observe that 'to achieve a consensus with non-EU countries which are parties to ECHR appears, at least *prima facie*, to be a potentially uphill struggle. For instance, the current political climate in EU relations with Russia or Turkey is not favorable by any stretch of imagination. Hence, to engage both countries in negotiations of nitty-gritty technicalities may not be the best idea. It boils down to a more general question of whether the demands made by the Court of Justice are a "ransom" worth paying for. Arguably, the caveats laid down by the drafters of the Treaty of Lisbon have been turned into locks, or, to put it differently, they are condition sine qua non for future approval of the revised Accession Agreement'.

some criticism, as attributing a special role to the CJEU would generate imbalances with regard to the domestic courts of the other Contracting Parties to the ECHR.[103]

From the EU practice under bilateral and (draft) multilateral agreements, one may note that prior involvement and referral are still restricted to a limited number of treaties. Whether these procedures will become a more common practice in the international dispute settlement mechanisms negotiated by the EU remains to be seen. This is so in light of the special nature of the CJEU-ECtHR relationship as well as the peculiar legal features of the AAs with Ukraine, Moldova, and Georgia.[104] At this stage of the analysis, it is time to ask whether referral to the CJEU could also be foreseen in agreements that do not fall under the two categories identified above.[105] Interestingly, in 1992, Schermers advocated for the extension of preliminary rulings to the then Court of Justice of the EEC in order to improve the cooperation among courts and tribunals.[106] This is certainly an interesting proposal for third countries that ratify treaties in order to allow EU law to apply to their national legal orders, just as it was the case under the EEA Agreement. For international courts and tribunals, however, the perspective of this being possible is certainly more complex. Despite the undoubted relevance of the CJEU's Opinions on EU autonomy and international dispute settlement mechanisms, some doubts still remain as to their application to treaty contexts other than those examined above. Unfortunately, the CJEU has not been given the opportunity to rule on dispute settlement provisions under agreements whose purpose goes beyond the two categories of treaties identified above. From this perspective, the WTO Dispute Settlement System has not been scrutinized by the CJEU in Opinion 1/94. The same situation seems to affect investor-to-state dispute settlement (ISDS) provisions as, through Opinion 2/15, the Commission limited its questions on matters concerning the scope of the new exclusive competence on Foreign Direct Investment without raising issues on

[103] POTTEAU Aymeric, *Quelle adhésion de l'Union européenne à la CEDH pour quel niveau de protection des droits et de l'autonomie de l'ordre juridique de l'UE?*, R.G.D.I.P. 2011, p 105 ; GAJA, *Accession to the ECHR, op. cit.,* p. 194 ; LOCK Tobias, *End of an Epic? The Draft Agreement on the EU's Accession to the ECHR*, Yearbook of European Law 2012, p. 182.

[104] As emphasized in the academic debate, the AAs with Ukraine, Moldova and Georgia occupy 'a unique position within the network of bilateral agreements concluded between the EU and third countries [due to] the comprehensive nature of the agreement, the underlying conditionality approach and the complex mechanisms for legislative approximation and dispute settlement' (VAN DER LOO, VAN ELSUWEGE, PETROV, *The EU-Ukraine Association Agreement, op. cit.,* p. 28).

[105] Interestingly, according to CAZALA Julien, *La contestation de la compétence exclusive de la Cour de justice des Communautés européennes. Étude des relations entre divers systèmes internationaux de règlement des différends*, RTDE 2004, p. 505, there may be cases where an international jurisdiction may refer a case to the CJEU despite the silence of the treaties. The author, in particular, reads the suspension of the proceedings operated by the UNCLOS arbitral tribunal in the *MOX Plant* case, in favour of the CJEU, as a 'véritable renvoi préjudiciel', stating that 'si la Cour reconnaît qu'elle n'est compétente que pour trancher la « partie communautaire » du litige, et laisse ainsi au Tribunal la possibilité (qui selon nous s'en est inutilement privé) d'examiner celui-ci, on pourra considérer que la suspension de procédure décidée par le Tribunal arbitral a consisté en un véritable renvoi préjudiciel. […] Même si la saisine d'une juridiction extérieure au système communautaire était qualifiée de manquement à l'article 292 ou à l'article 10, ceci ne saurait priver ce tribunal de son titre de compétence'. Nevertheless, one should keep in mind that, in this case, the issue at stake was the determination of the competent jurisdiction, rather than the interpretation of EU law, while the procedure of referral, as analysed in the present work, enables the CJEU to state on the interpretation (and validity) of EU law, while the international jurisdiction, where the case is brought, remains the competent judicial forum.

[106] SCHERMERS Henry G., *Opinion 1/91 of the Court of Justice, 14 December 1991; Opinion 1/92 of the Court of Justice, 10 April 1992,* Common Market Law Review 1992, pp. 1007-1008.

ISDS.[107] Moreover, while the academic debate also discusses to what extent ISDS may be compatible with the EU Treaties in light of the CJEU's Opinions,[108] under the recent draft agreements on Free Trade with Canada and Singapore, and the current negotiations on the Transatlantic Trade and Investment Partnership (TTIP) with the United States, no referral is foreseen so far as ISDS is concerned. This may be a further element corroborating the hypothesis that prior involvement and referral are the envisaged mechanisms only under the two typologies of agreements identified above.

V. Concluding remarks

Although doubts have been expressed in the academic debate for legal necessity, appropriateness, and effectiveness of prior involvement procedure, according to the CJEU, this mechanism is necessary to safeguard the autonomy of the EU legal order. Moreover, prior involvement and referral procedures display some advantages as they do not require an amendment to the EU Treaties, and they appear to be more effective and feasible than alternative solutions. Referral to the CJEU is certainly to be preferred over the provisions that require an international tribunal to rule on a dispute without reference to EU norms when the interpretation of Union law is at stake. However, other questions have no clear answers. In particular, under the EU current practice, the referral procedure has been foreseen under international agreements whose applicable law includes Union law, such as the Agreements with Ukraine, Moldova, and Georgia, and the Draft Agreement on European and Community Patents Court, or where there are strong historical and legal ties on the protection of human rights between EU and the treaty at issue, as is the case with the ECHR. This may suggest that such procedures are specifically designed for these two typologies of agreements. Whether referral could be a desired procedure under any treaty creating an international legal mechanism for the resolution of disputes remains an open question. Subsequent practice of the Union will suggest whether these procedures will become the prominent mechanism to allow an international court or tribunal to rule on disputes involving international law as well as Union law, without undermining EU autonomy, and whether the 'EU-Ukraine model' for dispute settlement will be replicated.

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[107] In Opinion 2/15, the Commission submitted to the Court the following question: 'Does the Union have the requisite competence to sign and conclude alone the Free Trade Agreement with Singapore? More specifically, which provisions of the agreement fall within the Union's exclusive competence? ; Which provisions of the agreement fall within the Union's shared competence? ; and is there any provision of the agreement that falls within the exclusive competence of the Member States?' (available at http://curia.europa.eu/juris/document/document.jsf?text=Singapore&docid=170868&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=395652#ctx1).

[108] See HINDELANG Steffen, *The Autonomy of the European Legal Order. EU Constitutional Limits to Investor-State Arbitration on the Basis of Future EU Investment-Related Agreements*, European Yearbook of International Economic Law 2013, pp. 187-198; LAVRANOS Nikolaos, *Designing an International Investor-to-State Arbitration System After Opinion 1/09*, European Yearbook of International Economic Law 2013, pp. 199-219.

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