EU Accession to the ECHR:

In Search of a Compromise between Inter-State Cases and EU Law

[Master's Thesis]

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List of abbreviations

CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CoM	Committee of Ministers of the Council of Europe
DAA	Draft Accession Agreement
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	Court of Justice
ECSC	European Coal and Steel Community
EMBL	European Molecular Biology Laboratory
EU	European Union
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
MS	Member state(s) of the European Union
NEUMS	Non-European Union Member state(s) CoE member
PR8	Protocol (No 8) to the EU Treaties - relating to art. 6(2) TEU on Accession
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UNCLS	United Nations Convention on the Law of the Sea
WTO	World Trade Organization

Introduction

The protection of Human Rights has been a major priority in Europe since the Second World War. In that mindset, the Council of Europe was formed in 1949, currently having 46 members of the European continent. One of its greatest accomplishments would come just a year later with the signing of the *Convention for the Protection of Human Rights and Fundamental Freedoms,* more commonly referred as 'European Convention on Human Rights'. All CoE members are also Signatories to the ECHR.

The ECHR binds its Signatories to guarantee all human beings the rights established in arts. 2-14 ECHR. If those rights are violated, the European Court of Human Rights can provide relief. There are 31 articles (19-51 ECHR) of the Convention dedicated to the functioning of the ECtHR, and the first, of four Chapters, of this dissertation will be dedicated to one its enforcement mechanisms – the Inter-State procedure.

A different association is the European Union, which has 27 European Member states. It was originally devised as the 'European Coal and Steel Community', in 1951, to prevent armed conflict between the MS. It has since evolved to pursue a wider range of objectives, including the protection of Human Rights. The Court of Justice of the European Union is the EU Institution responsible for spearheading that expansion of fundamental rights, as the EU treaties had initially omitted any guarantee[1].

Every MS is a CoE member, thus, all are ECHR Signatories as well, individually. But the EU itself is not a Signatory. This creates deficiencies in the effectiveness of the ECHR: the portion of sovereignty ceded to the EU by the MS is exempt from ECHR requirements. Not only is the EU unable to be a respondent before the ECtHR[2], but the Institutions are unobliged by the Convention in their acts, at least directly. Two major problems arise from it. First, individuals whose ECHR rights are violated by EU mandates have limited recourse in the ECtHR. Since they are unable to sue the EU, the ECtHR has instead allowed them to sue the MS who executed those mandates, but only if those leave margin of discretion[3]. Illustrating the difficulty in holding the EU accountable, individuals have unsuccessfully sued the collective of the MS who voted in favor of the mandates

[1] EU doc. 5.4 ps. 1-2
[2] Cfr. ECtHR case 2.1.1
[3] Cfr. ECtHR case 2.1.2

in the EU Council[4]. And second, the disparity between ECHR and EU Human Rights' standards creates circumstances where EU obligations conflict with the ECHR. The result is MS must sometimes choose between infringing ECHR rights, or disobeying the EU[5].

In search of correcting these deficiencies, the MS and the CoE have long searched for EU Accession to the ECHR, which is the topic of this dissertation. There was the realization that Accession would bring structural changes to the EU, so the ECJ was preemptively requested an Opinion regarding the competence for the Institutions to pursue Accession. In 1996, Opinion 2/94 would be unfavorable because, at the time, the Treaties omitted any intention to accede. Since the Opinion procedure, provided in art. 218(11) TFEU, is binding, Accession efforts were suspended.

Faced with this setback, the EU instead proclaimed the Charter of Fundamental Rights, in 2000. It would later be elevated to EU primary law, which places it, hierarchically, in the same level as the EU Treaties and their Protocols. The CFREU provides guarantees to natural and legal persons, invokable whenever an EU act is implemented, but these are liable to be restricted based on other EU objectives[6]. In contrast, only extreme public emergencies may justify limitations to ECHR rights[7].

The MS would finally provide the missing competence for EU Accession in the Treaty of Lisbon (2007): art. 6(2) TEU now mandates Accession, albeit with the conditions imposed by Protocol (No 8). Similarly, the ECHR was added art. 59(2) soon after, welcoming EU's signature. Still, the ECJ clarifies, in *Menci*[8]: "(…) although, as Art. 6(3) TEU confirms, the fundamental rights recognised by the ECHR constitute general principles of EU law and although Art. 52(3) of the Charter provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by that Convention[9], the [ECHR] does not constitute, as long as the EU has not acceded to it, a legal instrument which has been formally incorporated into EU law". The relevant EU law provisions of the Accession process will be analyzed in Chapter 2. After EU Accession, the ECHR would have a place in the hierarchy of EU law sources only surpassed by the Treaties and their Protocols.

[4] Cfr. ECtHR cases 2.1.4, 2.1.5, 2.1.6 & 2.1.8
[5] Callawaert (2018) ps. 1710-1712
[6] Cfr. 52(1) CFREU
[7] Cfr. art. 15 ECHR
[8] CJEU Case C-524/15: 22.
[9] Cfr. Callawaert (2014) ps. 34-41 for an explanation of the ineffectiveness of art. 52(3) CFREU

The second attempt at EU Accession started in 2010. Representatives from the CoE, the MS and the EU Commission worked on adapting the ECHR to the special nature of the EU. All parties desired the 'Co-Respondent Mechanism'[10], designed to justly partition responsibility for ECHR violations between MS and the EU. The most notorious concession by the CoE was the unprecedented 'Prior Involvement'[11], by which the CJEU would have the opportunity to define the interpretation of EU law relevant in an ECtHR application.

The last stage of those negotiations involved representatives from all CoE members, plus the EU – the '47+1' Group. In April 2013, the Group would present a Draft Accession Agreement, to be annexed to the ECHR, if ratified. Understanding that the EU is not a State, that DAA provided for a change in the name of the Inter-State procedure: 'Inter-Party Cases'. Given that the procedure currently retains its original nomenclature, that is how this dissertation will address it.

An Opinion would once again be requested to the ECJ, with the court ruling the DAA incompatible with EU law. One of the objections in this controversial *Opinion 2/13* was a conflict between the Inter-State procedure and art. 344 TFEU, which will be dissected in Chapter 3. That objection was the genesis of our Research Question: "Is there compatibility, and to what extent, between Inter-State Cases and EU law?".

A third attempt for EU Accession started in 2019, and is ongoing at the time of the submission of this dissertation. The '46+1' Group, reduced after the Russian Federation was expelled from the CoE, has submitted a New DAA, which shall be summarized in Chapter 4.

Solving this obstacle would be an important step forward towards reaching an agreement on EU Accession. It is necessary to meet ECJ demands, to obtain its approval, but the CoE desires to preserve as much Inter-State jurisdiction as possible. Therefore, the ideal resolution for the Inter-State quandary is a compromise which satisfies both. EU Accession would then bring larger Human Rights protection and enforcement to all individuals who interact with the EU legal order, raising the EU standards, and harmonizing CJEU and ECtHR jurisprudence[12]. For starters, the EU Institutions would be subjected to scrutiny in the field of Human Rights from a body independent from the EU[13]. Second, if the EU were to become a legitimate respondent in the ECtHR, not only would compensation for EU mandates with no margin of discretion be eligible for individuals, but

[10] Cfr. CoE doc. 4.12, Appendix I, art. 3, & Appendix V, 35-64
[11] *Idem*, Appendix I, art. 3.6 & Appendix V, 65-69
[12] Polakiewicz (2016) 5.a
[13] Spaventa (2015) ps. 38-41; Callawaert (2018) ps. 1712-1715

the MS who execute those acts would be relieved from sole responsibility, as well[14]. And third, it cannot be underestimated the internal and external signaling: the EU would be able to legitimize the ECHR before its MS, and third nations[15]. The beneficiaries would extend beyond EU citizens, to include immigrants and refugees, for example, whose guarantees would have to cease being deprioritized over other EU objectives. To that end, our position on the viability of Inter-State Cases after EU Accession will be presented in Chapter 4.

The lion-share of the methodology employed in the research was doctrinal. In addition to the analysis of key provisions of the ECHR (Chapter 1), and EU law (Chapter 2), jurisprudence was invaluable. In Chapter 2, particular focus will be on CJEU decisions developing art. 344 TFEU, in order to then demonstrate, in Chapter 3, how the ECJ maintained or altered its doctrine. In a supporting role, the socio-legal factors that influence the stance of the relevant actors in EU Accession will be featured in Chapter 4.

[14] *Idem* ps. 41-42; Douglas-Scott (2014); Callawaert (2018) ps. 1688-1690
[15] Spaventa (2015) ps. 43-44; Lock (2020) p. 3

Chapter 1

The Inter-State Procedure

1.1 An Enforcement Mechanism of Human Rights

The ECHR has been revolutionary due to its methods of enforcement. This Human Rights' treaty establishes mandatory jurisdiction over its Signatories to an international tribunal charged with securing compliance[16]. This is the status of the Convention – created to enforce rights conferred by Signatories to all individuals, with the latter being compelled to be respondents, and bound to abide by its rulings.

The ECtHR was provided two enforcement mechanisms: Inter-State Cases (art. 33 ECHR), and Individual Applications (art. 34 ECHR). While Inter-State Cases are brought on by Signatories, Individual Applications are done so by the very persons whose rights were violated. Nevertheless, the substance of the review by the ECtHR is the same: both procedures are designed to supervise the Signatories' respect of individual Human Rights. It must be noted, however, that the mechanisms diverge in admissibility criteria.

Risini adequately characterizes the Inter-State procedure as "collective enforcement of Human Rights"[17]: a Signatory makes its resources available to sponsor the plea of persons whose ECHR rights were infringed. In the final decision, the ECtHR orders the respondent-Signatory, if found in violation, to make whatever changes and reparations adequate and reasonable, with monetary compensation often being required[18].

It is undeniable some Inter-State Cases have essentially consisted of one Signatory asking for relief against another's aggression, but that is technically outside ECtHR jurisdiction[19]. The Court usually grants standing on such cases, but what Strasbourg will review are concrete violations of rights of persons[20]. Hence, the ECtHR, and the Inter-State procedure specifically, are an ineffective method of settling disputes between two signatories, even though it is actually an excellent

[16] Ulfstein & Risini (2020) p. 3
[17] Risini (05.2020)
[18] Pinto de Albuquerque (2020) ps. 2688-2693; White & Ovey (2011) ps. 42-45
[19] Ulfstein & Risini (2020) p. 5
[20] White & Ovey, p. 12

jurisdictional forum for the offended nation to present their case, given the mandatory concession of jurisdiction.

Important to the EU Accession discussion is the judge formations in Inter-State Cases. According to art. 29(2) ECHR, only a Chamber or a Grand Chamber decides Inter-States Cases. This means, per art. 26(4) ECHR, the judge nominated by the respondent-Signatory will sit in the proceedings. Such composition is unusual in judicial systems under the rule of law, due to the skepticism that those judges will remain impartial. The ECHR, however, relies on strict criteria for office, in art. 21 ECHR, which ensures integrity and complete independence from the home state[21]. The objective is for those judges to provide insight into particular details of law adopted or invoked by their Home-State[22]. The ECHR evidently prioritized that expertise over impartiality doubts, given the enormous diversity surrounding the Signatories. If the EU were to accede, its appointed judge would be relied on during Inter-State Cases in the same manner, to explain complex matters surrounding the EU legal order that would emerge in the proceedings.

The judge formations are only one component of the ECtHR's good faith cooperation. There is also significant margin of discretion given to the Signatories, when faced with scrutiny[23]. Furthermore, there is tolerance towards social-cultural practices which conflict with the Signatories' majority understanding of the scope of a certain human right. In earnest, the ECHR represents a consensus between the European nations, to which even the EU has contributed. In fact, when choosing between multiple interpretations to find that European Consensus, EU Fundamental Rights have been considered by the ECtHR as the expression of the opinion of more than half the Signatories[24]. This receptivity towards EU law has its pinnacle in the 'Bosphorus presumption'[25], where any EU act is, unless proven otherwise, considered harmonious with the ECHR[26]. However, when faced with unprecedented challenges, brought by innovation in technology, for example, the judges are not afraid to expand the Convention's original meaning to secure effective protections[27]. This brings some unpredictability to ECtHR rulings.

[21] Pinto de Albuquerque (2020) ps. 3049-3053
[22] White & Ovey (2011), p. 23
[23] Pinto de Albuquerque (2020) ps. 2721-2738; White & Ovey (2011) ps. 78-81
[24] Lock (2016) ps 18-23
[25] Introduced by ECtHR case 2.1.7
[26] Lock (2016) p. 4
[27] White & Ovey ps. 73-77

A final note is the subsidiary role of the supervisory mechanisms of the Convention[28]. Such trait is mandated by art. 35(1) ECHR, and has been reiterated in the Interlaken[29] and Izmir[30] Declarations. This means that, while ECtHR means of enforcement should give precedence to national resources, they must remain available as a last resort for unsatisfied victims claiming ECHR violations. Only in this balance can art. 55 ECHR remain effective.

1.2 The Role in ECHR Enforcement System of the ECHR

The Inter-State procedure contains features of enormous importance for ECHR enforcement. First, making the resources of a nation available to investigate violations of Human Rights, and, subsequently, to make a case for remedies in the ECtHR, cannot be understated. It is a fact the respondent is always a State, with tremendous, equivalent means. Those can be employed in thorough investigations to discredit witnesses and cover-up evidence, for example. Having the same types of assets on the applicant's side can help counteract those efforts. Despite this, there is always an incentive for respondents to cooperate, as the Court has considered such acts as evidence of guilt[31]. Additionally, by taking on the cause, it eliminates costs for the individuals, such as lawyers' fees, and unburdens the victim from the stress of coordinating the proceedings. In another perspective, the applicant-Signatory can exert pressure for remedies in extra-judicial ways, such as a diplomatic reprisals and publicity to the case, with the goal of damaging the reputation of the respondent.

Second, the applicant-Signatory can sponsor foreign nationals. The legitimacy to apply to the ECtHR is irrespective of the nationality of the victims - an *erga homenes* trait of Inter-State[32]. Most of the persons who apply to the ECtHR do so against alleged violations by their own government. Logically, that government is prohibited from being an Inter-State applicant against itself, and would have no interest in doing so. Having the option of another State stepping-in for the victims is incredibly valuable.

Third, many Individual Applications can be coordinated and joined into one single Inter-State case. This means relief for the ECtHR case-load, by appending and deciding multiple

[28] Spaventa (2015) p. 38
[29] CoE doc. 4.4
[30] CoE doc. 4.5
[31] White & Ovey (2011) ps. 25-26, 28-30
[32] Risini (2018) p. 180; Ulfstein & Risini (2020) p. 3

allegations based on the same facts; and also represents a tool to deal with systemic violations[33], overcoming the impracticality of deciding case-by-case, which would require all individual victims to apply. Furthermore, it yields faster and more contextualized decisions. Events originating large number of cases from a single respondent can easily be fathomed – a military invasion, a landmark judicial decision, a controversial law, among others. There is a perfect example: more than 5000 individual claims of human rights violations after the occupation by the Russian Federation of Crimea and the Donbas were taken-on by the Ukrainian government in a single Inter-State application in the ECtHR[34]. After the Russian invasion, in 2022, all violations originated since shall also be joined into one single Inter-State Case.

Fourth, there are more favorable admissibility criteria than in Individual Applications[35]. The ECtHR is more lenient regarding the requirement to exhaust domestic remedies, contained in art. 35(1) ECHR. In particular, grave, urgent, systemic, and government-sanctioned situations are expedited, and only rarely have claims been deemed "wholly unsubstantiated", and rejected. Even more fascinating is that the mere existence of a relatively high number of applications have led the ECtHR to accept technically inadmissible cases, by appending them into one Inter-State procedure[36]. Moreover, these more lenient criteria may allow for the rare opportunity to act without a victim, or even preemptively. The ECtHR has reviewed national legislation and administrative practices related to, but not the source of, the Inter-State claims, and considered them as autonomous factors when granting standing.

Finally, but still concerning admissibility, the ECtHR has accepted Inter-State Cases whose substance-matter had also been submitted for review to other international tribunals[37]. Even though those cases were pending, never completed, it represents another circumvention of the court's admissibility rules, favorable for alleged victims, this time prescribed by art. 35(2(b) ECHR.

[33] Risini (2018) p. 180
[34] Ulfstein & Risini (2020) p. 6
[35] *Idem* p. 3; Risini (2018) p. 181
[36] Ulfstein & Risini (2020) p. 6
[37] *Idem* ps. 4-5

1.3 The History

There is great disparity between the numbers of Inter-State cases and Individual Applications submitted to the ECtHR. Concretely, by the end of 2021, the court had rendered 24'511 decisions on Individual Applications since its creation, while 70'150 were pending[38]. In contrast, only 16 Inter-State cases have been concluded, and 19 are ongoing. It is worthy of note that 16 Inter-State applications were submitted after 2017, which shows an unprecedented growth in the recourse to this procedure.

Some of the most impactful occurrences in Europe's history, after the Second World War, have been the cause of Inter-State Cases. Examples include the military coup in Greece in 1967, the invasion of Cyprus by Turkey in 1974, and the invasions of Georgia (2008) and Ukraine (2014, 2022) by the Russian Federation[39]. Even though the individual Human Rights' violations are the subject-matter, the Inter-State procedure has become a vital forum for discussing the most impactful diplomatic conflicts in Europe. It expands Human Rights enforcement, as these crises inevitably originate violations which will be at the basis of the political discussion[40].

Last, but not least: there have been two Inter-State applications between States who were MS at the time of litigation. The first was *Slovenia v. Croatia*[41]. It was not admitted, because it is an example of a State asking for relief against another in pursuit of its own sovereign interests. In that light, the ECtHR did not deem a publicly-owned bank as a subject of ECHR rights, so it rejected Slovenia's sponsorship.

The decision is especially illustrative of some tension between the ECtHR and the CJEU. The ECtHR demonstrates its divergence to the concept of «fundamental rights' subject» contained in the CFREU: while the ECHR protects subjects in the limited terms of art. 34 ECHR, there are few restrictions as to who may apply for relief before EU courts[42]. In support, it cites Bank Mellat[43], and another 5 similar CJEU cases. Furthermore, the ECtHR adds the mandate of equivalence between CFREU and ECHR contained in art. 52(3) CFREU does not apply, because only the "meaning and scope" of rights is to be equivalent, not the subjects who could benefit. This

[38] CoE doc. 4.30
[39] Ulfstein & Risini (2020) p. 6; White & Ovey p. 12
[40] Ulfstein & Risini (2020) p. 4; White & Ovey p.12
[41] ECtHR case 2.2.2
[42] *Idem*: 69.
[43] CJEU Case C-176/13 P

demonstration of the ECtHR analyzing CJEU jurisprudence and interpreting EU law, in the form of the CFREU, is one of the concerns the ECJ had in *Opinion 2/13*. Nonetheless, it demonstrates that the level of Human Rights jurisdiction in Europe, under the ECtHR, currently encompasses disputes between MS, involving EU law.

The second Inter-State Case between MS was *Latvia v. Denmark*[44]. This was an extradition conflict, which was extrajudicially resolved between the MS, so the ECtHR dismissed it under art. 37(1)b) ECHR.

[44] ECtHR case 2.2.3

Chapter 2

The Compatibility between EU Law and Inter-State Cases

2.1 Article 6(2) TEU

"*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties*."

This is the provision that enables EU Accession. It was introduced in December of 2009, with the entry into force of the Treaty of Lisbon, and gave the EU competence to make itself bound by the ECHR in earnest.

2.1.1 The Foundations

EU Accession has specific objectives in place. Primarily, it endeavours to bind the EU Institutions to the same Human Rights' standards as all of Larger-Europe, including external compliance supervision. Acceding to the ECHR presupposes surrendering jurisdiction to its enforcement entity – the ECtHR -, which would impose reparations for individuals, and promote change in harmful EU acts. This process would close the current gap in ECHR enforcement, whenever a Human Rights' violation is attributed to an act emanated from the EU, and enforced with no discretion.

The secondary goals of EU Accession relate to interests of MS. On the one hand, there are situations where the MS have conflicting obligations regarding their commitment to both the EU and the ECHR – MS are forced, in practice, to choose disobeying one or the other. If the EU were to accede, the ECHR obligation would prevail every time, and the conflict would be resolved. On the other hand, the MS are often held solely responsible in the ECtHR for executing EU mandates which violate Human Rights. If the EU were to be a legitimate respondent in the ECtHR, the responsibility could be justly partitioned with the MS.

2.1.2 The Scope

Not only thus art. 6(2) TEU grant competence to the EU and its Institutions to realize Accession, but it imposes a duty to do so, as well[45]. The process is not straightforward, however, as the EU must negotiate with the CoE, in order to comply with a reservation: the second period of art. 6(2) TEU appears to require the EU's competences to remain unchanged by Accession.

The EU is not a State, rather a federative association of multiple States. That union can be fragile, as the will emerging from the EU as an entity is not always unanimous, but affects all MS every time. Therefore, the effects of EU Accession cannot be the same as they would be for a single State, and special adjustments must be made. In particular, there is the Principle of Conferral (art. 5 TEU), where the EU can only exert a competence delegated by the MS. It is this Principle the second period of art. 6(2) TEU looks to safeguard.

However, it is impossible to take the reservation at its absolute. Preventing any effect on the competences would make EU Accession meaningless. A primary goal is for the EU to be held responsible for ECHR violations, so it must obtain the new responsibility to be a respondent before the ECtHR. This includes subjecting the EU Institutions to ECtHR supervision. Furthermore, being subjected to the ECHR, the EU must be heard in future revisions to the Convention, so it ought to be included in the CoM in such occasions. That would be a new competence as well, but was intended when signing the Treaty of Lisbon.

The conclusion is art. 6(2) TEU presents two concurrent and conflicting obligations: 1) to accede; and 2) to preserve competences. In this light, this provision is considered an 'endeavour clause', only binding the EU Institutions to an obligation of 'best-efforts' in the pursuit of Accession[46]. Instead of an obligation of results, it imposes an obligation of means. In practice, this requires good-faith negotiation, but if the CoE is resolute in requiring terms which expand EU competences, or alter characteristics, to a level significantly beyond what was intended, the EU Institutions must walk away.

We will go one step further and consider that art. 6(2) TEU institutes a 'duty to compromise'. The EU Institutions must deem equally important the two instructions, and maximize them both. Since they are incompatible in their extremes, neither can be interpreted as such.

[45] Kellerbauer, Klmaert & Tomkin (2019) p. 82; Korenica (2015) ps. 141-142
[46] Kellerbauer, Klmaert & Tomkin (2019) p. 83

Therefore, the EU Institutions must strive for maximum compatibility with the Treaties when negotiating with the CoE for EU Accession, keeping changes in EU competences and characteristics to a minimum. But never at the cost of a rupture in the negotiations. If the negotiated terms have some measure of compatibility with EU law, and demanding any more concessions leads to cessation, the EU Institutions must accept those terms. Moreover, when confronted with the negotiated terms, there must be special tolerance and openness when evaluating their compatibility with EU law, since the Treaties themselves unprecedently endorse the process.

The Inter-State procedure is one of the areas where both EU competences, and the ECHR system, are in conflict. The quandary is finding a compromise between the CJEU's doctrine of exclusivity and the preservation of the jurisdiction of the ECtHR when EU law is involved.

In order to define the scope of the concession of jurisdiction to the ECtHR, regarding the Inter-State procedure, it must be taken into account the historical aversion regarding the growth of the EU's competences. For example, the CFREU was unanimously approved only when added art. 51(2), expressly excluding EU oversight of Fundamental and Human Rights outside the EU legal order. Therefore, it can be extracted one consequence for Inter-State Cases, from the reservation in art. 6(2) TEU: the EU is precluded from being an applicant in Inter-State Cases. Otherwise, it would be exercising a new power of ECHR enforcement[47]. It is evident the novelty and broadness of competences if the EU were to enforce the ECHR on NEUMS, through Inter-State Cases. However, enforcing the ECHR on the MS would be necessary after EU Accession, because the ECHR would become EU law. However, such enforcement should be limited to CJEU procedures, so as not to increase that enforcement power beyond what is necessary. In fact, ECHR Signatories have been effective in utilizing the Inter-State procedure individually.

It is a different matter in Inter-State Cases between MS. We shall make the case art. 6(2) TEU represents a permission and command to revise CJEU's monopoly to decide disputes between MS, involving EU law. When creating the duty to accede, the MS were revising that exclusive jurisdiction (or even sanctioning the jurisdiction the ECtHR has already exercised in those disputes). Since the Inter-State procedure is a fundamental enforcement mechanism of the ECHR, it must be embraced in EU Accession, as long as the procedure can be adjusted to have better compatibility with EU law.

[47] Risini (2018) ps. 182-186

2.2 Article 344 TFEU

2.2.1 The Foundations

2.2.1.1 Jurisdictional Autonomy and Certainty

First, when enshrining art. 344 TFEU, the MS desired to delimit the situations where they confer jurisdiction over their Union. When the MS all surrendered equal portions of their sovereignty to an international, federative association – the EU – one consequence was inevitable: whenever a dispute concerning EU law would arise, every MS would be affected. Concretely, if each MS was permitted to submit a dispute involving EU law to any tribunal of its choosing, the respective judgement would bind all MS. Therefore, as a matter of Jurisdictional Certainty, it was necessary to define which courts were agreed by all MS to rule over their Union, thus preventing them from being bound to any and all forms of dispute-settlement. Even more importantly, in order to ensure a durable Union, it was imperative that the MS had unanimously recognized and accepted in advance the body which would resolve disputes involving EU law, an expression of their Autonomy. The solution was to confer jurisdiction only to courts and tribunals provided in the Treaties, which are signed and revised by unanimity.

2.2.1.2 Legal Certainty

Second, there is the necessity for uniform interpretation and application of EU law. Art. 344 TFEU expresses the desire to keep decisions concerning EU law consistent and accurate, coherent and uniform[48], through a jurisdictional system which is competent to interpret and apply EU law. Therefore, only, and if, the Treaties approve the surrender of jurisdiction to a dispute-settlement mechanism, that mechanism will be considered apt and specialized in EU law. However, it does not mean only a court solely created to interpret and apply EU law can guarantee legal certainty in the EU, as the national courts of the MS were also granted jurisdiction by art. 19(1) TEU.

[48] Risini (2018) p. 186

There is another connection with art. 19(1) TEU, which grants the CJEU exclusive power to set a definitive interpretation for all EU law. This means any court or tribunal must follow the CJEU's interpretation of EU law when applying it in a dispute. In order to protect that monopoly, the national courts of the MS were subjected to the preliminary reference mechanism of art. 267 TFEU, which ensures the CJEU will have the opportunity to set the definitive interpretation of EU law in judicial disputes. In this paradigm, if the Treaties were to provide another mechanism to *apply* EU law, and the CJEU was guaranteed to see its *interpretation* followed during the proceedings, art. 344 TFEU would be respected.

2.2.1.3 The Preservation of the Continuity of Relationships

Risini explains: "One of the main judicial functions that the drafters of the EU treaties assigned to the [CJEU] was to settle disputes between member states. The EU's founding idea was to prevent conflicts (…) in a manner that would remove material incentives for armed conflict. This pre-emptive philosophy permeates also the structure of the dispute settlement mechanism of the EU, which channels and monopolizes conflicts between member states to dispute resolution instead of direct confrontation"[49].

In essence, art. 344 TFEU safeguards the core objective of the primordial incarnation of the EU - the European Coal and Steel Community. The ECSC brought the original MS in a Union to prevent future disputes between them from escalating to the point of a rupture in their relations, and, ultimately, avoid war. War has since ceased being a concern, but the preservation of economic and diplomatic relationships is still a challenge, and imperative. If a dispute is kept within EU boundaries, and assigned to a court sensitive to that fragility of the EU, it can decide the dispute in a manner tending to the best preservation of relations between the litigants. This includes not only preserving the relationship between two MS, as well as preserving the relation between one MS and the Union itself. Therefore, art. 344 TFEU signifies that only, and whichever, courts provided in the Treaties are to be considered legitimized to preserve the continuity of relationships of MS and the EU.

[49] Risini (2018) p. 188

2.2.2 The Letter

"Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein"

There is a prohibition to MS from litigating against each other, and against the EU, in external courts, whenever EU law is involved. However, the CJEU is omitted as being the exclusive forum for such disputes.

A different, broader, interpretation of the provision could have been a prohibition from *creating or acceding* to any external methods of dispute-settlement. In other words, a prohibition from granting any international court jurisdiction to apply EU law. The German language version of art. 344 TFEU permits such interpretation[50], but *Opinion 1/09* rejected it. It would have barred the inception of tribunals meant for individuals to sue MS and the EU[51]. This alternative must be rejected, since it has no correlation the preservation of the continuity of relationships, which is unaffected if the MS or the EU are not opposing parties. Such position would also have precluded both Inter-State Cases and Individual Applications in the ECtHR, thus, excluding all forms of ECHR enforcement.

Art. 344 TFEU does not actually refer to 'EU law'. Instead, it mandates that any dispute concerning the "Treaties" may only be resolved through a procedure *provided for* "therein". This means the EU legal realm which must be interpreted and applied during a dispute also dictates, to the exclusion of all other sources, the mechanism of settling the dispute.

But what is that EU legal realm? The expression "Treaties" must be interpreted, in principle, as 'EU primary law'. This because it can be verified through the distinction made in art. 267 TFEU that "Treaties" does not normally include EU "acts", which are part of secondary law. Additionally, the term "Union law" is utilized in the Treaties[52]. This notwithstanding, the expression in question ought to be interpreted broadly on occasion, as the ECJ would do in *Opinion 2/13*[53]. If secondary law were to be excluded from art. 344 TFEU's reservation, MS would be free to submit disputes concerning EU Regulations, for example, to any tribunal of their choosing. This would compromise

[50] Makrypidi (2019) p. 24
[51] Lock (2014); Douglas-Scott (2014)
[52] Cfr. 256(2) TFEU, i.e.
[53] Opinion 2/13: 202.

the foundations of art. 344 TFEU, so "Treaties", in this situation, must be interpreted as "primary and secondary law", exceptionally.

But how to reconcile the letter of 344 TFEU – establishing the same legal source for both the dispute, and the method to settle it – with the inclusion of secondary law in that legal source? It could mean secondary acts, such as international agreements and Regulations, which can be approved without unanimity, being able to create a binding tribunal for all. This compromises jurisdictional autonomy. The only solution is to create the following conciliatory interpretation: W*hen authorized by primary law, secondary law can provide the Member states with a method of settling disputes involving EU law*. The unanimous consent for new courts is, thus, preserved. In earnest, it represents the acceptance of implicitly-provided and indirectly-provided tribunals by primary law.

An implicitly-provided tribunal in the Treaties is one tacitly approved by a provision of primary law, due to the fact that accepting its jurisdiction is, evidently, necessary to comply with that provision. The sole implicitly-provided tribunal in the Treaties is the ECtHR. Now, an indirectly-provided tribunal is one expressly approved by primary law, but requiring a secondary act to be realized. For example, the specialized courts, under authorization by primary law [arts. 19(1) TEU & 257 TFEU], can be created through a Regulation, secondary law, thus establishing a court with jurisdiction over the MS indirectly. Other such indirect provisions can be found in arts. 270, 271, 272 TFEU, whilst art. 273 TFEU actually provides an indirect method of resolving disputes between MS, involving EU law.

The ECtHR is actually both implicitly, and indirectly, provided in primary law by art. 6(2) TEU. By mandating EU Accession, ECtHR jurisdiction is implicitly approved, given that it is an essential feature of the ECHR. In addition, for Accession to be realized, and ECtHR jurisdiction established, an international agreement – non-primary law – must be celebrated.

This view of ours is minoritarian. Art. 344 TFEU is more commonly interpreted to grant the CJEU exclusive jurisdiction for disputes between MS, involving EU law. For example, Klamert notes "344 TFEU stipulates that the Treaty provisions on the jurisdiction of the ECJ are exclusive in so far as litigation in matters of EU law is concerned. Thus, MS are confined to the infringement procedure in 259 TFEU and to the arbitration procedure in 273 TFEU (…) 344 TFEU complements 19(1) TEU, according to which it is for the ECJ to ensure that the law is observed in the

interpretation and application of the Treaties (…) the Court's exclusive jurisdiction is in itself an essential characteristic of EU law"[54].

2.2.3 The CJEU Jurisprudence

2.2.3.1 Opinion 1/91

This was the first case where art. 344 TFEU was developed in earnest. The ECJ preemptively rejected an international agreement – the European Economic Area – which included the establishment of a tribunal to settle disputes between MS.

The central concern was EU legal certainty. The tribunal, to be given jurisdiction over the MS and the EU Institutions, was rejected for not having to follow the CJEU's future interpretation of EU law[55]. Moreover, the tribunal was not only censured for its lack of obligation to refer to the CJEU for guidance[56], but also for that advice not being binding[57]. It could have decided diverging from the CJEU's interpretation, in violation of the its exclusive jurisdiction to interpret EU law. This was considered an infringement of EU Autonomy, a "foundation" of the EU legal order, caused by the violation of the competences assigned in the Treaties[58]. Additionally, art. 344 TFEU was described as 'confirmation' of the CJEU's exclusivity[59].

The ECJ also explained that while the goals of the international agreement may be EU goals[60], only a Treaty-provision could override the CJEU's exclusivity to resolve disputes between MS, and there was none which provided for the envisaged tribunal[61]. However, no treaty amendment could ever subtract from the CJEU's exclusive jurisdiction to interpret EU law[62]. Nevertheless, the ECJ was open to accepting international tribunals being able to interpret and apply the agreement which creates them in a binding way to MS and EU Institutions[63].

[54] Kellerbauer, Klamert & Tomkin (2019) ps. 2045-2046
[55] Opinion 1/91: 26, 44
[56] 1/91: 58
[57] 1/91: 61
[58] 1/91: 21
[59] 1/91: 35
[60] 1/91: 17
[61] 1/91: 6, 71
[62] 1/91: 72
[63] 1/91: 40, 70

The main concern in *Opinion 1/91* was securing the CJEU's exclusive interpretation of EU law, but the reasoning by which the envisaged tribunal was rejected to apply EU law in disputes between MS is implied in this manner[64]:

- Art. 344 TFEU only allows Treaty-provided methods to resolve EU law disputes submitted by MS; and
- The Treaties only provide the CJEU as a method of dispute-settlement; therefore
- Only the CJEU can settle a dispute between MS, involving EU law.

2.2.3.2 MOX Plant

MOX Plant[65] was an Action for Infringement, a CJEU mechanism of art. 258 TFEU, brought by the EU Commission against Ireland, for submitting a Maritime law dispute involving EU law to a tribunal established by the UNCLS. There was no Treaty-provision conceding jurisdiction to such mechanism, so Ireland was condemned for going outside the CJEU for a dispute with a MS, involving EU law.

While *Opinion 1/91* was a preemptive review of an agreement yet unsigned, all the MS, and the EU on its own, were already part of the UNCLS. The ECJ could not deem it incompatible with EU law, because it *was* EU law. Unquestionably in the spirit of finding the interpretation of the UNCLS most compatible with art. 344 TFEU, the ECJ would laid out rules for whenever the CJEU's jurisdiction is concurrent with international tribunals:

- The international agreement must allow Treaty-provided methods to occur[66];
- The international agreement must give "precedence" to those equivalent EU settlement mechanisms[67].
- To guarantee that priority, the MS must "inform and consult" the EU Commission when contemplating resorting to those international tribunals[68]. (It gives the Commission the opportunity to take the case itself to the ECJ. The Commission may also decline to sponsor the

[64] 1/91: 6, 71
[65] CJEU Case C-459/03, Commission v. Ireland
[66] MOX Plant: 124, 132
[67] MOX Plant: 125
[68] MOX Plant: 182

Action for Infringement itself, but, nevertheless, instruct the MS to bring it before the ECJ instead of the international tribunal[69]).

Per the Cambridge English Dictionary, to 'take precedence over' means to "to be more important, and therefore having to happen first". In the working language of the CJEU - French - the expression used is "prime", which translates into "precedence", while, in German, it is "vorrangig", meaning "priority".

MOX Plant seems to establish a precedent of validating the UNCLS due to its express deferral to Treaty-provided methods. Curiously, in Johansen's opinion, the conferral of precedence to EU methods "was not a decisive factor in *MOX Plant*", rather complementary[70]. Johansen maintains the important condition in *MOX Plant* was for MS to be permitted to choose Actions for Infringement first, and, thus, international agreements were not required to explicitly defer to CJEU methods. Or, in other words, for the EU to celebrate international agreements, the associated tribunals must abstain from requiring exclusive jurisdiction when there is EU law involved in a dispute between MS.

There was another important development in this decision. The CJEU's exclusive jurisdiction over disputes between MS, involving EU law, was declared as a "fundamental feature" of the EU judicial system[71]. It was a reinterpretation of art. 344 TFEU, given that, in *Opinion 1/91,* that exclusive jurisdiction had been a product of lack of alternatives. Only the exclusive *interpretation* of EU law had been considered fundamental, not its *application*.

2.2.3.3 Opinion 1/09

This third piece of relevant jurisprudence was the review of the Patent Court. These are the developments it brought:

- International tribunals are prohibited from invalidating EU acts, which is an exclusive power of the CJEU[72];

[69] Cfr. Art. 259 TFEU
[70] Johansen (2015) p. 174
[71] MOX Plant: 169
[72] Opinion 1/09: 78

- The purpose and effectiveness of the preliminary reference mechanism, by which MS defer the interpretation or invalidation of EU law to the ECJ, must not be affected[73].
- Art. 344 TFEU is cited literally, with the ECJ abstaining from proclaiming neither CJEU exclusivity over disputes between MS, involving EU law, nor its fundamentality[74];
-344 TFEU permits surrendering jurisdiction to international tribunals over cases brought on by individuals against MS or the EU[75];
- The Patent Court is considered outside the judicial system of the Treaties, due to its omission from either art. 19(1) TEU, or everywhere else in the Treaties[76]. In addition, the CJEU and MS' courts are declared the "guardians of that legal order"[77].
- "The [CJEU] has also declared that an international agreement may affect its own [the CJEU's] powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the European Union legal order"[78]

2.2.3.4 Opinion 2/13 (deferred to Chapter 3)

2.2.3.5 Achmea

Achmea[79] was a preliminary reference, and constituted a harsh stance by the ECJ. It decided to prohibit any concession of jurisdiction to investment tribunals between two or more MS.

The reason behind the decision is investment tribunals must enforce the law applicable between its parties. Since financial relations between MS are subjected to EU law, investment tribunals have often interpreted and applied it. However, the tribunals are not eligible to make preliminary references, under 267 TFEU, thus leaving the ECJ unable to advise them[80]. It creates situations where EU law may be incorrectly applied, compromising its uniformity.

[73] 1/09: 73, 79, 83, 89
[74] 1/09: 63
[75] 1/09: 63
[76] 1/09: 71
[77] 1/09: 66
[78] 1/09: 76
[79] CJEU Case C-284/16
[80] Achmea: 46

Since there was no norm in EU primary law providing investment tribunals with jurisdiction over disputes between MS, those tribunals were considered outside the EU legal system, by default of art. 19(1) TEU[81].

2.3 Article 3 of Protocol (No 8)

"Nothing in the agreement referred to in Article 1 shall affect Article 344 of the Treaty on the Functioning of the European Union."

Protocol (No 8) was created to regulate EU Accession, and its art. 3 is clearly addressing the question of the Inter-State procedure. It seems to prevent any compromise in which Inter-State Cases occur between MS, involving EU law, or between MS and the EU. In fact, art. 3 PR8 is often incorrectly cited as: "Nothing in the agreement *must* affect 344 TFEU"[82].

This prohibitive interpretation was endorsed the ECJ, and supported by at least one MS in its observations to *Opinion 2/13*. A huge obstacle to the maintenance of Inter-State Cases between MS, involving EU law. However, such an uncompromising interpretation conflicts with the rest of Protocol (No 8):

- The agreement (…) shall make provision for preserving the specific characteristics" (art. 1);
- The agreement "shall ensure that accession shall not affect the competences of the Union" (art. 2); and
- The agreement "shall ensure that nothing therein affects the situation of the Member States"; (art. 2)

An unavoidable difference is identified in art. 3 PR8 - "Nothing in the agreement (…) shall affect 344 TFEU", omitting the duty to '*provide*' and '*ensure*'. It certainly considers the 344 TFEU question differently than the previous, which had been constructed in a compromise-friendly manner.

[81] Achmea: 36
[82] Cfr. 3.4

2.3.1 Our Position

What does the discrepancy above mean? Is art. 344 TFEU such a structural part of the Treaties that art. 3 PR8 had to stress it in its instructions? A deeper look permits another equally literal interpretation – art. 3 PR8 can represent a declaration or prediction of compatibility between EU Accession and art. 344 TFEU. The word "shall" is ambiguous. Instead of taking it to mean 'must', one can instead interpret: *Nothing in EU Accession affects art. 344 TFEU,* or, instead, *nothing in the agreement 'will' affect art. 344 TFEU.* The omission of the command to "provide", or "ensure", creates sufficient doubt regarding the intention of the MS when redacting Protocol (No 8). Consequently, the negotiators have minimal legitimacy to arrange a compromise, instead of being obliged to reject any Inter-State litigation involving EU law.

This polar-opposite interpretation cannot be adopted without reservations, due to concerns surrounding eventual litigation between MS and the EU. But the meaning of art. 3 PR8 requires an analysis, beyond its letter. We shall now present four arguments demonstrating critical flaws when interpreting art. 3 PR8 in a compromise-hostile manner: the contradiction with art. 2 PR8; the lesser importance of the interests at stake; the perspective of other language versions; and the greater sensibility of the negotiation directive. These will demonstrate the spirit of compromise should prevail when interpreting art. 3 PR8.

2.3.1.1 The Contradiction with Article 2 of Protocol (No 8)

It is the command of art. 2 PR8 to the negotiators to "ensure that nothing (…) affects the situation of Member States in relation to the European Convention, <u>in particular in relation to</u> (…)". The examples the provision proceeds to provide are only indicative, not totative, per the underlined expression. Consequentially, art. 2 PR8 dictates the MS must be permitted to litigate against each other in Inter-State Cases, involving EU law, because that is a recourse currently available to them.

Furthermore, art. 2 PR8 provides fundamental insight into the objectives of PR8: whatever directions and restrictions art. 6(2) TEU and PR8 provide, their scope only pertains to novelties brought on by EU Accession. By ensuring "the situation of Member States in relation to the European Convention" is unaffected, art. 2 PR8 considers the individual accessions by the

MS, and all their consequences, compatible with EU law. Considering that, in *Slovenia v. Croatia*, EU law was interpreted in an Inter-State Case between MS[83], due to their individual accessions, that "situation" must be preserved. Moreover, there was no Action for Infringement initiated against Slovenia as a violation of art. 344 TFEU. Nevertheless, given all the complexities surrounding Accession, and the impossibility of Protocol (No 8) to provide for every obstacle in EU Accession, the spirit of compromise should prevail. Inter-State Cases involving EU law should be adjusted, but never excluded.

2.3.1.2 The Lesser Interests at Stake

This second argument leads us to compare the mandates in Protocol (No 8). Art. 1 PR8 endeavours to preserve the "specific characteristics" of the EU, and, art. 2, its competences and powers, as well as the "situation of the Member States". Without its specific characteristics, the EU cannot fulfill its purpose, as proclaimed in art. 3 TEU. And regarding art. 2 PR8, it guarantees the Principle of Conferral, which preserves the autonomy and sovereignty of the MS from unintended expansion of the EU. These are some of the most fundamental interests in the EU. With this in mind, the Treaties believed commanding the negotiators to "provide" and "ensure" for their preservation was enough. In art. 3 PR8, there is no such command, only a declaration. But that declaration cannot be interpreted to be more restrictive to the negotiators, because the foundations of art. 344 TFEU are, at least, as structural, and partially compatible with the Inter-State provision. Let us see how.

To start, the MS already surrendered jurisdiction to the ECtHR individually, so their intention of extending it through art. 6(2) TEU is clear. Regarding the uniformity of EU law, the prior involvement mechanism, preserving ECJ's exclusive interpretation, was present in the rejected DAA, and could be applicable to Inter-State cases.

However, the preservation of the continuity of relationships is a significant concern if MS are able to initiate an Inter-State case against the EU. Since EU acts are the single source of EU-MS relations, adding the supervision of ECHR compliance could strain those relationships. Especially within ECtHR jurisdiction, because it will not consider the continuance of relations a

[83] Cfr. 1.3

fundamental decision criterion. To that end, Inter-State Cases initiated by MS against the EU are prohibited under art. 344 TFEU.

Differently, MS have other interactions outside the EU sphere. The relations between them can turn hostile through other origins, but have repercussions in their EU relations, nonetheless. Therefore, allowing Inter-State cases between them will increase the overall hazard minimally. Furthermore, ECtHR's history of competence, tolerance, margin of appreciation and cooperation guarantees it would take the preservation of relations into account. All in all, the foundations of 344 TFEU, safeguarded by art. 3 PR8, must be considered under minimal threat when compared to the remainder concerns of Protocol (No 8).

To conclude, one must look at art. 6(2) TEU. Protocol (No 8) exists to develop it, and art. 6(2) TEU only commands the competences of the EU, therefore the powers of the EU Institutions, to be preserved. If Inter-State Cases between MS, involving EU law, can be included in a way unaffecting the essential traits of equivalent mechanisms in CJEU's competence, art. 3 PR8 can be considered respected. In fact, in *Opinion 1/09*, the CJEU was open to having its powers restricted in a non-essential manner.

2.3.1.3 The Greater Sensibility of the Directive in Article 3 of Protocol (No 8)

Another comparison with the remainder of Protocol (No 8) is in order. Looking at arts. 1 and 2, there are specific matters to be addressed:

i. the participation of the EU in the ECHR control bodies;
ii. proper respondents; and
iii. the preservation of the MS' arrangements regarding ECHR Protocols, derogations[84] and reservations[85].

Common-sense leads to the conclusion these matters are relatively peaceful to resolve in the negotiations with the CoE and NEUMS:

i. it is only fair the EU participate in the developments of the ECHR if it shall be bound to it, and all current Signatories have equal representation;

[84] 15 ECHR
[85] 57 ECHR

ii. the CoE has long desired EU Accession in order to close the gap in the ECtHR's jurisdiction, thus being able to bring the EU to judgement whenever it is the true catalyst for an alleged ECHR violation. It is common-ground in the negotiations to partition responsibility between MS and the EU; and

iii. there is no perturbance to the ECHR system with the maintenance of the status quo regarding the individual position of each MS towards the Convention. The NEUMS have an interest in preserving their own reservations and subscriptions of ECHR Protocols, as well as autonomy in derogations.

It is clear all the specific instructions of Protocol (No 8) are expected to be conceded in the negotiations with the CoE, actually representing mutual interests. However, that is not the case with art. 3 - the Inter-State quandary. Whenever a new Signatory has acceded, full jurisdiction in Inter-State Cases was conceded. But after EU Accession, more than half the Signatories could, unprecedently, be barred from litigating in an Inter-State Case against EU. The MS, also Signatories, were aware of the importance of the Inter-State procedure to the Convention's enforcement system, so could not have so lightly disregarded any compromise allowing for the preservation of the procedure in some form. Lock perfectly explains: "The main weakness in the Court's argument stems from its neglect of art. 6(2) TEU. In contrast to other provisions conferring external competence on the EU, this one specifically relates to the Convention, which suggests that the [MS] (…) had the basic features of the ECHR system in mind and nonetheless wanted the EU to join. Of course, art. 6(2) TEU cannot be read as authorizing accession under all circumstances. (…) Art. 6(2) TEU should nonetheless be understood to (…) [demand] that the basic workings of the ECHR system of judicial review are deemed compatible with the Treaties."[86]

Despite the positions of the EU and CoE being obviously adversarial where Inter-State is concerned, Protocol (No 8) gave no specific command on how to approach it. Now, the expressions chosen in the specific commands of arts. 1 and 2 - to 'provide', and to 'ensure' – signify a mere duty of 'best-efforts', despite the desired objectives being easily achievable. Those commands must be considered the most unyielding of Protocol (No 8), because they are non-contentious. To interpret the abstract command of art. 3 more severely – as uncompromisable - is incongruent.

[86] Lock (2015) p. 25

The greater sensitivity of the Inter-State point of the negotiations must be realized, and, therefore, art. 3 is more adequately interpreted, in conformity with the remainder of Protocol (No 8), as actually the most compromise-friendly provision.

2.3.1.4 Multilingualism

The fourth argument pertains to the different language versions of Protocol (No 8). In EU law, there is the Principle of Equal Authenticity between the multiple official languages of the EU. Each have the same status and must be given the same consideration when interpreting a provision[87]. Let us consider the Portuguese and Spanish ones, respectively:

- "Nenhuma disposição (…) afeta o artigo 344º do TFUE"
- "Ninguna disposición (…) afectará al artículo 344"

The direct English translation of the Portuguese version is: *Nothing in the agreement (…) affects article 344 TFEU,* and the Spanish is: *Nothing in the agreement (…) will affect article 344 TFEU*. Both present a way of interpreting art. 3 PR8 in a manner which enables Inter-State: a statement or prediction of compatibility between EU Accession and art. 344 TFEU. It provides a legal possibility for a compromise preserving the viability of the Inter-State procedure between MS, involving EU law. It is CJEU settled case-law that all official languages of the EU are equally authentic[88], but it is unavoidable that some become practically more prominent: English, French and German have become the three major dialects of the EU[89].

The English version of art. 3 PR8 is ambiguous, and can be interpreted in polar opposites. The expression "Nothing in the agreement (…) shall affect 344 TFEU" can either be a prediction of compatibility, or a command to avoid any threat. The German version translates into "shall". However, the French version is the harshest towards compatibility – "Aucune disposition (…) ne doit affecter l'article 344 TFEU" - meaning *Nothing (…) must affect article 344 TFEU*. This is the working language of the CJEU, and it commands the negotiators not to compromise. Perhaps that is why the CJEU has taken this position.

[87] Fernández (2020) ps. 19, 29, 34, 52
[88] *Idem* p. 153
[89] *Idem* ps. 186-191

Taking it further, the metalinguistic, literally meaning the 'origin of the text', must be approached[90]. First, it requires analyzing the *purpose* of Protocol (No 8) and art. 6(2) TEU: to realize EU Accession, whilst preserving EU traits. Two conflicting obligations, that must be subject to reciprocal concessions – a compromise to be achieved. No extreme position can be taken to fulfill that purpose. Second, the overall *context and scheme* of the provisions. Given the lesser interests it protects, it should warrant less concessions. And third, the *functionality* of the norms. The Inter-State procedure is a fundamental feature of the ECHR. Taking the strictest language version would require the substantial reduction of that important enforcement mechanism. Such solution is strongly undesired by the CoE, and lessens the chances for an Accession Agreement. Thus, another interpretation must be chosen, one closer to the Portuguese and Spanish versions, consistent with the spirit of compromise EU Accession requires and imposes.

[90] *Idem* ps. 149-152

Chapter 3

Opinion 2/13 & the Inter-State Procedure

3.1 Summary

A 3-year-long negotiation process between the CoE and the EU produced a Draft Accession Agreement in April 2013. Acknowledging the structural impact if would have on the legal order of the EU, the EU Commission requested the ECJ to analyze the compatibility of the DAA with the Treaties. The result was an unfavorable *Opinion 2/13*, released on the 18th December 2014. In its aftermath, the negotiations for EU Accession were suspended, due to the requirements of article 218(11) TFEU. Whilst this norm makes ECJ Opinions facultative, once requested, it prohibits the envisaged DAA from being signed without correcting all indicated incompatibilities. In this light, the '47+1' Group considered necessary to interrupt the process and reflect in depth. Not only were there profound objections to practically every aspect of the DAA, but the demands were also extremely impactful for the ECHR system, so any rapid solution was discarded.

The Opinion has been criticized by an overwhelming majority of scholars regarding most of its arguments[91]. It especially noteworthy the lack of weight the constitutional duty to accede had on the ECJ's conclusions, having no tolerance for incompatibilities[92]. However, the ECJ's interpretation of art. 344 TFEU, and consequent position on the Inter-State procedure, has been somewhat of an exception. Most academics consider Inter-State Cases, either MS v. MS, or MS v. EU, involving EU law, incompatible with art. 344 TFEU, and would concede the demands imposed[93]. However, some criticize the ECJ for requiring the express exclusion of the procedure in the DAA[94].

In its observations, Greece actually disregarded any compatibility between art. 344 TFEU and Inter-State Cases involving MS, regardless of EU law being the subject-matter[95]. This doctrine

[91] i.e. O'Neill (2014); Peers (2014); Lock (2014); Michl (2014); Johansen (10.01.2015); Johansen (2015); Lazowski & Wessel (2015); Douglas-Scott (2014); Lambrecht (2015); Eeckhout (2015); Spaventa (2015); Besselink (2014); Lambrecht (2015)
[92] Lock (2015) p. 3
[93] i.e. Halberstam (2015) ps. 15-16; Barnard (2015); 31-32; Tacik (2017) ps. 928, 948
[94] i.e. Polakiewicz, (2016) 27.; Lock (2015) p. 8
[95] Opinion 2/13: 143

would bring a subtraction of ECtHR jurisdiction over one of its two enforcement mechanisms, and "one of its key functions", to the degree of almost 60% of the Signatories (27 MS out of 46 Signatories) impeded from litigating against each other[96].

The ECJ varied in its tone throughout *Opinion 2/13*. In four of its ten objections, the court was merely concerned with the DAA's omission of a solution for certain conflicts, and, while in another four, it considered the solutions insufficient, leaving discretion for their amendments. However, it was in the objection to Inter-State that the ECJ took the harshest stance – it rejected the negotiated solution, arguing the interests are irredeemably incompatible for an alternative other than complete prevalence of EU law.

3.2 The Interests Invoked

There is one principal objective behind all the objections invoked by the ECJ: the preservation of the Autonomy of the EU legal order. This was the broad interest interpreted to be behind art. 6(2) TEU's 'duty to preserve competences', and art. 1 PR8's command to ensure the "specific characteristics of the EU legal order"[97]. However, the ECJ should have specified and developed it when addressing concrete objections to the DAA. Instead, when addressing art. 344 TFEU, its specific foundations were poorly explained[98].

According to Odermatt, "[a]utonomy means self-rule. An entity, which possesses autonomy, has the right to choose a path for itself, without the influence, direction and control of others"[99]. The ECJ's concept of Autonomy translates into the ability to guarantee the "essential character" of the powers assigned to the EU Institutions by the Treaties[100]. This includes CJEU's responsibility to ensure "consistency and uniformity in the interpretation of EU law"[101]. Consequently, it prohibited the DAA from conferring the ECtHR the ability to question the ECJ's findings on substantive EU law. The ECJ also claimed that exclusive power includes primary and secondary law, both in art. 19(1) TEU[102], and in art. 344 TFEU[103].

[96] Lock (2015) p. 29
[97] 2/13: 174
[98] 2/13: 183
[99] Odermatt (2017) p. 1; cited by Makrypidi (2019) p. 10
[100] 2/13: 174; cfr. Odermatt (2017) ps. 6-7
[101] 2/13: 186
[102] 2/13: 242-248
[103] 2/13: 202

Has it had been established in *Opinion 1/91*[104], the essence of the CJEU's exclusive power to *interpret* EU law consists of being the only body able to set a definitive meaning in the EU legal order, and to bind the EU Institutions and MS to that particular meaning. The ECJ renewed that position in *2/13*[105], as it has always been its's principal objective[106]. However, the ECJ went even further in *2/13,* when evaluating the Inter-State procedure: it extended that exclusive responsibility to the *application* of EU law in disputes between MS, and between MS and EU.

Autonomy is, certainly, a pillar of any legal order, but it is too abstract and comprehensive to be invoked as justification for curtailing Human Rights' enforcement solely for formalistic reasons. Craig refutes it as such, reasoning that the EU, by providing for Accession, is voluntarily searching to join an international agreement – the ECHR - and, consequentially, willing to be bound by the substantive and procedural obligations of that same agreement[107]. Unquestionably, art. 6(2) TEU, providing for EU Accession, includes a voluntary surrender to ECtHR jurisdiction. Regarding Inter-State Cases, voluntarily abdicating exclusive jurisdiction over disputes between MS, involving EU law, is an expression of Autonomy. As long as the equivalent dispute-resolution mechanisms in the CJEU remain effective and independent, that EU Institution remains autonomous, because its procedures remain essentially intact.

While the ECJ broaches the foundations we attribute to art. 344 TFEU, only the need to keep uniformity in the interpretation and application of EU law was expressed. Indeed, art. 19(1) TEU requires the CJEU retain the exclusive *interpretation* of EU law during Inter-State Cases, but there is no explanation why the ECtHR should be barred from *applying* EU law, if the interpretation could be reserved. Concerns with the preservation of relations between MS and EU would have been its best argument, but it failed to invoke them when requiring the disputes to be resolved 'in-house'[108].

All in all, in paragraph 210, the court fails to satisfactorily support the argument that art. 344 TFEU was created to keep all disputes between MS within CJEU's jurisdiction. That was its onus, given that the letter of art. 344 TFEU omits such monopoly, and precedent was altered. The ECJ also failed to make a balancing of the interests at stake: i) formalistic adherence to assigned

[104] Cfr. 2.2.3.1
[105] 2/13: 184
[106] Cfr. Opinions 1/91 & 1/09, and Achmea, in 2.2.3
[107] Craig (2009), ps. 1142-1145
[108] O'Neill QC (2014)

competences, against (ii) Human Rights enforcement[109], putting all emphasis on the former[110]. In fact, Eeckout considers that the court "hardly even mentions [the] objective of strengthening the fundamental rights protections of human beings" throughout 2/13[111]. Considering that never had a Treaty-provided international agreement been sent for ECJ's review, and that the most relevant precedent – *MOX Plant* – dates before the Treaty of Lisbon, when that provision was made, deferring the basis for precluding Inter-State to that same precedent was irresponsible.

The only complementary reason given for maintaining CJEU's exclusive jurisdiction was the 'Duty of Loyalty'. It consists of a subsidiary obligation for mutual cooperation between MS and EU Institutions and is, essentially, a general and formalistic Principle of compliance[112]. As such, provides no substantive explanation why CJEU's monopoly should prevail over Human Right's enforcement.

3.3 The Provision of the ECtHR in the Treaties

The largest criticism of *Opinion 2/13* has to be the contradictions at its core. The ECJ starts by conceding that EU Accession is provided for by the Treaties, and, hence, so is the ECtHR, implicitly. That 'confession' is unquestionable in paragraph 182. Thus, there should have been considerable tolerance for the DAA, while all precedent should have been maintained, if not extended favourably. However, the ECJ proceeded to reject every compromise negotiated in the DAA to accommodate EU requirements, and to reinterpret precedent[113].

As it had become apparent in *MOX Plant*, the ECJ has foregone the letter of art. 344 TFEU, which omits a CJEU monopoly, instead only invoking the article as 'confirmation' of its exclusive jurisdiction over disputes between MS, involving EU law[114]. In fact, the Treaties had been constructed in a manner that provided that exclusivity, but only through a process of elimination[115]. Instead of explaining the deductive reasoning that had originated its exclusive jurisdiction, the ECJ renewed its elevation into a "fundamental feature of the EU system"[116].

[109] IdemKuijer (2020) p. 1004
[110] O'Neill QC (2014)
[111] Eeckout (2015) p. 978
[112] Kellerbauer, Klamert & Tomkin (2019) ps. 38-60
[113] Kuijer (2020) ps. 1004-1005
[114] 2/13: 201.
[115] Cfr 2.2.3.1
[116] 2/13: 202

Furthermore, in paragraph 181, the ECJ agrees to subject itself to the "control mechanisms provided by the ECtHR". If one notices the plural form employed, one realizes the ECJ recognizes the duality of the ECHR control mechanisms: Inter-State Cases and Individual Applications. The only takeaway is that the ECJ is recognizing Inter-State as a fundamental feature of the ECHR. If one were to wonder if the ECJ was referring to Advisory Opinions - the third, but non-binding, mechanism -, paragraph 197 acknowledged its exclusion in the DAA.

Advocate-General Kokott supported the ECJ's doctrine that art. 344 TFEU represents a concession by the MS to the CJEU of a monopoly on dispute-settlement between MS, and between them and the EU, whenever EU law is involved, considering it "settled case-law"[117]. In support of the essentiality of this monopoly, Halberstam sustains that "no international legal obligation can alter core principles of EU constitutional law"[118]. The CJEU has indeed elevated its doctrine of having exclusive jurisdiction over disputes between MS, involving EU law, to a "fundamental feature" of the EU system[119]. However, such monopoly has no expression in the letter of the Treaties. Furthermore, we would argue EU Accession is more than an "international legal obligation". Rather, it is mandated by art. 6(2) TEU, thus, a constitutional obligation itself.

In sum, the implicit provision of ECtHR jurisdiction, which includes Inter-State Cases, has at least the same constitutional legitimacy as the doctrine of CJEU exclusive jurisdiction. Therefore, both should have been weighed in a balance of the interests at stake: on one hand, the foundations of art. 344 TFEU, and in the other, larger Human Rights' enforcement.

3.4 The Interpretation of Article 3 of Protocol (No 8)

As demonstrated in 2.3, the intention of art. 3 PR8 should not be interpreted superficially, but *Opinion 2/13* presents three equivalent interpretations of the norm, with no reservations:

- The View of AG Kokott: "nothing in the proposed accession agreement is to affect Article 344 TFEU"[120]
- The EU Commission's assessment: "accession must not affect 344 TFEU"[121]

[117] 2/13_AG View: 107
[118] Halberstam (2015) p. 7
[119] 2/13: 202.
[120] 2/13_AG View: 108
[121] 2/13: 106

- The ECJ's position: "the accession agreement must not affect article 344 TFEU"[122]

There is no doubt in either three that Inter-State Cases between MS and EU, involving EU law, is incompatible with art. 344 TFEU. However, neither cited the actual expression employed in the English version of art. 3 PR8 - "shall not affect" – which is ambiguous, and less categorical than "must not affect". It is presumed this disparity comes from the French language being employed by the three, as the CJEU's working language, and then translated directly[123]. It is evident the ambiguity surrounding the interpretation, caused by the translation process. As it is the CJEU's duty to settle those ambiguities[124], it chose the literal meaning of the version of its working language.

Moreover, *MOX Plant*'s precedent ought to have been considered when interpreting art. 3 PR8: before 2/13, international tribunals had only to defer to (or permit) CJEU's precedence. According to Johansen: "It would not make sense if the savings clause in Article 3 of Protocol (No. 8) to the constituent treaties of the EU - which should be interpreted in light of the EU's obligation to accede to the ECHR under TEU Article 6(2)—imposed a stricter test when assessing the conformity of the Accession Agreement with TFEU Article 344 than what would otherwise apply"[125]. In short, it is unacceptable to employ art. 3 PR8 as a justification for a reinterpretation of art. 344 TFEU in a manner which hampers EU Accession.

3.5 The Reinterpretation of Article 344 TFEU

Unfortunately, the ECJ would make an unfavourable reinterpretation, pointed out by Johansen[126]. The precedent set in *MOX Plant* was for international agreements to 1) permit Treaty-provided methods to occur; 2) for "precedence" to be expressly given to those mechanisms, and 3) a complementary "duty to inform and consult" the EU Commission. Therefore, "the threshold for compliance with TFEU Article 344 [was] possibility of member state compliance"[127], allowing for the coexistence of rival dispute-resolution methods. Actions for Infringement in the CJEU could occur *first*, preceding an eventual subsequent Inter-State Case if the matter remained unresolved.

[122] 2/13: 203
[123] Cfr. 2.3.1.4
[124] Fernández (2020) ps. 111, 153
[125] Johansen (2015) ps. 175-176
[126] Johansen (2015)
[127] Johansen (2015) p. 174

AG Kokott noted the absence of precedence in the DAA, but actually recommended stricter conditions than *MOX Plant*, as it argued for the exclusion of Inter-State jurisdiction between MS and EU, involving EU law. Contrarily, the UNCLS establishes concrete jurisdiction in disputes involving EU law, and defers to the CJEU the choice to seise it, or not. Moreover, nothing in the UNCLS precludes litigation after the CJEU rules. In Kokott's View, adding a joint declaration by the EU, and its MS, to the DAA, relinquishing the resource of Inter-State Cases whenever EU law was subject-matter to a dispute, would sufficiently guarantee that "precedence"[128]. It could then also be accompanied by the extension of the Prior Involvement, giving the ECJ an opportunity to opine on its own jurisdiction. Finally, in case of infringement, the actions under 258-260 TFEU were considered "sufficient to safeguard the practical effectiveness of Article 344 TFEU"[129].

The ECJ would reject that proposal, requiring even stricter alterations to the requirements of *MOX Plant*. It considered "(t)he very existence" of the Inter-State procedure, and the ability to submit such application "liable in itself to undermine the objective of 344 TFEU"[130]. The ECJ desired to anticipate any infringement by removing any and all opportunity for the circumvention of its jurisdiction. 2/13 thus required "the express exclusion of ECtHR jurisdiction" in Inter-State Cases, between MS or between MS and the EU, involving EU law, in the DAA[131].

This reinterpretation is especially worrisome for the legitimacy of the ECHR. A necessary corollary of the ECJ's reasoning is that the MS being Signatories to the ECHR is, in itself, a violation of EU law, because the Inter-State procedure, in art. 33 ECHR, is a method for settling disputes between MS, which makes no exception for the involvement of EU law. Furthermore, the UNCLS, the international agreement which originated the conflict in *MOX Plant,* falls short of the new requirements of *2/13*, despite being an integral part of EU law, and previously validated by the court.

It was clear from the DAA no Signatory desired to enable Inter-State Cases between MS involving EU law. The CJEU jurisdiction was acknowledged through its exemption from ECtHR's jurisdictional reservation of art. 55 ECHR, allowing CJEU procedures to occur, thus partially adhering to *MOX Plant* requirements[132]. There was only the decision to omit an eventual

[128] 2/13_AG View: 120.
[129] 2/13_AG View: 118.
[130] 2/13: 208
[131] 2/13: 213; Johansen (2015) ps. 174-175
[132] Lock (2015) ps. 14-15

prohibition to such Inter-State litigation from the DAA, considering those concerns as internal to the EU[133].

It is doubtful the ECJ would have rejected the DAA solely based on the 344 TFEU objection, but, in fairness, *MOX Plant* arguably established the need to expressly recognize CJEU "precedence", and "inform and consult" the EU Commission, which the DAA failed at. Moreover, the DAA explanatory report read: "all States Parties to the Convention will be able to bring a case against the EU and vice-versa", failing to exclude the EU as an applicant[134]. Even so, the ECJ omitted any concerns with the EU becoming an applicant in Inter-State Cases against NEUMS.

The omission of precedence had been further reflected upon by AG Kokott. Her conclusion was that there are already a considerable number of tribunals established by international agreements which lack the express conferral of precedence: the ICJ, the WTO, the ILO, ICSID, EUROCONTROL, and EMBL[135]. The AG concluded stricter requirements would put the legitimacy of those international agreements, and their tribunals, in question[136].

Lastly, the ECJ's and Kokott's concept of "precedence" must be addressed[137]. The Cambridge English Dictionary's concept of 'precedence' signifies the CJEU rule first, before any other concurrent mechanism, thus allowing subsequent litigation elsewhere. Therefore, their concept of "precedence" is, actually, 'prevalence' - precluding any other, prior or subsequent, ruling on disputes between MS, involving EU law, on the same facts. It is worthy of note the Portuguese, Spanish and Italian versions of 2/13 (but not *MOX Plant*) show expressions which translate into 'prevalence'. However, unlike the different language versions of EU primary law and secondary acts, which are to be considered equally authentic, regardless of the working language used, the multiple versions of CJEU decisions are unavoidably, translations from French. This means we can understand the meaning the judges intended for the expression through the French version, which was "prime" (precede).

[133] Cfr. DAA explanatory report: 72. (CoE doc. 4.12, Appendix V)
[134] *Idem*
[135] Cfr. Parish (2012)
[136] 2/13_AG view: 117
[137] MOX Plant: 125; 2/13: 205

3.6 The "scope ratione materiae" of EU Law

In paragraph 204, the ECJ not only demanded exclusive jurisdiction over disputes between MS when "EU law is at issue", but it declared that, after Accession, the ECHR would become EU law, thus any dispute arising between MS, regarding the Convention, would also be reserved to the CJEU, per art. 344 TFEU. This was a radical demand that few noticed[138], but it reveals that the ECJ's preferred outcome is to have MS withdraw completely from Inter-State disputes against each other. This would have conferred exclusive jurisdiction to the CJEU in disputes between MS which have no connection to EU law other than the Convention.

However, the ECJ would put it in a different manner in paragraph 213, at the close, framing it as a prohibition of Inter-State Cases in disputes "within the scope *ratione materiae* of EU law". A joint reading of 2/13's paragraphs 185 and 186 leads to understand that, even considering the ECHR as EU law, only disputes concerning ECHR rights, but also involving a second source of EU law, other than the Convention, would be precluded. Therefore, this framing means the ECJ would tolerate MS litigating against each other in Inter-State Cases involving 'pure' ECHR disputes, lacking that second source of EU law. While that would leave some Inter-State jurisdiction for the ECtHR, Risini argues: "EU law permeates as of today a large part of national legislation. Moreover, it would discourage States from lodging Inter-State applications. Often, it is not clear where the *ratione materiae* scope of EU law ends"[139].

It has to be surmised the ECJ was 'negotiating' a long 2/13. While it would like to reserve all disputes between MS to itself, it will settle for reserving disputes involving a 'second' source of EU law.

3.7 The Admissibility Rules in Inter-State Cases

Paragraph 209 represents a shallow assessment of the ECHR's procedural guidelines. According to art. 35(1) ECHR, the "domestic remedies" available to the Signatories must be exhausted for the ECtHR to deem an application admissible. Were EU Accession to take place, and thus, both MS and the EU, Signatories, Actions for Infringement of articles 258-260 TFEU

[138] Risini (2018)
[139] Risini (2018) p. 188

could be, under the ECtHR's criterion, domestic remedies available to MS. The ECtHR would not, in fact, find itself "seised" of an Inter-State application between MS, because there is the possibility it could require the Applicant to resort to the equivalent procedure in the ECJ. Given the constant good-faith cooperation on the ECtHR's part, that option cannot be discarded.
Moreover, art. 37(1(c) ECHR is abstract, providing the ECtHR with a large margin of discretion to admit or strike out cases. If one were to consider the lengthy intervals between an Inter-State application and its decision, the ECtHR would be likely to require the exhaustion of remedies in the CJEU if, for example, the EU Commission legitimately protested a MS resorting to the ECtHR, instead of the CJEU. That level of dialogue exists.

In sum, while it is not certain that the ECtHR would reject an Inter-State application involving EU law, and maybe not even probable, it is inaccurate to consider it would "find itself seised" of the Case in the terms of the DAA. However, it is a fact the ECtHR, as the EU has not acceded, currently would be seised of an Inter-State application between MS, even involving EU law.

3.8 The External Control over the EU Institutions

The tension inherent in EU Accession is most evident in paragraphs 181 and 210. On the former, the ECJ concedes that the purpose of art. 6(2) TEU is to subject the CJEU, an EU Institution, to oversight by the ECtHR. On the latter, it claims art. 344 TFEU was created to ensure CJEU's exclusive jurisdiction over disputes between MS, precluding "any prior or subsequent external control".

3.9 The Omission in Article 1(b) of Protocol (No 8)

The argument presented by the ECJ in paragraph 211 is viable. If, hypothetically, a MS were to violate the ECHR, it could be doing so under an EU law mandate, without margin of discretion. Thereupon, an Inter-State application made by another MS should have to be forwarded to the EU. In this light, the ECJ notes that art. 1(b) PR8 only alludes to "non-Member States" when referring to ensuring proper respondents in Inter-State Cases, noticing the omission of MS.

The ECJ explains the omission with a confirmation of the Treaties' aversion to Inter-State Cases between MS, and Cases initiated by a MS against the EU, to the point of disregarding MS as applicants. This point of view is most pertinent.

However, art. 1 PR8 is not totative, with the directions it provides being only examples, and other eventual needs having to be met. Additionally, while it is logical to expect individual applicants and NEUMS to fail in correctly addressing the legitimate respondent, it is less likely for the government of a MS to commit the same mistake. Cautioning against that eventuality in Protocol (No 8) would be presuming an infraction of EU rules of competence on the part of a MS. That could also be a reason why it was omitted, leaving only a clear mandate for more likely scenarios. Moreover, while incorrectly addressed applications by MS could be amended under the EU Principles of Mutual Cooperation and Loyalty, a NEUMS-applicant would be under no obligation to do so.

Nevertheless, there is partial usefulness to extract from paragraph 211: no Inter-State litigation can occur between MS and the EU. In fact, a more adequate illation of the omission of MS should be that no Inter-State application made by a MS could ever be either originally directed, or subsequently redirected, to the EU.

3.10 Lack of Prior Warning and Concern

When looking at the preparatory works for EU Accession, there was no knowledge, on the CoE's side, of the stance the ECJ would take on art. 344 TFEU. Furthermore, CJEU precedent imposed less strict requirements on tribunals, although Halberstam would argue *Kadi*[140] and *Opinion 1/09* were warning signs[141].

To start, a 2002 CoE study had found the question of art. 344 TFEU an EU-internal, and, thus, concluded an Accession agreement could relinquish further protection, and even omit the matter entirely[142]. Then there is *MOX Plant*, where the only definitive requirement set for international tribunals was to permit EU mechanisms to occur, in conjunction with the duty of MS to preemptively "inform and consult" the Commission.

[140] CJEU Joined Cases C-402/05 and C-415/05
[141] Halberstam (2015) p. 7
[142] CoE doc. 4.2: II.B.5

Subsequently, a 2010 CJEU Document[143], and a 2011 Joint Communication by the CJEU and ECtHR Presidents[144], omitted Inter-State-related concerns when pointing out issues regarding Accession[145]. Finally, the CJEU observer in the negotiations between the EU and the CoE, who was obliged in all his suggestions, made no intervention explaining the Court's position on the Inter-State procedure[146].

If the ECJ had changed its stance on international tribunals resolving disputes between MS, involving EU law, it had to have signaled it in the opportunities described of the previous paragraph, given the expectations of the CoE. It was a violation of the 'endeavour clause' of art. 6(2) TEU, which imposes good-faith on the EU Institutions during the negotiation process.

[143] EU doc. 5.1
[144] CoE doc. 4.3
[145] Craig (2013) p. 1124
[146] EU doc. 5.2; Lazowski & Wessel (2015) ps. 210-211; Johansen (10.01.2015); Halberstam (2015) p. 5

Chapter 4

The Future of the Inter-State Procedure in EU Accession

4.1 The Position of the Council of Europe

In the CoE's perspective, EU Accession negotiations come down to preserving the integrity of the ECHR enforcement system[147], and the equality between the Signatories[148]. As demonstrated in Chapter 1, Inter-State Cases are a fundamental feature of the enforcement system of the Convention, so the Signatories have been unwilling to substantially adjust it.

Ever since EU Accession was envisioned, it became apparent special conditions would have to be conceded to the EU. However, in order for the ECHR to ensure that Integrity and Equality, the CoE adopted a Principle of Minimal Impact: any alterations to the ECHR, in benefit of EU inclusion, but reducing the potential of Human Rights' enforcement, should be confined to the bare essential[149]. The NEUMS had already compromised tremendously in the lead-up to *Opinion 2/13*, and the question remained if the stricter demands in 2/13 could be tolerated[150].

Therefore, in a New DAA, two parameters must be met: first, the overall level of enforcement of ECHR rights must increase. Only a significant expansion makes EU Accession desirable, given the work it requires. But it is reasonable, in the eyes of the '46+1' Group, for some concrete areas of oversight to see reductions in their potential. This is the parameter which leads the CoE to even consider restricting Inter-State jurisdiction, because the ECtHR's overall reach could be augmented solely through jurisdiction in Individual Applications. And second, the concessions made to the EU must be the minimum possible. The CoE should only accept a curtail of oversight if it is absolutely necessary to obtain ECJ approval.

Considering that precluding the EU from being an applicant in Inter-State Cases is essential to preserve its competences, that should be an acceptable concession for the CoE. The ECHR enforcement system would remain unperturbed, given that the advantages of collective enforcement of the Inter-State procedure can be pressed by the remaining Signatories effectively.

[147] CoE doc. 4.7, Appendix VI
[148] Idem; CoE doc. 4.11, Appendix III & CoE doc. 4.12; Polakiewicz (2016) 11.
[149] CoE doc. 4.7, Appendix VI & CoE doc. 4.11, Appendix III
[150] Polakiewicz (2016) 12.

There should be a third parameter at the forefront of Accession negotiations, but it lacks any recognition in either *Opinion 2/13*, or the delegations: a Principle of Non-Regression. While it should be possible to relinquish the maximum *potential* the entry of the EU could have, its Accession should not entail scaling back the *current* jurisdiction of the ECtHR in any area. In *Slovenia v. Croatia*, an Inter-State Case between MS, the ECtHR interpreted EU law; it is a current power it holds, due to the individual accessions of Slovenia and Croatia. The entry of the EU into the system should not require removing that jurisdiction. In fact, art. 2 PR8 requires the preservation of the effects of the individual accessions of the MS[151].

4.2 The Position of the European Union

EU interests in Accession are complex. To start, it is a Treaty obligation. Failing to reach an agreement damages credibility in the capacity to fulfill the objectives set up by the MS. Those Treaties bind the EU to respect and expand Human and Fundamental Rights[152], and, candidates to the EU are required to accede the ECHR[153]. Adding to this shortcoming, the EU has struggled with nationalist governments. The attitude of the ECJ transmitted a notion of EU superiority over the other Signatories, requiring conditions beyond what is necessary to compensate the special fragility of the Union[154]. How can the Commission and the CJEU demand those governments respect the rule of law, and the independence of their judicial bodies, after *Opinion 2/13*'s disregard for the duty to accede and the competence of the ECtHR? The overbroad complaints by the ECJ of Autonomy could even be reprised by other Signatories looking to disavow specific ECtHR decisions, or even withdraw from the Convention[155]. Moreover, *2/13* was a disregard of the good-will the ECtHR has always had towards the EU. The EU must search to accede before the privileges and dialogue it enjoys are revoked[156].

Regardless of indirect consequences, the '46+1' Group is handicapped by the conditions imposed in 2/13. The objections must be addressed in a satisfactory manner, otherwise the ECJ will once more reject it, solely based on the letter of art. 218(11) TFEU. The ECJ almost consists

[151] Cfr. 2.3.1.1
[152] Cfr. preamble & arts. 2, 3, 7, 21 TEU, i.e.
[153] Spaventa (2015) p. 43
[154] Lock (2020) p. 17
[155] Douglas-Scott (2014); Lambrecht (2015)
[156] Kuijer (2020) III.E.; Lambrecht (2015)

of a third party in the negotiations, given the divergence with the EU negotiators. In a New DAA, the ECJ ought to be flexible.

4.3 Our Proposal

A compromise must be reached. Neither side of the negotiation can fully achieve its objectives, so a middle-term would be the rational conclusion. However, the conditions of *Opinion 2/13* disproportionately disadvantage CoE goals. Whenever the ECJ is confronted with the conditions for Inter-State litigation in a new DAA, it should ponder its previous stance, keeping in mind that the provision of the ECtHR in the Treaties is unprecedented. Therefore, the terms of Inter-State jurisdiction should weigh heavily against other EU interests.

4.3.1 The Revision of the Exclusive Jurisdiction of the CJEU

First, it must be acknowledged the abolition of the CJEU's exclusive jurisdiction over disputes between MS, involving EU law. This monopoly had never been a direct creation of the Treaties, only the product of lack of alternatives in the Treaties, for it is undeniable art. 344 TFEU omits the CJEU as having that exclusive role.

With the inception of art. 6(2) TEU, an alternative "method" – the ECtHR - was finally "provided", and *Opinion 2/13* concedes as much[157]. Johansen suggests it, as well: "one might even argue that, due to TEU Article 6(2), submission of disputes to the ECtHR is indirectly provided for in the constituent treaties"[158]. In fact, ECtHR supervision is an essential part of the ECHR, supported by the dedication of more than half the Convention's articles to ECtHR's procedure. Therefore, the MS, when enshrining art. 6(2) TEU in the Treaties, had the intention of surrendering jurisdiction over the EU to Strasbourg. Consequently, the ECtHR was *implicitly*-provided in the Treaties as a method of settling disputes, essentiality adopting it as an EU court.

The ECtHR was not only implicitly-provided, but also indirectly-provided. It requires an Accession Agreement – non-primary EU law – to begin exercising jurisdiction over the EU Institutions. This level of abstraction in the potential adoption of the ECtHR puts into question its

[157] Cfr. 3.3
[158] Johansen (2015) p. 176

legitimacy to be considered an EU Court in the meaning of art. 344 TFEU. However, the specialized courts were demonstrated to be legitimate methods for settling disputes involving EU law, even though the Treaties likewise delegated their realization on non-primary law. And the interest at stake is Human Rights' enforcement, a strong motive to remove the exclusivity of the CJEU. Given that art. 344 TFEU omits CJEU exclusivity, it cannot be considered an indispensable trait.

Following the ECJ's own concession in *Opinion 1/09*[159], the powers of the CJEU can and should be reduced, in the form of the exclusivity to apply EU law in disputes between MS. Similarly, AG Kokott explained that the competences of EU Institutions are preserved if their "essential character" remains, even with the addition of new powers. The AG considered the addition of the power to advise the ECtHR, through Prior Involvement, not an expansion of CJEU powers, as the tasks involved are already in the court's repertoire – the preliminary reference[160]. *A contrario*, if the essential character of the CJEU procedures is preserved - being allowed to occur and bind, as the Treaties describe - CJEU's competences are unaffected with the subtraction of their exclusivity, which is required nowhere in the Treaties.

4.3.2 The Scope of the Concession of Jurisdiction by Article 6(2) TEU

The MS, as Signatories, are familiar with the essentiality of the Inter-State procedure. Therefore, if the MS wanted to exclude Inter-State Cases in any form when providing for EU Accession in art. 6(2) TEU and Protocol (No 8), they had to have been explicit. In contrast, art. 3 PR8 is ambiguous, so there is room to compromise.

The competences of the EU Institutions must remain essentially unchanged, and, so, the EU must be barred from being an applicant in Inter-State Cases, so as not to generate in the EU a new, impactful, competence of ECHR enforcement[161]. This prohibition should be explicit in the new DAA, so as to satisfy *Opinion 2/13*'s precedent.

The concession of jurisdiction to the ECtHR by art. 6(2) TEU was made taking into account the nature of the court's mandate: a) the ECtHR is a last-resort for applicants, requiring the prior

[159] Cfr. 2.2.3.3
[160] Opinion 2/13_AG View: 65.-69.
[161] Cfr. 2.1

exhaustion of domestic remedies; b) it also relies on the judge nominated by the respondent-Signatory for insight into its legal system; and, finally, c) the ECtHR provides considerable tolerance and margin of appreciation. Therefore, the ECtHR was provided as a method for settling disputes involving EU law, as long as, after EU Accession, that cooperation, tolerance, and residuality is preserved. Regarding residuality, whenever the EU treaties established an equivalent dispute-settlement mechanism, Inter-State applications must be inadmissible until their exhaustion.

4.3.3 The Jurisdictional Limit Imposed by Article 3 of Protocol (No 8)

4.3.3.1 Inter-State Cases Initiated by Member States against the EU

As reasoned in 2.3.1.2, the threat of compromising relationships between MS and EU greatly increases if they were to litigate over ECHR obligations. It would affect art. 344 TFEU's foundations substantially, in violation of art. 3 PR8. Therefore, a New DAA should also explicitly prohibit MS from initiating an Inter-State Case against the EU.

4.3.3.2 Inter-State Cases between Member States

4.3.3.2.1 The preservation of the continuity of the relationships

The menace to the continuity of relationships is a much weaker argument in Inter-State Cases between MS. First, *Slovenia v. Croatia*, and *Latvia v. Denmark,* demonstrate Inter-State Cases are a potential source of tension already. Second, MS can litigate each other in other international tribunals, such as the WTO and ICJ, and even in potential Inter-State Cases, with no EU law involved. Their relationships may become strained anyway from those external disputes, but have repercussions in EU interactions, nonetheless. Therefore, this form of dispute-settlement would be a negligible increase of 'stress', whilst the large benefits of maintaining the current reach of Human Rights supervision, are proven. Moreover, in light of the absence of EU law to interpret, there are no concerns relating to legal certainty. In this light, Inter-State Cases between MS, not involving EU law, must be preserved in a New DAA. As Eeckout argues: "the principle that all

ECHR Contracting Parties are equal would be breached in a way which cannot be justified on the ground of preserving the specificities of EU law"[162].

It should be highlighted that after EU Accession, the ECtHR will weigh the preservation of relationships between MS, when making a judgement. Such criterion has overwhelming importance to almost 60% of the Signatories, thus integrates the 'European Consensus' which the ECHR embraces. It will be given even more weight whenever EU law is involved.

In addition, the MS, being aware of the foundations of art. 344 TFEU, necessarily considered the ECtHR's methodology sufficiently adequate to preserve the continuity of relationships between them when providing for EU Accession, and ECtHR jurisdiction, in art. 6(2) TEU. Even if the ECtHR is inferior to the CJEU in securing the relationships, the MS, when providing for Accession, considered Human Rights protections a higher Value to be pursued[163]. While the CJEU would always put relationships first, the ECtHR will place Human Rights. That new hierarchy was desired by the 'Masters of the Treaties', and must be taken into consideration.

Art. 3 PR8 would, therefore, be respected, following our compromise-friendly interpretation of its mandate, since the preservation of relations, a foundation of art. 344 TFEU, would not be significantly affected.

4.3.3.2.2 Legal certainty

If EU law is involved in an Inter-State Case, the second foundation of art. 344 TFEU is the difference to be considered – legal certainty. Art. 19(1) TEU reserves to the CJEU the definitive settlement of the *interpretation* of EU law, so the solution is simple: Prior Involvement must be extended to Inter-State Cases. This mechanism would secure harmony in the interpretation of EU law, allowing the CJEU to define its meaning to the ECtHR.

Contrarily, the *application* of EU law is impossible to defer in the same manner. The ECtHR is the body entrusted by the Convention to decide Inter-State Cases, and, thus, transferring any portion of the final decision to the CJEU would be a revolutionary alteration to the enforcement system. Moreover, art. 19(1) TEU only reserves the interpretation, not the application. All in all**,** when providing for EU Accession in art. 6(2) TEU, and Protocol (No 8),

[162] Eeckout (2015) p. 976
[163] Risini (2018) ps. 182, 191

the MS, familiar with the implications, did not expressly reject Inter-State jurisdiction. The conclusion is the MS also considered the ECtHR's methodology adequate to apply EU law in a uniform and harmonious manner with the CJEU.

4.3.3.2.3 CJEU 'precedence' – the exhaustion of remedies

At last, CJEU's "precedence" must be addressed. Inter-State Cases can be equivalent remedies to the CJEU's Actions for Infringement – arts. 258-260 TFEU. Contrarily, the procedure of art. 273 TFEU refers to disputes between MS, but involving 'Treaty obligations', thus - EU primary law - for which ECHR obligations would not qualify.

While there are currently no restrictions to Inter-State Cases between MS, EU Accession would enable the CJEU to enforce the ECHR. Considering that the ECtHR is an *ultima ratio* resource, CJEU procedures must occur first, granting precedence. It is actually a requirement of art. 35(1) ECHR. Consequentially, a New DAA should explicitly declare that any and all adequate CJEU procedures are remedies that must be exhausted before an Inter-State Case, involving EU law, is initiated between MS. This solution is supported by Eeckout: "it is hard to see why an Article 33 [intra-EU] case ought to be excluded, if the dispute has first been dealt with by the CJEU"[164]. This should be express in the DAA in order to appease the ECJ, especially because Actions for Infringement are currently not remedies to be exhausted in ECtHR jurisprudence[165].

In practice, whenever there is a dispute between MS, regarding the ECHR, this should be the reasoning concerning the exhaustion of CJEU remedies:

1) If an Action for Infringement (either brought by the EU Commission or any MS) was either: i) unsubmitted; ii) unadmitted without prejudice; or iii) pending – then an Inter-State application concerning the same facts should be rejected under art. 35(1) ECHR – *domestic remedies not yet exhausted.*
2) If it had been definitively rejected on admissibility grounds, the Applicant had exhausted that remedy, so Inter-State would be viable.
3) If it succeeds, is complied with, and the individuals obtain compensation, an Inter-State application concerning the same facts should be rejected under art. 37(1(b) ECHR – *"the*

[164] *Idem* ps. 976-977, cited in Kratimenos, (2016) ps. 19-20
[165] ECtHR case 2.1.10; per Eckes (2013) [3.7] p. 262

matter has been resolved". However, the ECtHR should analyze if the reparations were adequate. Exceptionally, if it considers them manifestly inadequate, the Case should be accepted under the last paragraph of art. 37(1) ECHR – because *"respect for human rights (...) so requires"*.

4) And, finally, if the Action for Infringement had been unsuccessful on the merits, the application should be viable. An unsuccessful revindication of ECHR rights in the CJEU should be reviewed by the ECtHR. If the applicant-MS fails to conform with the ECJ's decision, *the matter* – clearly - *has not been resolved.* However, if the EU is eventually considered responsible for the EU act which allegedly violated ECHR rights, the ECtHR must terminate the proceedings.

Furthermore, the ECtHR must be bound by the ECJ's interpretation of EU law made in the unsuccessful, preceding, Action for Infringement, with Prior Involvement being mandatory in case novel issues of EU law are invoked. Most of all, the Prior Involvement would be paramount in situations where the Action for Infringement remedy had been exhausted, but EU law not interpreted. The largely theoretical example would be an Action for Infringement, concerning ECHR rights, being initiated, but rejected by the ECJ on admissibility grounds with prejudice.
The ECtHR could still decide differently in terms of fact and, of course, in the interpretation of the ECHR. Moreover, Actions for Infringement are untested substitutes for the indemnities Inter-State Cases can award individuals[166]. While the CJEU has imposed corrections on legislation and administrative practices, indemnities for individuals would be unprecedented, even though nothing in the letter of art. 260(1) TFEU seems to prevent it.

As a final note, a conflict of decisions regarding ECHR rights, between the CJEU and the ECtHR, would be acceptable, because the latter court is the ultimate guardian of the ECHR.

4.4 The Ongoing Negotiations

On the 31st October 2019, the EU Commission expressed interest in resuming negotiations for Accession, after almost 5 years of introspection. The CoE responded positively, and after 15 formal meetings, the '46+1 Group' finalized a New DAA on the 17th of March 2023. At the date

[166] Risini (2018) ps. 188-190

of the submission of this dissertation, it awaits approval by the CoM, and eventual Opinions by both the ECtHR and ECJ.

The Inter-State procedure has been overhauled, despite several delegations expressing discomfort[167]. Art. 4 of the New DAA - "Inter-Party cases" – now dictates[168]:

- the express exclusion of Inter-State Cases between MS and EU;
- the express exclusion of Inter-State Cases between MS, whenever EU law is involved; and
- a mechanism for the EU to assess, upon request, whether an Inter-State application involves EU law.

This resolution is often proposed in academia, and complies entirely with ECJ requirements in Opinion 2/13. If approved, it would substantially reduce the current jurisdiction of the ECtHR in Inter-State Cases. The third amendment of art. 4 is somewhat unclear regarding its mandatory, or advisory, nature, although the expression "to assess" indicates a mandate. Considering that the New DAA would bind the ECtHR, the second amendment would suffice to oblige that court to deem Inter-State Cases between MS, involving EU law, inadmissible. However, the third amendment removes that admissibility decision from the ECtHR, further eroding its jurisdiction.

Our research points to the inadmissibility of the EU as an applicant in Inter-State Cases, since it would represent a significant increase of Human Rights' supervision competences. However, the New DAA allows the EU as an applicant against NEUMS. The ECJ could raise objections in this aspect, despite not having done so in 2/13.

[167] CoE docs. 4.19 & 4.21
[168] CoE doc. 4.28

Conclusion

Chapter 1

The first chapter of this dissertation was utilized to characterize the enforcement system of the ECHR and demonstrate the particular importance of the Inter-State procedure to its overall effectiveness.

The ECtHR is the body charged with that enforcement. It consists of a court of law, with independent judges and mandatory jurisdiction, through two distinct mechanisms: Individual Applications and Inter-State Cases. Both look to hold accountable Signatories for the violation of the rights of individuals. However, the two mechanisms are not interchangeable, they complement each other[169]. In fact, Inter-State has become indispensable due to its unique traits: a third-State-sponsored method of enforcement with more lenient admissibility criteria. The small quantity of Inter-State Cases is misleading, each absorbing innumerable Individual Applications and dealing with the most severe allegations.

If the EU were to accede, it would appoint a judge as well to the ECtHR, which would provide insight into particularities of EU law. This factor should lighten concerns with adopting the ECtHR as an EU court. The EU would also benefit from the ECtHR's procedural residuality, and substantive margin of discretion and tolerance.

At last, the ruling in *Slovenia v. Croatia* demonstrated the ECtHR, through the Inter-State procedure, currently has jurisdiction to resolve disputes between MS which involve EU law.

Chapter 2

In the second chapter, various norms of EU law were contrasted with the characteristics of the Inter-State procedure.

Art. 6(2) TEU grants the EU competence for Accession, creating two concurrent obligations: to accede, and to preserve current competences. Their natural incompatibility means the EU Institutions must negotiate in good-faith and compromise. Considering that judicial enforcement is an essential feature of the ECHR, art. 6(2) TEU provides the ECtHR as a court with

[169] Ulfstein & Risini (2020) p. 2

jurisdiction over the EU. Nonetheless, since it would represent a substantial, unessential, and historically undesired, increase in competence, the EU cannot be an applicant in Inter-State Cases.

Art. 344 TFEU is the greatest obstacle for Inter-State Cases between MS, involving EU law. Its foundations are: to reserve jurisdiction over EU law to courts agreed by all; to secure uniform interpretation and application of EU law (but only the interpretation is exclusive to the CJEU); and to make sure disputes are resolved in a manner which preserves relationships. This third foundation precludes any Inter-State Cases between a MS and the EU.

The letter of 344 TFEU must be paid close attention: the CJEU was not named as the exclusive body capable of resolving disputes between MS and EU. Even though that has been an exclusive task of the CJEU, art. 344 TFEU permits other tribunals to be provided in primary law.

According to CJEU jurisprudence, the scope of 344 TFEU, in the lead-up to *Opinion 2/13*, was as follows:

- The CJEU's exclusive jurisdiction to interpret EU law is absolute;
- There must be a Treaty-provision for an international tribunal to be given jurisdiction to resolve disputes between MS, involving EU law (to apply EU law);
- International tribunals must require concurrent CJEU procedures to precede;
- The MS must inform and consult the EU Commission regarding the initiation of a dispute involving EU law in an international tribunal;
- The CJEU's exclusive jurisdiction over disputes between MS, involving EU law, is a fundamental feature of the enforcement system of the Treaties;
- The CJEU may have its powers reduced in a non-essential manner.

At last, the structure of Protocol (No 8) demonstrates it its incoherent to interpret its art. 3 as impeding any compromise. Furthermore, multilingualism around art. 3 PR8 varies between polar-opposites, legitimizing a compromise on 'middle-ground'.

All in all, there is compatibility between EU law and Inter-State Cases only in disputes between MS. However, if EU law is involved, some restrictions must be established.

Chapter 3

In the third chapter, the infamous *Opinion 2/13* was dissected regarding its objection to Inter-State Cases between MS and EU.

According to the ECJ, the Principle of the Autonomy of the EU legal order would be compromised. Essentially, the court considers Inter-State Cases between MS, involving EU law, a usurpation of an exclusive competence attributed to the CJEU by the Treaties, but fails to

Opinion 2/13 also imposed harsher conditions for the admissibility of Inter-State procedure of the ECtHR – a treaty-provided mechanism -, than the ones *MOX Plant* had established for a tribunal which is not provided.

This incoherent rationale warrants an assessment of 'ultra vires'. Introduced by the German Constitutional Court, in its *PSPP* judgement[170], it consists of answering the following questions: is there a manifest, and structurally significant, exceeding of competences by the CJEU, an EU Institution? Is the ECJ – the 'Guardian of the Treaties' - impeding the integration agenda chosen by the MS – the 'Masters of the Treaties', by arbitrarily obstructing EU Accession? Is the ECJ revising the Treaties by demanding a reduction in the jurisdiction the ECtHR currently has in Inter-State Cases? If answered in the affirmative, the doctrine of '*ultra vires*' sustains the MS may disregard *Opinion 2/13*'s objection as arbitrary, despite its formal validity.

There is evidence to such abuse in *2/13*: the contradiction in paragraph 182, the unfavorable alteration of the precedence of MOX Plant, the demand in paragraph 204, and the overall uncompromising stance are a violation of the 'endeavour clause' present in art. 6(2) TEU. The ECJ had opportunities to signal its position, which was contrary to all expectations of the CoE. Furthermore, the MS approved the DAA unanimously.

However, the court's manifestly inadequate argumentation does not amount to an arbitrary use of its discretion. First, the ECJ's adoption of the literal meaning of the French version of art. 3 PR8 is a clear connection with the common traditions of methodology. And second, precedent was not completely altered, since *MOX Plant*'s precedent appears to require international agreements to expressly give "precedence" to CJEU mechanisms, which the DAA failed at.

Therefore, our conclusion is the MS cannot disregard the objection of art. 344 TFEU in Opinion 2/13 through the *PSPP* doctrine of '*ultra vires*', although Besselink advocates for such drastic measure[171].

[170] FCC Case No. 2 BvR 859/15
[171] Besselink (2014)

Chapter 4

The final chapter described: the practical interests in the negotiations for EU Accession, our view on the best compromise, and the status of the current negotiations. The Inter-State procedure is a perfect example of the natural incompatibility between the ECHR and EU law, and the need for both sides to take a moderate position for Accession to succeed.

On the one hand, the CoE sees Inter-State Cases as an indispensable part of the enforcement system of the Convention. On the other hand, the MS and the EU seek to obtain as many concessions as possible to satisfy *Opinion 2/13*'s demands.

Our conclusion is that art. 6(2) TEU provided the ECtHR as an EU court, thus revising the exclusive jurisdiction of the CJEU regarding disputes between MS, involving EU law. The MS deemed the ECtHR capable of applying EU law and secure the continuity of relationships amid disputes. Furthermore, art. 344 TFEU omits the CJEU as the sole court where those disputes may be submitted.

All in all, our research demonstrates that in order to ensure a coherent application of art. 6(2) TEU and Protocol (No 8), the regulation of the Inter-State procedure in art. 4 of the New DAA[172] should be amended as follows:

3. The EU shall not avail itself of Article 33 ECHR. The member States of the EU shall not avail themselves of Article 33 ECHR in a dispute with the EU.

4. The member States of the EU shall only avail themselves of Article 33 ECHR, insofar as a dispute between them concerns the interpretation or application of EU law, after the exhaustion of remedies in the CJEU.

5. In Article 33 ECHR proceedings where EU law is involved, the CJEU may intervene in the terms of paragraph 7 of art. 3.

The deciding factor should be a Principle of Non-Regression, given that the ECtHR is currently empowered to decide disputes between MS, involving EU law. The EU, committed to Human Rights' protection, should not require that its Accession result in a curtailment in that protection.

[172] CoE doc. 4.28

However, the ‘46+1’ Group concluded the latest negotiations with the exclusion of all Inter-State litigation between MS involving EU law. It also failed to preclude the EU being an applicant in Inter-State Cases.

BIBLIOGRAPHY

(following alphabetical order)

1. Books

1.1 Kellerbauer, M.; Klamert, M.; & Tomkin, J., (23 May 2019), "*The EU Treaties and the Charter of Fundamental Rights: A Commentary*"

1.2 Korenica, F., (2015), "*The EU Accession to the ECHR – Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection*"

1.3 Kosta, V., Skoutaris, N., & Tzevelekos, V., (2014), "*The EU Accession to the ECHR*"

1.4 Lorenzmeier, S., & Sancin, V., (2018), "*Contemporary Issues of Human Rights Protection in International and National Settings*"

1.5 Pinto de Albuquerque, P., (March 2020) "Comentário da Convenção Europeia dos Direitos Humanos e dos Protocolos Adicionais"

1.6 Porto, M. L., & Anastácio, G., (2012), "*Tratado de Lisboa Anotado e Comentado*"

1.7 White, R.C.A., & Ovey, C., (2010) "*Jacobs, White, and Ovey: The European Convention on Human Rights*", 5th Edition

1.8 Risini, I, (May 2018), "*The Inter-State Application under the European Convention on Human Rights – Between Collective Enforcement of Human Rights and International Dispute Settlement"*

2. Dissertations

2.1 Fernández, I. O., (2020) "Multilingualism and the Meaning of EU Law", Doctoral Thesis, European University Institute, available at https://cadmus.eui.eu/bitstream/handle/1814/66308/Fernandez_2020_LAW.pdf?sequence=1&isAllowed=y

2.2 Makrypidi, A., (30 September 2019), "Issues of compatibility of dispute resolution clauses, included in international agreements with EU law", National and Kapodistrian University, available at https://www.academia.edu/41384409/Issues_of_compatibility_of_dispute_resolution_clauses_included_in_international_agreements_with_EU_law

3. Articles

3.1 Article 19.org, "*UK: Leaving the European Convention would jeopardise freedom of speech*", available at https://www.article19.org/resources/uk-leaving-the-european-human-rights-convention-would-cripple-free-speech/

3.2 Barnard, C., (16 February 2015), "*Opinion 2/13 on EU Accession: Looking for the Silver Lining*", available at http://eulawanalysis.blogspot.com/2015/02/opinion-213-on-eu-accession-to-echr.html

3.3 BBC.com, (2022), "*Bill of Rights: Liz Truss shelves plans to reform human rights law*", available at https://www.bbc.com/news/uk-politics-62818286

3.4 Besselink, L. F. M., (23 December 2014), "*Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13*", available at https://verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213-2/

3.5 Callewaert, J., (2009), "*The European Convention on Human Rights and European Union Law: a Long Way to Harmony*", European Human Rights Law Review Issue 6, available at https://d-nb.info/1133493823/34

3.6 Callewaert, J., (6 December 2018), "*Do we still need Article 6(2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences*", Common Market Law Review Vol. No. 55, available at https://rm.coe.int/common-market-law-review-article-callewaert-johan/16809e9af8

3.7 Callewaert, J., (August 2014), "*The accession of the European Union to the European Convention on Human Rights*", Council of Europe

3.8 Carlbom, S., Johansson, M., & Pettersson, E., (23 April 2015), "*Problematic aspects of the EU's accession to the ECHR*", available at https://eulaworebro.wordpress.com/2015/04/23/problematic-aspects-of-the-eus-accession-to-the-echr/

3.9 Craig, Paul, (2013), "*EU Accession to the ECHR: Competence, Procedure and Substance*", Articles by Maurer Faculty. 2124, available at https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2629&context=ilj

3.10 Cummings, D., (11 May 2015), "*On the Referendum #1: Gove and the Human Rights Act*", Dominic Cumming's Blog, available at

https://dominiccummings.com/2015/05/11/on-the-referendum-1-gove-and-the-human-rights-act/

3.11 Douglas-Scott, S. (24 December 2014), "*Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice*", U.K Const. L. Blog (ukconstitutionallaw.org), available at https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/

3.12 Eckes, C. (2013), "*EU Accession to the ECHR: Between Autonomy and Adaptation*", The Modern Law review, available at https://ael.eui.eu/wp-content/uploads/sites/18/2015/04/Eckes-08-Eckes.pdf

3.13 Eckes, C. (2013), "*The European Court of Justice and (quasi-)judicial bodies of international organisations*", in R. A. Wessel, & S. Blockmans (Eds.), Between autonomy and dependence: the EU legal order under the influence of international organisations (pp. 85-109). Asser Press., available at https://doi.org/10.1007/978-90-6704-903-0_5

3.14 Eeckhout, P., (2015) "*Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*", Fordham International Law Journal Vol. 38:955 2015, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605821

3.15 Gáspár-Szilágyi, S., (2021) "*Between Fiction and Reality: The External Autonomy of EU Law as a "Shapeshifter" after Opinion 1/17*", European Papers Vol. 6 No 1, available at https://www.europeanpapers.eu/en/e-journal/between-fiction-and-reality-external-autonomy-eu-law-shapeshifter-after-opinion-1-17

3.16 Halberstam, D., (February 2015), "*It's the Autonomy, Stupid! A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*", Public Law and Legal Theory Research Paper Series Paper No. 432, available at https://www.cambridge.org/core/journals/german-law-journal/article/its-the-autonomy-stupid-a-modest-defense-of-opinion-213-on-eu-accession-to-the-echr-and-the-way-forward/32594952DDA4CE75B84480D2B03CDF3F

3.17 Johansen, S. O., (2015), "*The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences*", German Law Journal Vol No. 16, available at https://www.cambridge.org/core/journals/german-law-journal/article/reinterpretation-

of-tfeu-article-344-in-opinion-213-and-its-potential-consequences/DDFE7F3934A8DBD76394306AECAEA43E

3.18 Johansen, S. O., (10 January 2015), "*Opinion 2/13: A bag of coal from the CJEU*", Oby-kanalen, blog at worldpress.com, available at https://www.jus.uio.no/pluricourts/english/blog/stian-oby-johansen/opinion-213-a-bag-of-coal-from-the-cjeu.html

3.19 Kratimenos, N., (2016), "*Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – Analysis of Opinion 2/13 of the European Court of Justice*", JAEM01 Master Thesis, Faculty of Law of Lund University, available at https://www.academia.edu/28319563/Accession_of_the_European_Union_to_the_European_Convention_for_the_Protection_of_Human_Rights_and_Fundamental_Freedoms_ECHR_Analysis_of_Opinion_2_13_of_the_European_Court_of_Justice

3.20 Krenn, C. (2015), "*Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13*", German Law Journal Vol 16 No. 01, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680736

3.21 Kuijer, M., (2020), "*The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession*", International Journal of Human Rights, 24(7), 998–1010. https://doi.org/10.1080/13642987.2018.1535433

3.22 Lambrecht, S. (2015), "*The Sting is in the Tail: CJEU Opinion 2/13 objects to draft agreement on accession of the EU to the European Convention on Human Rights*", available at https://www.researchgate.net/publication/335107939_The_Sting_is_in_the_Tail_CJEU_Opinion_213_objects_to_draft_agreement_on_accession_of_the_EU_to_the_European_Convention_on_Human_Rights

3.23 Lazowski, A. & Wessel, R. A., (2015) "*When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*", German Law Journal Vol. 16 No.01, available at https://www.cambridge.org/core/journals/german-law-journal/article/when-caveats-turn-into-locks-opinion-213-on-accession-of-the-european-union-to-the-echr/5409CEB3F6A4F40ADD3B79BBE1CFF61F

3.24 Lock, T., (18 December 2014), "*Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR"*, available at https://verfassungsblog.de/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu-2/

3.25 Lock, T., (2015), "*The future of EU accession to the ECHR after Opinion 2/13: is it still possible and is it still desirable?*", University of Edinburgh, Research Paper Series No 2015/18, Europa Working Paper No. 2015/, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616175

3.26 Lock, T., (2016) "*The Influence of EU Law on Strasbourg Doctrines*", European Law Review 804, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922462

3.27 Lock, T., (2020), "*The future of EU human rights law: Is accession to the ECHR still desirable?*", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633997

3.28 Massias, J., (January 2007), "*Russia and the Council of Europe: Ten Years Wasted?*", available at https://www.ifri.org/sites/default/files/atoms/files/ifri_CE_massias_ang_jan2007.pdf

3.29 Michl, W., (23 December 2014), "*Thou shalt have no other courts before me*", available at https://verfassungsblog.de/thou-shalt-no-courts/

3.30 Odermatt, J., (July 2017), "*When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law*", EUI Max Weber Programme, available at https://cadmus.eui.eu/bitstream/handle/1814/41046/MWP_2016_07.pdf?sequence=1

3.31 O'Neill QC, Aidan, (18 December 2014), "*Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty*", available at https://eutopialaw.wordpress.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/

3.32 Parish, M. (2012), "*International Courts and the European Legal Order*", The European Journal of International Law Vol. 23 no. 1, available at https://academic.oup.com/ejil/article/23/1/141/525583

3.33 Peers, S., (18 December 2014), "*The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection*", available at https://www.cambridge.org/core/journals/german-law-journal/article/eus-accession-

to-the-echr-the-dream-becomes-a-nightmare/2CDD3DAB836E7592873622C91AC54BDF

3.34 Polakiewicz, J., (20 April 2016), "*Accession to the European Convention on Human Rights (ECHR): stocktaking after the ECJ's opinion and way forward*", available at https://www.europarl.europa.eu/cmsdata/104500/EP_hearing_20_April_2016_rev.pdf

3.35 Risini, I., (2018), "*The Accession of the European Union to the ECHR and the Inter-State Application under Article 33 ECHR*", in Contemporary Issues of Human Rights Protection in International and National Settings

3.36 Shleina, V. (18 September 2015), "Opinion 2/13: Some Further Reflections", KSLR EU Blog, available at https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=966

3.37 Spaventa, E. (2015), "*A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13",* available at https://ael.eui.eu/wp-content/uploads/sites/18/2015/04/Spaventa-10-Spaventa-Fearful-Court.pdf

3.38 Tacik, Przemyslaw, (2017), "*After the Dust Has Settled: How to Construct the New Accession Agreement After Opinion 2/13 of the CJEU*", German Law Journal Vol. 18 No. 04, available at https://www.cambridge.org/core/journals/german-law-journal/article/after-the-dust-has-settled-how-to-construct-the-new-accession-agreement-after-opinion-213-of-the-cjeu/B8EFB2E45A8A111043E894B6BAC64EE2

3.39 Ulfstein, G., & Risini, I., (28 January 2020), "*Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges*", available at https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/

4. Coucil of Europe Documents (CoE docs.)
(https://www.coe.int/en/web/portal)

4.1 "*Russia's request for membership of the Council of Europe*", (1996), Parliamentary Assembly Opinion 193

4.2 "*Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights"*, (28 June 2002), DG-II(2002)006, [CDDH(2002)010 Addendum 2], [Report adopted at CDDH 53rd meeting, 25-28 June 2002]

4.3 Joint communication from Presidents Costa and Skouris, (17 January 2011)

4.4 "*Interlaken Declaration*", (27 April 2011), [High Level Conference on the Future of the European Court of Human Rights, 18-19 February 2010]

4.5 "*Izmir Declaration*", [High Level Conference on the Future of the European Court of Human Rights, 26-27 April 2011]

4.6 Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights, (14 October 2011), CDDH(2011)009

4.7 Steering Committee for Human Rights (CDDH) Report, 75th Meeting, (19-22 June 2012), CDDH(2012)R75

4.8 First Negotiation Meeting Between the CDDH and the European Commission on the Accession of the European Union to the European Convention on Human Rights Report, (21 June 2012), 47+1(2012)R01

4.9 Second Negotiation Meeting Between the CDDH ad hoc Negotiating Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights Report, (17-19 September 2012), 47+1(2012)R02

4.10 Third Negotiation Meeting Between the CDDH ad hoc Negotiating Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights Report, (7-9 November 2012), 47+1(2012)R03

4.11 Fourth Negotiation Meeting Between the CDDH ad hoc Negotiating Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights Report, (21-23 January 2013), 47+1(2013)R04

4.12 Fifth Negotiation Meeting Between the CDDH ad hoc Negotiating Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights Final Report, (3-5 April 2013), 47+1(2013)008rev2

4.13 Virtual Informal Meeting of the CDDH ad hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights Report, (22 June 2020), 47+1(2020)Rinf

4.14 6th Meeting of the CDDH ad hoc Negotiation Group (“47+1”) on the Accession of the European Union to the European Convention on Human Rights Report, (22 October 2020), 47+1(2020)R6

4.15 7th Meeting of the CDDH ad hoc Negotiation Group (“47+1”) on the Accession of the European Union to the European Convention on Human Rights Report, (26 November 2020), 47+1(2020)R7

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4.29 United Kingdom: backsliding on human rights must be prevented, Commissioner for Human Rights

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5. European Union documents (EU docs.)

5.1 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 (5 May 2010), available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf

5.2 Council of the European Union document no. 13714/10 (17 September 2010), Request for the participation of a delegate of the Court of Justice of the European Union as an observer, at the next consultations with the Member States, pertaining to the accession of the European Union to the European Convention on Human Rights (ECHR), available at https://data.consilium.europa.eu/doc/document/ST-17807-2009-INIT/en/pdf

5.3 European Parliament Briefing, (2018), "*Action for damages against the EU*", available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/630333/EPRS_BRI(2018)630333_EN.pdf

5.4 European Parliament Briefing, (July 2017), "*EU accession to the European Convention on Human Rights (ECHR)*", available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607298/EPRS_BRI(2017)607298_EN.pdf

5.5 European Parliament Study, (2016), "*What next after Opinion 2/13 of the Court of justice on the accession of the EU to the ECHR?*", Directorate-General for Internal Policies, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556975/IPOL_STU(2016)556975_EN.pdf

5.6 European Parliament Hearing, (20 April 2016), "The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward", Committee on Constitutional Affairs, available at https://www.europarl.europa.eu/cmsdata/104504/Executive%20Summary%20Morano Foadi%20Andreadakis%20April%202016.pdf

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1. CJEU – Court of Justice of the European Union

1.1. Judgements

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1.1.2. **Case C-26/62**, (5 February 1963), *Van Gen den Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1

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1.1.8. **Case 36/75** (28 October 1975), *Roland Rutili v Ministre de l'intérieur*, ECLI:EU:C:1975:137

1.1.9. **Case 30-77**, (27 October 1977), *Régina v Pierre Bouchereau*, ECLI:EU:C:1977:172

1.1.10. **Case 283/81**, (6 October 1982), *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, ECLI:EU:C:1982:335

1.1.11. **Case C-104/81** (26 October 1982), *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A.*, ECLI:EU:C:1982:362

1.1.12. **Joined cases 46/87 and 227/88**, (21 September 1989, *Hoechst AG v Commission of the European Communities*, ECLI:EU:C:1989:337

1.1.13. **Case C-72/95**, (24 October 1996), Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland, ECLI:EU:C:1996:404

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1.1.15. **Case C-94/00**, (22 October 2002), *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities*, ECLI:EU:C:2002:603

1.1.16. **Case C-145/04**, (12 September 2006), *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2006:543

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1.1.29. **Case C-524/15**, (20 March 2018), *Criminal proceedings against Luca Menci*, ECLI:EU:C:2018:197

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1.2.3. **Opinion 1/91** (14 December 1991), *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area*, ECLI:EU:C:1991:490

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1.2.6. **Opinion 2/94,** (28 March 1996), *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:1996:140

1.2.7. **Opinion 1/00**, (18 April 2002), *Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area*, ECLI:EU:C:2002:231

1.2.8. **Opinion 1/09**, (8 March 2011), *Creation of a unified patent litigation system - European and Community Patents Court*, ECLI:EU:C:2011:123

1.2.9. **Opinion 2/13,** (18 December 2014), *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, ECLI:EU:C:2014:2454

1.2.9.1. **View of Advocate General** Kokott (13 June 2014), *Opinion procedure 2/13*, ECLI:EU:C:2014:2475

1.2.10. **Opinion 1/17,** (30 April 2019), *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA)*, ECLI:EU:C:2019:341

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