

**TRIPS-PLUS PROVISIONS IN EUROPEAN UNION AGREEMENTS:  
ENHANCED PROTECTION OF INTELLECTUAL PROPERTY OR  
RESTRICTION OF HUMAN RIGHTS?**

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# **Dedication**

This thesis is dedicated to John Philips Sousa

‘the Skrillex of his day’

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## **Abstract**

This thesis charts, and investigates the role of Trade-Related Aspects of Intellectual Property Rights (TRIPS)-Plus provisions to protect intellectual property rights in the European Union (EU) international agreements. It critically discusses the extent to which the EU is seeking higher levels of intellectual property (IP) protection in the global sphere and analyses whether and to what extent the use of TRIPS-Plus provisions potentially clashes with the objective of the promotion and protection of human rights in the EU external action. This analysis is conducted across two intertwined axis: a chronological one and a conceptual one, in order to understand the evolution of the balance between IP and human rights protection. The main and overarching research question to which this thesis aims to answer is the following:

To what extent and how has the EU reconciled high levels of IP protection with the promotion of human rights in its own international agreements?

In answering this question, this thesis also purports broader considerations on the overall coherence of EU international agreements with the objectives laid down in Articles 3 and 21 of the Treaty on the European Union (TEU). The theoretical framework of this research is that of the EU's 'constitutional regime governing foreign affairs', and, in line with it, the approach adopted is normative, and the methodology used is doctrinal.

This PhD dissertation is divided into three parts. The first part discusses the evolution of IP protection at the international level. The second part examines the position of IP rights within the EU, the competence of the EU to act in the IP field both internally and externally. The third and final part of this thesis systematically examines IP provisions in EU agreements and discusses the extent to which IP protection might conflict with the promotion of human rights.

## **Plagiarism Declaration**

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of PhD in Law, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

# **Table of Contents**

## **Introduction**

1. Background of the Thesis
2. Overall Objective of the Thesis
3. Key Research Questions
4. Terminology
5. Theoretical Framework
6. Conceptual Framework of the Thesis
  - 6.1. Intellectual Property Rights
  - 6.2. European Union International Agreements
  - 6.3 Human Rights within European Union Agreements
  - 6.4. The Chronological Scope
7. Research Methodology
8. Structure of the Thesis
9. Contribution to the State of Art

## **Part I**

### **The International Context**

#### **-Chapter One -**

#### **Putting TRIPS-Plus in Context: The Development of International Intellectual Property Law**

1. Introductory Remarks
2. Intellectual Property as a Cornerstone of the World Economy

3. Overview of International Intellectual Property Law
  - 3.1. Historical Origins of International Intellectual Property Law
  - 3.2. The Set-up of the World Intellectual Property Organisation
  - 3.3. The Shift to the World Trade Organisation Forum and Towards a Trade-Related Conception of Intellectual Property Law
    - 3.3.1. US-Spring Assemblies
    - 3.3.2. US-Section 337
    - 3.3.3. Intellectual Property and Trade
  - 3.4. The TRIPS Agreement
  - 3.5. Beyond TRIPS: TRIPS-Plus Standards
  - 3.6. The Most Recent Developments in the WIPO
  - 3.7. The Failure of ACTA
4. The Controversial Nature of Intellectual Property Rights in International Law
  - 4.1. Intellectual Property as a Component of the Right to Participate in Cultural Life
  - 4.2. Intellectual Property as a Human Right: Critical Views
  - 4.3. Moving Away from a Polarized Debate
5. The Conflict between Intellectual Property and Human Rights at the International Level
  - 5.1. Balancing Intellectual Property with Human Rights
  - 5.2. The Right to Health and Intellectual Property
  - 5.3. The Right to Food and Intellectual Property
  - 5.4. The Freedom of Expression and Intellectual Property
  - 5.5. The Right to Education and Intellectual Property
  - 5.6. The Rights of Indigenous Peoples and Intellectual Property
6. The Role of the European Union in the Development of International Intellectual Property Law

6.1. The European Union in the World Trade Organisation and the ‘Forum Shifting’

6.2. The Role of the European Union from Forum Shifting to TRIPS-Plus

7. Concluding Remarks

## **Part II**

### **The European Union Legal Framework**

#### **-Chapter Two-**

### **The European Union and Intellectual Property**

1. Introduction

2. Intellectual Property in the Current European Union Constitutional Framework

2.1. The Treaties

2.2. Intellectual Property in the Charter of Fundamental Rights

3. Intellectual Property Law within the European Union

3.1. Introductory Overview

3.2. European Union Trademark Law: An Overview

3.2.1. The European Union Trademark Legal Framework

3.2.2. The Role of the CJEU in Shaping European Union Trademark Law

3.3. European Union Copyright Law: An Overview

3.3.1. The European Union Copyright Legal Framework

3.3.2. The Role of the CJEU in Shaping European Union Copyright Law

- 3.4. European Union Patent Law: An Overview
  - 3.4.1. The European Union Patent Legal Framework.
  - 3.4.2. The Role of the CJEU in Shaping European Union Patent Law
- 3.5. Recent Developments and New Forms of Intellectual Property
- 4. Intellectual Property, Free Movement Goods and Competition in the Internal Market
  - 4.1 Introductory Remarks
  - 4.2. Trademarks and the Free Movement of Goods and Competition in the Internal Market
  - 4.3. Copyright, Free Movement of Goods and Competition in the Internal Market
  - 4.4. Patent, Free Movement of Goods and Competition in the Internal Market
  - 4.5. Geographical Indications and the Free Movement of Goods
  - 4.6. Design and the Free Movement of Goods
- 5. Intellectual Property and European Union International Obligations
  - 5.1. Effects and Relevance of International Obligations in European Union Law
  - 5.2. Case Law on International Intellectual Property Provisions
- 6. Concluding remarks

### **-Chapter Three-**

## **The European Union, Human Rights and Intellectual Property**

- 1. Introduction
- 2. The Development of Human Rights Protection within the European Union Treaties

- 2.1. The Beginning: The Treaty of Rome
- 2.2. From the Single European Act (SEA) to the Treaty of Amsterdam  
Passing by Maastricht
- 2.3. From the Treaty of Amsterdam to the Treaty of Lisbon
  - 2.3.1. The Constitutional Developments
  - 2.3.2. The Role of the CJEU
- 2.4. The Treaty of Lisbon
3. The Charter of Fundamental Rights: An Overview
  - 3.1. The Development of the Charter of Fundamental Rights
  - 3.2. The Charter of Fundamental Rights.
4. The European Convention of Human Rights and the European Union Legal  
Order: An Overview
5. Intellectual Property and Human Rights in the European Union Legal Order:  
The European Court of Human Rights as a Point of Reference
  - 5.1. Intellectual Property as a Human Right
    - 5.1.1. The Protection of Intellectual Property under the ECtHR  
as a ‘Model of Protection’
    - 5.1.2. The Role of the CJEU in Protecting the Right of the Author
  - 5.2. Balancing Intellectual Property and Other Human Rights
    - 5.2.1. Intellectual Property and the Right to Health
    - 5.2.2. Intellectual Property and the Right to Education
    - 5.2.3. Intellectual Property and the Freedom of Expression
6. Concluding Remarks

## **-Chapter Four-**

### **Defining the External Competence on Intellectual Property and Embedding Human rights in the External Action of the European Union**

1. Introduction
2. The European Union External Competences: An Overview
  - 2.1. European Union External Competences: From Their Origin to the Treaty of Lisbon
  - 2.2. The Current European Union External Competences
3. The Common Commercial Policy
  - 3.1 Introductory Remarks
  - 3.2. The Developing Scope of the Common Commercial Policy from Rome to Lisbon
  - 3.3. The Current Scope and Limits of the Common Commercial Policy
4. The European Union External Competences on Intellectual Property Matters: The Road towards Exclusivity
  - 4.1. Daiichi Sankyo: The Commercial Aspects of Intellectual Property as part of the Common Commercial Policy
  - 4.2. Broadcasting Rights: Intellectual Property as an Exclusive Competence Outside the Common Commercial Policy
  - 4.3. The Commercial Aspect of Intellectual Property: Opinion 2/15
  - 4.4. The Commercial Aspect of Intellectual Property: Opinion 3/15
  - 4.5. The Commercial Aspect of Intellectual Property: Commission v Council. (Lisbon Agreement)
  - 4.6 The Constraints of Exclusive Competence on Intellectual Property Matters
5. Embedding Human Rights in European Union External Relations
6. Concluding remarks

## **Part III**

### **Assessing TRIPS-Plus Obligations in European Union Agreements**

#### **- Chapter Five -**

### **TRIPS-Plus Obligations in European Union Agreements**

#### 1. Introduction

#### 2. Intellectual Property in European Union Agreements: A Chronological Overview

##### 2.1 The ‘Three Eras’

##### 2.2. The First Era: Post-TRIPS Agreements

##### 2.3. The Second Era: The Rise of TRIPS-Plus Provisions

###### 2.3.1. The Increase of Intellectual Property Protection

###### 2.3.2. The Increase of Intellectual Property Protection but Balanced Between the European Union and Central-South American Countries: A Prelude to the ‘Third Era’

##### 2.4. The Third Era: The Move Towards TRIPS-Plus-Plus and the Search for a Balance

###### 2.4.1. Ushering the ‘Third Era’: The EU-Cariforum Agreement

###### 2.4.2. The EU-South Korea Agreement

###### 2.4.3. The EU-Central America Agreement

###### 2.4.4. The European Union Agreements with other South American Countries

###### 2.4.5. Other EU Agreements in the Context of Neighbourhood Policy

###### 2.4.6. The Most Recent Agreements

#### 3. Intellectual Property Provisions in Agreements as a Restriction of Trade

- 3.1. Intellectual Property as a Restriction to Trade by its Very Nature and as a Tool to Address Divergence
- 3.2. Intellectual Property as a Restriction to Trade across the Three Eras
- 4. Intellectual Property Provisions in Agreements as an Enhancement of Trade
  - 4.1. Enhancing Trade as a Rationale for Intellectual Property Protection
  - 4.2. How Intellectual Property served as an Enhancement of Trade Across the Three Eras
- 5. TRIPS-Plus Provision and their Impact on Specific Elements of Intellectual Property
  - 5.1. Copyright
  - 5.2. Trademarks
  - 5.3. Patent
  - 5.4. Traditional Knowledge
  - 5.5. Geographical Indication
- 6. Concluding Remarks

## **-Chapter Six-**

### **TRIPS-Plus Obligations and Human Rights Clauses**

- 1. Introduction
- 2. A Critical Overview of the Development of Human Rights Clauses within the European Union Trade Policy
  - 2.1 From Lomé and its Lessons to Cotonou
  - 2.2. Human Rights Clauses in Other Agreements
  - 2.3. Human Rights as Essential Elements of the European Union Agreement.
  - 2.4. Human Rights Clauses in Practice Post-TRIPS

- 2.5. Upholding the Human Rights Clauses, Trade Policy and Sustainable Development Principles
- 3. The Criticism of Human Rights Clauses within the European Union Trade Policy
  - 3.1. Neo-Colonialism
  - 3.2. Effectiveness of the Human Rights Clauses
- 4. TRIPS-Plus Provisions and of Human Rights Clauses: An Overview
- 5. The Shifting Intersection of Intellectual Property Protection and Human Rights Clauses in European Union Agreements
  - 5.1. The First Era
  - 5.2. The Second Era: Dawn of the TRIPS-Plus Obligations and Human Rights
- 6. Paving the Way Towards the Third Era Agreements: Balancing Intellectual Property Provisions with Human Rights
  - 6.1. The EU-Chile Agreement
  - 6.2. The EU-Cariforum Agreement
- 7. The Third Era: Further Expansions of TRIPS-Plus and Human Rights
  - 7.1. TRIPS-Plus, Human Rights in the EU-South Korea Agreement: A Step Back?
  - 7.2. TRIPS-Plus, Human Rights, and European Union Agreements in the Context of European Union Neighbourhood Policy
  - 7.3. TRIPS-Plus and Human Rights in the South and Central America Agreements: A Better Balance?
- 8. The Most Recent Developments
  - 8.1. The Comprehensive Economic and Trade Agreement (CETA) with Canada: The Return of a Pure Trade Perspective?
  - 8.2. The EU-Singapore Agreement: One Step Forward and Two Steps Back?

8.3. The EU-Japan Agreement

8.4. The EU-Vietnam Agreement

9. Concluding Remarks

## **Conclusion**

1. The Core Tenets of This Thesis

2. Does the Inclusion of TRIPS-Plus Provisions Within the Various European Union Agreements Considered Within this Research Serve to Increase Intellectual Property Protection?

2.1. Not Only Stronger but Broader? The Increased Material Scope of Intellectual Property Protection

2.2. The European Union: A Global Intellectual Property Policy Driver as a Result of Constitutional Evolution

3. To What Extent Does Increased Intellectual Property Protection Conflict with the Protection and Promotion of other Human Rights within the European Union's External Action?

4. This Thesis as an Advancement of the State of Art and a Starting Point for Further Research

# Introduction

## 1. Background of the Thesis

This thesis falls within the field of European Union (EU) external relations law and aims to contribute to the current state of the art in this area by investigating the role and the limits of Trade-Related Aspects of Intellectual Property Rights (TRIPS) - Plus provisions in EU international agreements. It takes into account the constitutional development of the EU,<sup>1</sup> which has gradually incorporated new and wider objectives as a result of the Treaty changes, has led to the EU holding a major, and often leading role on the international scene. It takes into account the growing importance of intellectual property (IP) in the contemporary world and the expansion of IP regulation,<sup>2</sup> with the approval and advancement of TRIPS-Plus.

Before presenting the research questions that this PhD research aims to answer, this introduction succinctly addresses the core aspects of this thesis. Section 2 clarifies the overall objectives of the thesis, with a third section presenting the two central research questions of this thesis. Section 4 then includes a discussion of the key utilised terminology within this thesis. Section 5 establishes the theoretical framework which underpins the analysis conducted within it. In doing so, both those sections provide the guiding focus of this thesis and the approach adopted throughout. Building upon this, a sixth section introduces the conceptual framework for this research, including the discussion of IP and TRIPS-plus, EU agreements, and the position of human rights within the agreements in a chronological fashion.

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<sup>1</sup> See generally, Robert Schütze, Constitutionalism and the European Union in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press, 2014); Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009); Robert Schütze, *European Constitutional Law* (Cambridge University Press, 2012); Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press, 2015).

<sup>2</sup> The term regulation, as used throughout this thesis, reflects a broader understanding than 'law', as it includes legislation within the EU and its Member States, as well as provisions found within both hard and soft law.

The remainder of the chapter then details the format and structural aspects of the thesis. This begins with a seventh section which details the methodology and limitations of this study. Section 8 explains the structure of this thesis and details how the research questions feed into the tripartite division of the thesis. A ninth section concludes the chapter with a discussion of the thesis's contribution to the scholarship and state of art.

## **2. Overall Objective of the Thesis**

As briefly mentioned above, this thesis investigates the role of provisions to protect intellectual property rights (IPRs) in the EU international agreements. It discusses the progressive inclusion of TRIPS-Plus provisions in EU international agreements concluded within various strands of EU's External Action, including the Common Commercial Policy (CCP) and enlargement policy, and taking into account the broader international context. It identifies the extent to which the EU can be viewed as seeking higher levels of IP protection in the global sphere and discusses whether, and to what extent, the use of TRIPS-Plus provisions has clashed with the objective of the promotion and protection of human rights in the field of EU external action.

By providing a comprehensive legal analysis of the balance that has been achieved between the protection of IPRs on the one hand, and separate and potentially conflicting human rights on the other, in EU international agreements, this thesis also problematizes and calls into question the overall coherence of EU international agreements with the broader objectives laid down in Articles 3 and 21 of the Treaty on the European Union (TEU).<sup>3</sup> As it will be discussed further in this introductory chapter, the theoretical framework of this thesis is that of the EU's 'constitutional regime governing foreign affairs'.<sup>4</sup> In line with this theoretical framework, as it will be further discussed in section 5 and 7 of this introductory chapter, the approach

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<sup>3</sup> Article 3 TEU, as it will be further examined in Part II, require the EU to 'uphold and promote its values and interests and contribute to the protection of its citizens' in its external relations and to 'contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law'. Article 21 TEU reiterates that the 'Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement'.

<sup>4</sup> Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2016) 299.

adopted to investigate the research questions is normative, i.e. it focuses on the relevant legal provisions and its interpretation and assessment,<sup>5</sup> and the methodology used is doctrinal.<sup>6</sup>

### 3. Key Research Questions

This thesis focuses on two key research questions:

- Does the inclusion of TRIPS-plus provisions within the various EU agreements considered within this research serve to increase IP protection?
- If IP protection has increased, to what extent does this conflict with the protection and promotion of other human rights within the EU's external action?

In answering these questions, this thesis addresses the coherence of EU international agreements with the broader objectives laid down in Articles 3 and 21 TEU.

To answer these core research questions, and in addressing the intersection between the protection of IP and the protection and promotion of human rights, a series of interrelated sub-questions arise and must be addressed. In particular, this thesis aims to explore how has the expansion of EU competences impacted on the protection of IP and the promotion of human rights in international agreements, and how has the growing relevance of IP protection within the EU contributed to the advancement of IPRs in international law. Moreover, the thesis reflects on the extent to which the increased protection of human rights within the EU has prompted the EU to enhance its role as human rights promoter globally. Finally, the thesis explores how has the development of the EU's competence to act externally contributed to the conflict between IP protection and the promotion of human rights.<sup>7</sup>

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<sup>5</sup> Sanne Takema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice?' (2018) *Law and Method*, 1.

<sup>6</sup> The justification for this approach is discussed *infra* Sections 5 and 7.

<sup>7</sup> This position and development form the crux of the analysis in Part III.

#### 4. Terminology

In line with its overall objective and the research questions mentioned above, the thesis adopts a distinct terminology. Firstly, this thesis acknowledges that the term ‘Fundamental Rights’ is used in EU law in relation to its internal sphere,<sup>8</sup> whereas the wording ‘human rights’ is used in EU external relations law and policy.<sup>9</sup> While acknowledging this diverse terminology,<sup>10</sup> this thesis uses the term human rights

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<sup>8</sup> Article 6 TEU states that ‘1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions. 2. 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. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law’.

<sup>9</sup> Article 21 TFEU states that ‘1. The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations. 2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance. 3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies. The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect’.

<sup>10</sup> This thesis acknowledges that human rights are ‘fundamental’ rights. Gianlugi Palombella, ‘From Human Rights to Fundamental Rights. Consequences of a Conceptual Distinction’ (2006) EUI LAW 2006/34 <<http://hdl.handle.net/1814/6400>>. Palombella, while arguing a difference between those terms, suggests that ‘human rights are also fundamental, (if and) because they

with regards to the internal sphere of the EU and its external relations law and policy. Since this thesis focuses on external relations law, the use of the term human rights was considered more appropriate and more apt to this disciplinary subfield. Moreover, this terminological approach has been adopted with the aim of increasing clarity and consistency within the thesis.

Secondly, throughout this thesis, the term ‘EU agreement(s)’ or ‘agreement(s)’ refers to the various bilateral and multilateral agreements the EU has completed with its various Third Countries. This term includes but is not limited to Free Trade Agreements, Stabilisation and Association Agreements, Economic Partnership Agreements, or Partnership and Cooperation Agreements. Whilst acknowledging the diverse legal basis that will be engaged for each of these categories (as well as within each category), this collective classification recognises common trade and human rights elements across all agreements and allows for a comprehensive discussion across this thesis.

Thirdly, in discussing the increased levels of IP protection, this thesis notes that there is not a set definition of TRIPS-Plus. Rather, scholars have used ‘TRIPS-Plus’ as a collective term for standards beyond those found in TRIPS.<sup>11</sup> In that regard, El-Said notes the dynamic and evolving nature of the term TRIPS-Plus and suggests that ‘[g]enerally speaking, there can be no fixed definition for the term “TRIPS-Plus”’, and ‘[t]his term is still in the process of evolution and has proven to be case- and country-specific’.<sup>12</sup> Additionally, this thesis refers to ‘TRIPS-plus-plus’ levels of IP protection. Again, this is not a set or defined term. Rather, it is an informal indication of the level of protection and how far increased it is in comparison to the standards found within TRIPS.

Finally, as it will be discussed below, this thesis collectively refers to the elements

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posit at the basis of our life in common, and they are concretely implemented through the fabric of an organised social system’.)

<sup>11</sup> Among others Marco M. Aleman, ‘Impact of TRIPS-Plus Obligations in Economic Partnership and Free Trade Agreements on International IP Law’ in Josef Drexler, Henning Grosse Ruse-Khan, and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer, 2014) 63.

<sup>12</sup> Mohammed El-Said, ‘The Road from TRIPS-Minus, to TRIPS, to TRIPS-Plus: Implications of IPRs for the Arab World’ (2005) 8(1) *The Journal of World Intellectual Property* 53, 59. El-Said notes the dynamic and evolving nature of the term TRIPS-Plus as new circumstances and challenges arise. ‘Generally speaking, there can be no fixed definition for the term “TRIPS-Plus”. In fact, such a term is still in the process of evolution and has proven to be case- and country-specific’.

of intellectual property as ‘IP’ throughout the discussion. This collective use encapsulates the overall standards and developments following TRIPS and general provisions. Thus, this thesis does not attempt to define IP as a concept, and instead relies on well-established scholarship, which is further discussed in chapter 1 of the thesis. Moreover, this thesis does not discuss in detail single IPRs. This choice is dictated by the fact that EU agreements focus on IP as a whole, and adopt a collective approach to IP.

## 5. Theoretical Framework

After presenting the research questions that this thesis aims to answer and the terminology used, this section succinctly discusses the theoretical framework in which these questions arise, which is that of the constitutional nature of the EU.

At the very beginning, the EU ‘was conceived as an international organisation’.<sup>13</sup> This classification has remained valid today among some scholars, but the EU legal order is now more complex than that of other international organisations and entails constitutional characters.<sup>14</sup> This thesis fully embraces the idea that the EU, in fact, ‘constitutes a new legal order in international law’.<sup>15</sup> In that the thesis embraces the EU’s constitutional self-understanding that was reiterated by the Court of Justice of the European Union (CJEU) most recently in *Andy Wightman*.<sup>16</sup> Furthermore, while this thesis does not discuss the constitutional nature of the EU in-depth and it does not endeavour to contribute to the scholarly debate on the constitutionalisation of the EU, it is informed by the view that the constitutional nature of the EU has greatly impacted on the relationship between EU law and international law in several

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<sup>13</sup> Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2016) 22. See also Karen E. Smith, *European Union Foreign Policy in a changing World* (Cambridge 2003).

<sup>14</sup> Henri De Waele, *Layered Global Player Legal Dynamics of EU External Relations* (Springer 2011) 1.

<sup>15</sup> Judgment of the Court of 5 February 1963, *Van Gend En Loos*, Case 26/62, EU:C:1963:1, paragraph 12.

<sup>16</sup> Judgment of the Court of 10 December 2018, *Andy Wightman*, Case C-621/18, EU:C:2018:999, paragraph 44. The Court held that ‘[i]n that respect, it must be borne in mind that the founding Treaties, which constitute the basic constitutional charter of the European Union (judgment of 23 April 1986, *Les Verts v Parliament*, 294/83, EU:C:1986:166, paragraph 23). The Court established, that unlike ordinary international treaties, a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals ...’.

respects.<sup>17</sup>

The Union's ability to take action internally has often existed in a somewhat liminal space due to the complexities surrounding the EU's competence to act in certain fields. Wessel notes that '[a]t a minimum level, the legal framework creates political possibilities and sets the boundaries for any action by the EU'.<sup>18</sup> As such, the ability of the EU to act and engage in international law and enact foreign affairs policies is constrained by the constitutional characteristics of the EU. Wessel and Takács suggest that 'the first steps of the European Union as a global actor were in the area of trade'.<sup>19</sup> As such, within the scope of this thesis, the exclusive competence in the field of the CCP was and remains key to the EU's international capabilities. However, nowadays, the international capacity of the EU extends 'over the whole field of [its] objectives'<sup>20</sup> in the context of EU legal personality. As with virtually all aspects of EU legal development, the expansion of the Union's external competences was met with criticism. Weiler argues that this expansion exists as 'a new unique contribution to true federalism'.<sup>21</sup> In that vein, Eeckout classifies the extended use of mixed agreements to cover areas largely encompassing Member States' powers as 'an unnecessary burden making the EU a more cumbersome and inflexible international actor'.<sup>22</sup> As Schütze correctly argues, the 'Union is constitutionally entitled to set its foundational values above the Member States' international obligations'.<sup>23</sup>

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<sup>17</sup> Joxerramon Bengoetxea, 'The EU as (More Than) an International Organization' in Jan Klabbers, Asa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Northampton Publishing House, 2011) 449. Bengoetxea notes that the 'EU is an international organization but a *sui generis* or special one. It is considered special not because of its identity problems but because of the high degree of 'constitutional' development, *supranational* components and rule of law features within this organization making it look almost like a federation of states'.

<sup>18</sup> Ramses A. Wessel, 'The Legal Framework for the Participation of the European Union in International Institutions' (2011) 33(6) *European Integration* 621, 621-622.

<sup>19</sup> Ramses A. Wessel and Tamara Takács 'Constitutional Aspects of the EU's Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament' (2017) 28(2) *European Business Law Review* 103, 103.

<sup>20</sup> Judgment of the Court of 31 March 1971, *Commission v. Council*, Case 22/70 EU:C:1971:32, paragraph 14.

<sup>21</sup> JHH Weiler, *The External Relations of Non-Unitary Actors: Mixity and the Federal Principles* (Cambridge University Press) 130.

<sup>22</sup> Piet Eeckout, *External Relations of the European Union: Legal and Constitutional Foundations*. (Oxford University Press, 2004) 224.

<sup>23</sup> Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2016) 106.

The expansion of the external competence to act concerning the commercial aspects of IP are then discussed in detail in Chapter Four.<sup>24</sup> However, it can be said that the CCP now encompasses goods, services, and commercial aspects of IP and entails ‘one of the most important expansions of the EU’s competence in the whole of the Lisbon Treaty’.<sup>25</sup>

The expansion of the international role of the EU, combined with its constitutional nature, also requires that, within the EU legal order, previously established agreements between the Member States and their respective trading partners,<sup>26</sup> cannot be contrary to EU law. This development and expansion of the Union’s constitutional powers inevitably limits the ability of Member States to implement their obligations to their respective trading partners for these pre-existing bilateral agreements. Further, the Court of Justice (CJEU) insisted that:

‘when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to European Law, the Member State must refrain from adopting such a measure’.<sup>27</sup>

Finally, with regards to international agreements concluded by the EU, the CJEU (according to several scholars) has expressed a ‘general receptiveness to international agreements’ and in allowing such agreements to be directly effective.<sup>28</sup> This approach stems from the impossibility of isolationism in this era and how ‘the contemporary world is an international world, a world of collective trade agreements and collective security systems’.<sup>29</sup>

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<sup>24</sup> See *infra* Chapter Four.

<sup>25</sup> *Inter alie* Piet Eeckout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004) 62; Marise Cremona, ‘A Policy of Bits and Pieces? The Common Commercial Policy After Nice’ (2002) 4 *Cambridge Yearbook of European Legal Studies* 61–69. Cremona notes the wider scope of services under Article 207 TFEU. ‘Within the EU internal market services were distinguished from establishment, largely on the basis of the inherently temporary nature of the provisions of services. Within world trade law, on the other hand, service is a broader concept, encompassing aspects of establishment and indeed capital movement’.

<sup>26</sup> Article 234 EEC, 307 EC, 351 TFEU.

<sup>27</sup> Judgment of the Court of 28 March 1995, *The Queen v Secretary of State for the Home Department, ex parte Evans Medical and Macfarlan Smith*, Case C-324/93, EU:C:1995:84, paragraph 32.

<sup>28</sup> Piet Eeckout, *External Relations of the European Union: Legal and Constitutional Foundations*. (Oxford University Press, 2004) 301.

<sup>29</sup> Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (Cambridge University Press 2016) 1.

## 6. Conceptual Framework of the Thesis

This thesis builds upon the wide scholarly debate on the balance between IPRs and potentially competing human rights. In doing so, it frames the analysis within the specific context of the EU external action.<sup>30</sup> After having detailed the key research questions and briefly traced the theoretical framework of the thesis, this section outlines in greater detail, the conceptual framework underpinning the thesis as a whole.

### 6.1. Intellectual Property Rights

This thesis generally refers to IP and IPRs, to include patents, trademarks, geographical indications (GIs), copyright and rights related to copyright, and design rights, since those forms of IP are covered by the agreements under examination. As noted, most recently, by Husovec:

‘Intellectual property rights are legal constructs which govern the use of information. They mostly come in the form of exclusive rights which are expected to be traded on the market in exchange for licensing revenue. Exclusivity and remuneration are thus two defining features of IPRs’.<sup>31</sup>

In general, the overall aim of IPRs is that of protecting and facilitating ‘innovation’.<sup>32</sup> For the purpose of the following analysis, it suffices to recall that patents are intended to protect inventions and are granted by States in return for the investment put in by inventors to create a new product. Patents offer protection for innovations that could be reverse-engineered if disclosed, and they give their owner the right to prevent others from making, using or selling the invention without permission by controlling distribution channels. In *Centrafarm v. Sterling Drug*,<sup>33</sup>

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<sup>30</sup> Graeme B. Dinwoodie and Rochelle C. Dreyfuss, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime*, (Oxford University Press 2012) 9. Dinwoodie and Dreyfuss suggests that ‘intellectual property...necessarily constitutes a balance between the interests of proprietors in securing a return on their investments and controlling their reputations, and the interests of followers and the public in the robust domain of accessible knowledge’.

<sup>31</sup> Martin Husovec, 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' (2019) 20(6) German Law Journal 840, 841.

<sup>32</sup> However, it must be noted that the protection of GIs have a function beyond the protection for the purpose of stimulating innovation.

<sup>33</sup> Judgment of the Court of 31 October 1974, *Centrafarm v. Sterling*, Case 15-74, EU:C:1974:114.

the CJEU set out a definition of the ‘subject matter’ of a patent, and stated that it is:

‘the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time either directly or by the grant of licences to third parties, as well as the right to oppose infringements’.<sup>34</sup>

Trademarks afford protection to signs capable of graphic representation used by traders to distinguish their goods from competing products. Copyright is intended to protect literary and artistic works against copying and to reward ability and skill, which will enhance the cultural life of the community. Design rights protect the shape or design of industrial products. Geographical Indications (GI) are forms of identification which identify a product as originating in a region or locality in a particular country. Usually, ‘know-how’ is also considered part of IPRs, broadly conceived. It is defined as any form of technical information or assistance relating to the manufacture and includes any practical knowledge, techniques, and skill that are required to achieve some practical end.<sup>35</sup>

Aside from the primary purpose of protecting and promoting ‘innovation’ in an overarching sense, IPRs are also territorial in nature, i.e. they confer protection on the rightsholder in a particular Member State, and they are exclusive, i.e. they give monopoly protection (provided that there are no adequate substitute technologies that might preserve the possibility of competition), for a limited period of time. This territorial nature of IPRs is inextricably linked to the fact that IP law has generally been created along national lines and drafted at the national level (albeit deeply influenced by international law, including the WIPO conventions and the WTO’s and TRIPS). Consequently, despite a certain degree of harmonisation occurring, particularly in the field of trademarks, there is still a fragmentation within the EU in this regard.<sup>36</sup> As such, this thesis takes a broad view of what IP encompasses,

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<sup>34</sup> Judgment of the Court of 31 October 1974, *Centrafarm v. Sterling*, Case 15-74, EU:C:1974:114, paragraph 9.

<sup>35</sup> For a general perspective see Lionel Bently and Brad Sherman, *Intellectual Property* (Oxford University Press, 2011).

<sup>36</sup> Directive 2008/95 to approximate the laws of the Member States relating to trade marks [2008] OJ L 299/25. See *inter alia* Hanns Ullrich, ‘Harmony and Unity of European Union Intellectual Property Protection’, in David Vaver and Lionel Bently, *Intellectual Property in the New Millennium* (Cambridge University Press, 2004) 20.

taking into account that '[n]one of the traditional or even emerging realisation for intellectual property rights fully or satisfactory account for all intellectual property regimes'.<sup>37</sup>

As noted above, this thesis does not delve into the debate on the philosophical nature and legal nature of IP.<sup>38</sup> Rather, as it will be discussed in Part I, the thesis builds upon this scholarly debate and embraces the well-established view that the right of authors and creators is a human right, while acknowledging the economic nature of the prerogatives attached to IPRs. This conceptual framing allows for a discussion that better encapsulates the complexity of the balance that must be achieved between IPRs and other human rights within EU agreements, which is the very purpose of this thesis.

## ***6.2. European Union International Agreements***

Part III of this thesis discusses a number of international agreements that the EU has completed with its various trading partners over the last twenty-plus years, after the conclusion of the TRIPS and until 1 September 2019. The various agreements were negotiated and concluded taking into account the WTO framework, in particular for this thesis, the multilateral framework of TRIPS. As such, the position of the EU must be highlighted. Within this framework, since the 1 January 2005, the EU (until 30 November 2009, the former European Communities) has been a member of the WTO. At the same time, the Member States were also WTO members in their own right. As a single customs union with a single trade policy and tariffs, the Union maintained a strong presence within the WTO in part due to its economic value. However, due to the WTO policy of 'One Nation, One Vote', the EU as entity did not have a vote *per se*, rather the European Commission — the EU's executive arm — spoke on behalf of all EU member States at almost all WTO meetings.

The agreements discussed in this thesis include both bilateral and multilateral Free

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<sup>37</sup> Peter S. Menell, 'Intellectual Property: General Theories' in Boudewijn Bouckaert and Gerrit De Geest, (eds), *Encyclopaedia of Law and Economics, Volume II. Civil Law and Economics*, (Edward Elgar 2000) 163. See also Chidi Oguamanam, 'Beyond Theories: Intellectual Property Dynamics in the global Knowledge Economy' (2009) 9(2) *Wake Forest Intellectual Property Law Journal* 5.

<sup>38</sup> *Inter alia* Alexandra George, *Constructing Intellectual*, (Cambridge University Press 2014).

Trade Agreements (FTA), Economic Partnership Agreements (EPA), as well as Association Agreements and Stabilisation Agreements under the European Neighbourhood Policy (ENP).<sup>39</sup> This approach allows to identify shifts in the EU policy concerning IPRs and to address how the EU has adapted to such shifts. While these agreements are not purely focused on IP, the latter is a growing component of the agreements.

### ***6.3 Human Rights within European Union Agreements***

This thesis examines the balance between the protection of IPRs and the enhancement of competing human rights in EU agreements. It acknowledges that human rights are divided into three broad generations, and that a fourth generation of rights is emerging.<sup>40</sup> The first includes civil and political rights such as the freedom of expression, the right to information, and the right to property. The second encompasses economic, social, and cultural rights, such as the right to health, the right to food, or the right to cultural expression. The third includes collective rights or ‘solidarity rights’,<sup>41</sup> such as the rights of indigenous peoples.<sup>42</sup>

Due to the broad formulation of human rights clauses in EU agreements, this thesis embraces the view that all three generations of human rights are protected by those clauses. However, the analysis does focus on those economic, social, and cultural rights, which are more impacted by a high level of IP protection.

Numerous commentators have analysed areas of overlap between human rights and IP from a variety of different perspectives.<sup>43</sup> Thus, this thesis builds upon that

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<sup>39</sup> The competence to compete each form of Agreement is discussed in detail in Chapter Four.

<sup>40</sup> Karel Vasak, "Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights", UNESCO Courier 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977, pp-29-32. For further discussion on this division of rights, see generally Uvin P. (2002) *From the Right to Development to the Rights-Based Approach: How ‘Human Rights’ Entered Development*. *Development in Practice* 17:598–599, Ishay M (2008) *The History of Human Rights*. Berkley, University of California Press.

<sup>41</sup> C. Welleman, ‘Solidarity, the Individual and Human Rights’ (2000) 22 *Human Rights Quarterly*, 639.

<sup>42</sup> This thesis also acknowledges the developing 4<sup>th</sup> Generation of human rights, which relates to the rights of humanity as a whole or the collective rights and assets of humanity. However, its development is outside the scope of this thesis.

<sup>43</sup> Robert D. Anderson and Hannu Wager, ‘Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy’ (2006) 9 *Journal of International Economic Law* 707; Philippe Cullet, *Human Rights and Intellectual Property in the TRIPS Era* (2007) 29 *Human Rights Quarterly* 403; Hans Morten Haugen, ‘Human Rights and TRIPS

analysis and focus on when ‘intellectual property rights are used excessively and contrary to their functions’ within EU agreements.<sup>44</sup> It also analyses, in Part III, the consequences on human rights protection of ‘unbalanced [IPRs clauses], often itself an unfortunate consequence of heavy lobbying on the part of [IPRs ] holders’.<sup>45</sup>

#### ***6.4. The Chronological Scope***

The thesis adopts a wide chronological scope by analysing the TRIPS-Plus provisions over the last two decades, in order to detect trends and patterns. This chronological scope allows for a robust and detailed study of the development of IPRs in EU agreements. This thesis includes completed and officially published agreements, but also include those whose ratification is pending, as each final agreement has a knock-on effect on concurrent or those concluded soon after.

In particular, this thesis examines agreements concluded by the EU and its various trading partners from 1 January 1995 until 1 September 2019. These dates reflect the entry into force of TRIPS, the benchmark upon which the later agreements are measures against and the creation of the WTO in 1995. From this period, both the EU and the Member States were of the WTO.

The cut-off date allows the project to address the most recent agreements concluded by the EU in light of its modern constitutional competences in the field of external action.

### **7. Research Methodology**

This thesis builds upon the scholarly work conducted in the fields of EU external relation law, and EU law more broadly, as well as within IP and human rights literature, in order to bring together and forward those different strands of academic legal research. This thesis is based upon a doctrinal research methodology. Gerstel

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Exclusion and Exception Provisions’ (2008) 11 Journal of World Intellectual Property.

<sup>44</sup> Christophe Geiger, ‘Fundamental Rights: A Safeguard for the Coherence of Intellectual Property Law?’ (2004) 35 International Review of Intellectual Property and Competition Law 268, 278.

<sup>45</sup> Estelle Derclaye ‘Intellectual Property Rights and Human Rights: Coinciding and Cooperating’ in Paul Torremans (ed), Intellectual Property and Human Rights: Enhanced Edition of Copyright and Human Rights (Wolters Kluwer, 2008) 141.

and Melitz describe a doctrinal research methodology as ‘arguments... derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications’.<sup>46</sup> In line with this understanding, the thesis draws on the EU's agreements as the ‘supplier of concepts, categories, and criteria’.<sup>47</sup> Palmer notes ‘there are theoretically no stopping points to the pursuit of information about legal rules’.<sup>48</sup> This research, therefore will not be limited to primary sources such as the agreements themselves, related case law of the Court of Justice of the European Union (CJEU), WTO Panel and Appellant Body’s reports, as well as a wide range of secondary sources, such as academic works, publications governments’ or international institutions’ publications, and stakeholders documents. Hutchinson suggests that:

‘[d]octrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials’.<sup>49</sup>

Consistent with this understanding of doctrinal research, the various agreement provisions will be assessed or measured against the rules of TRIPS and their impact of trade, their enforceability of international IP law, their general operational ability in relation to conflicts with human rights obligations, and if such provisions create a conflict with the terms and obligations of TRIPS. Moreover, they will be evaluated, *vis-à-vis* the constitutional objectives of the EU.

This methodological choice is based on several considerations. First, whilst legal scholarship has gradually become more receptive towards methodologies used in

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<sup>46</sup> Rob van Gestel and H.-W. Micklitz, ‘Revitalizing Doctrinal Legal Research in Europe: What About Methodology?’, European University Institute Working Papers Law (2011)/05. 26.

<sup>47</sup> Pauline Westerman, ‘Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law’ in Mark Van Hoecke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 94. Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012)17(1) Deakin Law Review 83, 118 While Hutchinson and Duncan describe the methodology as ‘a critical, qualitative analysis of legal materials that supports a hypothesis’.

<sup>48</sup>Vernon Valentine Palmer, ‘From Lerotholi to Lando: Some Examples of Comparative Law Methodology’ (2004) 4(2) Global Jurist Frontiers 1, 27.

<sup>49</sup> Terry Hutchinson, ‘Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era’, (2014) 106(4) Law Library Journal 579, 584. See also Council of Australian Law Deans, Statement on the Nature of Legal Research (May and October 2005) <<https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf>>

other social sciences, the doctrinal method remains ‘the core legal research method’.<sup>50</sup> In this respect, despite the rise in popularity of interdisciplinary studies,<sup>51</sup> doctrinal research remains a worthy methodology for legal analyses.<sup>52</sup> Secondly, in this thesis, the doctrinal methodology is best suited to support ‘a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation’.<sup>53</sup> Thirdly, the choice of a doctrinal methodology, over a socio-legal, fits well with the theoretical framework chosen and allows to evaluate the balance between IPRs and human rights within the various agreements, in light of the overall EU constitutional development.<sup>54</sup>

## 8. Structure of the Thesis

Following on from these introductory remarks, this thesis adopts a tripartite structure. Part I consists of Chapter One and provides the background and context of the development and interaction of IP at the international level. It focuses on and underlines the centrality of IP within the global economy as well as its historical

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<sup>50</sup> Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2011) 17(1) Deakin Law Review 83, 85.

<sup>51</sup> Terry Hutchinson, ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ (2015) 3 Erasmus Law Review, 130, 130. Hutchinson notes that ‘legal scholars are endeavouring to accommodate statistics, comparative perspectives, social science evidence and methods, and theoretical analysis’>.

<sup>52</sup> Christopher McCrudden, ‘Legal Research and the Social Sciences’ [2006] Law Quarterly Review 632, 648. McCrudden argues that ‘[i]f legal academic work shows anything, it shows that an applicable legal norm on anything but the most banal question is likely to be complex, nuanced and contested’. Terry Hutchinson, ‘The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law’ (2015) 3 Erasmus Law Review 130.

<sup>53</sup> Terry Hutchinson, ‘Valé Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era’, (2014) 106(4) Law Library Journal 579, 584. See also Council of Australian Law Deans, Statement on the Nature of Legal Research (May and October 2005) <https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf> accessed 10 January 2018 ‘Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials’.

<sup>54</sup> J.B.M Vranken, ‘Methodology of Legal Doctrinal Research’ in M.A.A Hoeke (ed), *Methodologies of Legal Research Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2010) 114. Hoeke puts forward a new approach to reflect the unique position of the EU as an entity and collection of the Member States in international developments. Hoeke suggest that ‘[a] newer, and more difficult, approach is to view private law in Europe as a single, multi-layered system, in which elements of public and private law, procedural law and substantive law, national law and European law, state and non-state law must be forged into a new whole’. Also see. Martijn W. Hesselink, ‘A European Legal Method? On European Private Law and Scientific Method’ (2009) 15(1) European Law Journal 20.

development. In doing so, Chapter One examines the linkage between IP and trade, as well as the subsequent growth of IP as a concept and body of law as it became a key component in the global trade agenda. In doing so, this chapter looks at the development of TRIPS and its subsequent development which shapes the rest of the Thesis. Further, Part I weighs in on the debate surrounding IP and human rights. In particular, this includes the examination of whether and to what extent IP can be considered a human right. It concludes by providing the scope and context for Parts II and III, focusing on the EU's role in developing the IP agenda.

Part II builds upon the analysis conducted within the preceding Part, and focuses upon the EU's legal framework, investigating the position of IP and human rights within the EU's legal order. It then concludes with an examination of the growth and development process of the EU competence for IP and human rights as part of its External Action Policy. Chapter Two serves to develop and chart the position of IP within the EU throughout the Treaty changes and how the role of the CJEU has affected this position. Furthermore, this chapter provides further context for Part II, as it highlights the implementation of WTO obligations and International IP provisions within the EU. Chapter Three illustrates a similar development of human rights within the EU. This chapter looks at the changes to the EU and human rights across the Treaties. Additionally, it discusses how, having accepted it as such, IP as a human right exists within this same legal order. On the whole, Chapters Two and Three provide the context for the subsequent discussion, which is conducted in Chapter Four, of the relevant EU external competences. The latter chapter discusses the development of the EU external competences in general fashion as they developed as the Treaties changed. In particular, Chapter Four looks the development of IP within the Common Commercial Policy of the EU and ends with a brief overview of how the Treaty have attempted to embed human rights within the EU External Relations Policy. In doing so, this chapter provides the necessary background for Part III.

Part III develops upon the arguments and analyses outlined within its predecessors by assessing the TRIPS-Plus obligations in the EU agreements and the progressive inclusion of human rights clauses within these agreements. Chapter Five addresses the development of TRIPS-plus provisions within the agreements negotiated and concluded by the EU with its various trading partners. Firstly, it chronologically

examines the progressive inclusion of TRIPS-plus provisions from TRIPS until 2019. Secondly, Chapter Five tests whether the inclusion of the TRIPS-plus provisions serves to enhance trade, restrict trade, or a combination of both. A sixth and final chapter complements the analysis undertaken in Chapter Five by examining the progressive inclusion of human rights clauses with the same agreements and the effect they may have on the implementation of the TRIPS-plus provisions. Part III also cumulatively evaluates the appropriateness of the inclusion and operation of these human right clauses, building on the work of the previous Parts.

The thesis then concludes by addressing the two central research questions

- Does the inclusion of TRIPS-plus provisions within the various EU agreements considered within this research serve to increase IP protection?
- If IP protection has increased, to what extent does this increased protection conflict with the protection and promotion of other human rights within the EU's external action?

The conclusion also offers avenues for further research and development of the topic as a whole. It then reflects on the limitation of the scope and the difficulties of this study, before offering some final remarks, including commentary on the upcoming trade agreements and what can be learned from this thesis

## **9. Contribution to the State of Art**

This thesis seeks to advance the current state of the art in several fields related to the core research questions. To achieve this goal, it builds upon the existing scholarship across many areas of law, namely IP law, EU law and Human Rights Law, while concurrently providing additional avenues for further research.

Firstly, this thesis charts the development of TRIPS-plus provisions within the various EU agreements from the implementation of TRIPS to the current conclusion of agreements. While other studies have examined the inclusion of TRIPS-plus provisions within international agreements,<sup>55</sup> these studies have not been conducted

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<sup>55</sup> Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press 2016); Josef Drexler, Henning Grosse Ruse-Khan, and Souheir Nadde-Phelix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?*

in a systematic and comprehensive fashion (as this thesis does), and they do not focus on EU agreements. In this respect, this thesis attempts an unprecedented systematisation, identifying three eras in the development of IP provisions in EU agreements. Moreover, in order to deepen the understanding of the rationale for the inclusion of TRIPS-plus provisions, it provides a critical analysis of the content of IP chapters.

Secondly, the study is anchored in and conducted through the perspective of EU law and links the development of IP provisions in EU agreements to the EU constitutional development of the EU. This approach involves a comprehensive analysis of the EU's internal understanding of both IP and human rights, the constitutional development of the EU legal order as a result of the Treaty changes, and the development of the EU's external action policy.<sup>56</sup> While there are significant studies in each of these areas,<sup>57</sup> they do not engage with TRIPS-Plus provisions in EU agreements as such. For example, Tanghe,<sup>58</sup> Wilińska-Zelek and Malaga,<sup>59</sup> have explored IP external competences but without discussing in-depth IP clauses in EU agreements. In that, this thesis displays a significant innovative value.

Thirdly, this thesis builds upon the seminal work conducted by IP scholarship on the intersection of IP and human rights and expands upon this work in several ways.<sup>60</sup> Differently from other studies that focus on EU internal dimension, such as that recently published by Sganga,<sup>61</sup> this thesis focuses on the EU's external action.

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(Springer, 2014); Hanns Ullrich, Reto M. Hilty, Matthias Lamping, and Josef Drexl (eds), *TRIPS plus 20* (Springer 2016).

<sup>56</sup> Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press, 2008)

<sup>57</sup> Eleftheria Neframi, 'The Competence to Conclude the New Generation of Free Trade Agreements: Lessons from Opinion 2/15' in Juien Chaisse (ed), *China-European Union Investment Relationships* (Elgar Edwards 2018); Marise Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore' (2018) 14(1) *European Constitutional Law Review* 231.

<sup>58</sup> Yole Tanghe, 'The Borders of EU Competences with Regard to the International Regulation of Intellectual Property Rights: Constructing a Dam to Resist a River Bursting Its Banks' (2016) 32(82) *Utrecht Journal of International and European Law* 27.

<sup>59</sup> Anna Wilińska-Zelek and Miłosz Malaga, 'EU Competence and Intellectual Property Rights. Internally Shared, Externally Exclusive?' (2017) 1, *Środkowoeuropejskie Studia Polityczne* 27.

<sup>60</sup> Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2012); Laurence R. Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence?' (2003) 5 *Minnesota Intellectual Property Law Review* 47; Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015).

<sup>61</sup> Caterina Sganga, *Propertizing European Copyright. History, Challenges and Opportunities*

Previous research has also mostly examined single IPRs, e.g. copyright or patent.<sup>62</sup> In that, the overall approach of this thesis departs significantly from previous research by examining the IP clauses in their complexity, while highlighting issues which may occur in respect to distinct elements of IP.

On the whole, this thesis puts forward an unprecedented comprehensive analysis of the EU's development as an international actor in the field of IP, and discusses how this impacts on the EU commitment to promoting human rights.<sup>63</sup> This analysis looks at how the EU has acted over the past twenty-five years with its various trading partners and the legacy it has created. Further, this analysis presents guidance on how the EU is likely (and possibly will) act in future trade agreements.

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(Edward Elgar, 2018).

<sup>62</sup> Eleonora Rosati, 'Copyright in CJEU Case Law: What Legacy?' (2019) 14(2) *Journal of Intellectual Property Law and Practice* 79; Christophe Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' in Irini A. Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016); Marcella Favale, Martin Kretschmer and Paul C. Torremans, 'Is there an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2016) 79(1) *Modern Law Review* 31.

<sup>63</sup> Hanns Ullrich, Reto M. Hilty, Matthias Lamping, and Josef Drexl (eds), *TRIPS plus 20* (Springer 2016); Josef Drexl, Henning Grosse Ruse-Khan, and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer, 2014).

# **Part I**

## **The International Context**

# -Chapter One -

## Putting TRIPS-Plus in Context: The Development of International Intellectual Property Law

### 1. Introductory Remarks

This thesis builds on the observation that the inclusion of TRIPS-Plus provisions in European Union (EU) international agreements has been prompted by developments that have occurred at the international level, especially within the World Trade Organization (WTO) to which the EU (alongside its Member States) is a party. The growing importance of intellectual property (IP) in the contemporary world and the global expansion of IP law have been significant factors in influencing the centrality of IPRs within the EU's external action agenda.<sup>1</sup> This chapter provides the foundations for the analysis conducted throughout the remainder of the thesis by detailing the international IP legal framework, as well as its development throughout history. In particular, it focuses on the international context in its first half, exploring the genesis of IP law in the international sphere to the introduction of TRIPS and further developments. This chapter does so in order to situate the main research questions of the thesis. In the second half, it moves on to provide an analysis of the role of the EU within such an international context. This in-depth analysis will provide the necessary background for the discussion of the pertinent EU agreements for the purposes of this study, which is conducted in Part III of this thesis.

Further to these introductory remarks, Section 2 discusses the growth of IP protection within the international trade framework. It aims to highlight the context in which IP clauses have been progressively (and somewhat aggressively) included

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<sup>1</sup> The development of IPRs within the EU's external action agenda, as well as the respective competence do so is discussed in detail *infra* Chapter Four.

in the various agreements that the EU has concluded with its trading partners. A third section provides a diachronic overview of the development of international IP law. It addresses the development of the applicable IP regimes, as well as the underlying motives for the shift towards the introduction of higher standards of protection. Section 4 then examines, on the one hand, the extent to which IP falls within the realm of human rights and, on the other, the potential conflict between IP and other human rights. Section 5 builds upon its predecessor, by examining the conflict between IP and specific human rights such as:

- The right to participate in culture
- The right to health
- The right to food
- The right to freedom of expression
- The right to education
- The rights of Indigenous Peoples

A sixth section draws the analysis away from this broader international context and underlines the important role that the EU has played in the development of international IP law. The chapter then concludes with some general remarks on IP international regimes, as well as providing some strands for further study that will be developed in later chapters.

## **2. Intellectual Property as a Cornerstone of the World Economy**

IP is not an invention of contemporary international law.<sup>2</sup> One of the first recorded instances of what would now be considered IP infringement can be traced back to 6th century Ireland. This related to the copying of the *Cathach* manuscript in secret and without permission by the Irish monk Columcille.<sup>3</sup> Following a dispute over ownership of the copied version, the matter was brought before the local chieftain

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<sup>2</sup> Amir H. Houry, 'Ancient and Islamic Sources of Intellectual Property Protection in the Middle East: A Focus on Trademarks' (2003) 43 IDEA; The Journal of Law and Technology 151, 155-156.

<sup>3</sup> The *Cathach* is a famed section of the Bible containing a vulgate version of Psalms 10-13, located at the monastery of Finian Merville in 6th century Ireland.

who ruled: '[t]o every cow its calf, to every book its copy'.<sup>4</sup> The purpose of this judgment was to attribute ownership of both the original version of the work and the copy to the original creator. Consequently, it can be said that the impetus for the creation of IP aims to strike a balance between the need for protection of the owner of the work on the one hand, and the right of others to access the material created on the other.

In a contemporary world, this balance has become even more complicated with the ever-increasing number of potentially interested parties.<sup>5</sup> From two monks and a local chieftain, IP is discussed in the context of over 150 nations, countless multinational corporations, hundreds of international organisations, and thousands of NGOs and interested third parties. IP now accounts for a sizeable portion of the economy of many developed nations. Recent studies have highlighted the significant growth of IP over the last decade: in 2013, for example, the Commission on the Theft of American Intellectual Property<sup>6</sup> published a report that IP and IP-intensive industries accounted for an estimated 40% of trade by the United States.<sup>7</sup> Similarly, a joint study published in 2013 by the European Union Patent Office (EPO) and Office for Harmonization in the Internal Market (OHIM)<sup>8</sup> found that between 2008-2010 IP and IP-intensive industries accounted for an estimated 29% of job creation and an estimated €4.7 trillion or 39% of the GDP of the European Union.<sup>9</sup> The growing importance of IP in the world economy has gone hand in hand with a growing public awareness of IPRs and their economic backlash as a result of

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<sup>4</sup> Charleton J quoting St. Colmcille's aphorism '*Le gach bó a buinín agus le gach leabhar a chóip*' in *EMI (Ireland) Ltd and Ors v. Eircom Ltd* (2010) IEHC 108 at paragraph 28.

<sup>5</sup> Carolyn Deere, *The Implementation Game. TRIPS and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) 129.

<sup>6</sup> The Commission on the Theft of American Intellectual Property is an independent and bipartisan initiative of leading Americans from the private sector, public service in national security and foreign affairs, academic, and politics.

<sup>7</sup> The Intellectual Property Commission Report 'The Report of the commission on the Theft of American Intellectual Property' <[http://www.ipcommission.org/report/ip\\_commission\\_report\\_052213.pdf](http://www.ipcommission.org/report/ip_commission_report_052213.pdf)>.

<sup>8</sup> European Patent Office and the Office for Harmonization in the Internal Market, 'Intellectual Property Rights Intensive Industries: Contribution to Economic Performance and Employment in the European Union' <[https://oami.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/resources/home/joint\\_report\\_epo\\_ohim\\_en.pdf](https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/home/joint_report_epo_ohim_en.pdf)>.

<sup>9</sup> However, these TRIPS-Plus provisions in international Agreements seem to have enhanced a phenomenon of cross-fertilisation, and Molly Land notes that many developing nations are currently introducing domestic legislation which is seen as 'over compliance with TRIPS'. Molly Land, 'Adjusting TRIPS for Development' New York Law School Legal Studies Research Paper Series 12/13 Number 47, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2178023](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178023)> 4

their infringement. This backlash primarily stemmed from a series of high profile cases by the Recording Industry Association of America towards users of the peer to peer software Napster.<sup>10</sup> Consequently, public engagement increased in areas such as geo-blocking of content on the internet,<sup>11</sup> the public campaign for the extension of copyright terms for music in the EU,<sup>12</sup> and the mass protest organised against attempts to bring the discussion of IP protection and enforcement levels out from behind closed doors.<sup>13</sup>

The economic importance of IP explains why many of the developed nations prompted the adoption of international treaties regulating IPRs and steadily pushed for increased IP protection and enforcement measures at the international level.<sup>14</sup> The main international instrument governing IP is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),<sup>15</sup> which was negotiated and implemented under the World Trade Organisation (WTO)<sup>16</sup> during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT)<sup>17</sup> in 1994.<sup>18</sup> Many of the developed nations of the WTO faced internal pressure from IP-dependent industries to seek higher international standards of IPRs. Such industries argued, and continue to do so, that discrepancies within and among national and international standards in IPRs were harming economic growth. For example, the

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<sup>10</sup> This approach to combat IP infringement was negatively perceived by the media and the public due to the aggressive levels of litigation by the RIAA, often resulting in legal actions against families for sums in the hundreds of thousands of dollars. Nate Anderson, 'Has the RIAA sued 18,000 people... or 35,000?' <<http://arstechnica.com/tech-policy/2009/07/has-the-riaa-sued-18000-people-or-35000/>>.

<sup>11</sup> Mark Walton, 'EU hits Sky and Hollywood with antitrust complaint over pay-TV geoblocking' (Arstecnica, 23 July 2015) <<http://arstechnica.co.uk/tech-policy/2015/07/eu-hits-sky-and-hollywood-with-antitrust-complaint-over-pay-tv-geoblocking/>>.

<sup>12</sup> Rory Cellan-Jones, 'Victory for Cliff's law' (BBC, 7 September 2011) <<http://www.bbc.com/news/technology-14829373>>.

<sup>13</sup> David Lee, 'ACTA protests: Thousands take to streets across European Union rope' (BBC, 8 March 2012) <<http://www.bbc.com/news/technology-16999497>>. Charles Author, 'Acta criticised after thousands protest in European Union rope' (The Guardian, 13 February 2012) <http://www.theguardian.com/technology/2012/feb/13/acta-protests-europe>; Annika Glatz, 'Interest Groups in International Intellectual Property Negotiations' 2012 SECO / WTI Academic Cooperation Project Working Paper Series 7 / 2012 WI paper, 17 <[http://www.wti.org/fileadmin/user\\_upload/wti.org/7\\_SECO-WTI\\_Project/Publications/Paper%20Draft1%20Annika%20Glatz%20WTI.pdf](http://www.wti.org/fileadmin/user_upload/wti.org/7_SECO-WTI_Project/Publications/Paper%20Draft1%20Annika%20Glatz%20WTI.pdf)>.

<sup>14</sup> This will be further discussed in Section 3.

<sup>15</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the WTO Agreement (Marrakesh, 15 April 1994, 1869 U.N.T.S 299).

<sup>16</sup> World Trade Organisation (Marrakesh, 15 April 1994, 1867 U.N.T.S 154).

<sup>17</sup> General Agreement on Tariffs and Trade 1994 (Marrakesh, 15 April 1994, 1867 U.N.T.S 190).

<sup>18</sup> General Agreement on Tariffs and Trade 1994 (Marrakesh, 15 April 1994, 1867 U.N.T.S 190).

U.S. sought to prevent the so-called ‘free-riding’ of developing nations,<sup>19</sup> particularly by South East Asian countries. This pressure, mounted by IP-centred industries, was subsequently strengthened with a shift in the economies of developed nations towards more knowledge-intensive production. The U.S. then began to focus more closely upon and recognise the economic importance of the protection of IPRs, with some scholars arguing that this constituted the major driver of global IP protection.<sup>20</sup> Within this shift is a clear desire for increased protection of IP, and the first attempts to link IP with trade.

TRIPS set down a minimum standard for IP protection and enforcement for all Member States of the WTO. However, while TRIPS was accepted and ratified by all members of the WTO, it was faced many obstacles in its implementation. Many of the developing nations found the provisions too restrictive and believed that it would hamper their potential for economic growth. Conversely, developed nations sought higher levels of protection in order to solidify and ensure their economic power. The time frame that allowed for the implementation of TRIPS provisions also resulted in a very different economic climate from that of the ratification period.<sup>21</sup> Overall, dissatisfaction with certain aspects of TRIPS grew and prompted calls for revisions in the subsequent Doha Development Round of negotiations.<sup>22</sup> However, this would ultimately be delayed, and later abandoned, due to an increased focus on problems related to agricultural trade policies, anti-dumping, and a general division between developed and developing nations on a wide range of issues rather than a central conflict over IP matters.<sup>23</sup>

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<sup>19</sup> In this thesis the term ‘developing nations’ or ‘developing countries’ is used in a general fashion with reference to the ‘self-classification’ expressed by countries themselves in the WTO. See further at <[https://www.wto.org/english/tratop\\_e/devel\\_e/dlwho\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm)>.

<sup>20</sup> Jerome H. Reichman, ‘Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow’ (2009) 46(4) *Houston Law Review* 1115. One must also be aware, this shift to ensuring protection was a relatively recent development. See generally, John Steele Gordon, *Empire of Wealth: The Epic History of American Economic Power* (Harper Perennial, 2005); B. Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920* (Cambridge University Press, 2005)

<sup>21</sup> Henning Grosse Ruse-Khan, ‘Intellectual Property and Trade in a Post-TRIPS Environment’ in Hanns Ullrich, Reto M. Hilty, Matthias Lamping, and Josef Drexel (eds), *TRIPS Plus 20* (Springer 2016) 170. Ruse-Khan notes that the ‘tendencies to agree to additional “TRIPS-Plus” IP protection and enforcement rules in international treaties has created a vast network, commonly referred to as a “spaghetti bowl” of bilateral and regional treaties with often different standards and norms. In addition, unilateral advances serving the needs of domestic IP holders complicate the picture’. This expansion and creation of TRIPS-Plus is discussed in detail below.

<sup>22</sup> Doha Declaration of the TRIPS Agreement and Public Health (Doha, 14 November 2001, WT/MIN(01)/DEC/2).

<sup>23</sup> Alasdair R. Young, ‘Trade Politics Ain’t What It Used to Be: The European Union in the Doha

Thus, it is of little surprise that ‘no interest group involved felt truly satisfied with the outcome and consequently searched for ways to reshape the status quo towards their interests’.<sup>24</sup> From its negotiation and entry into force, TRIPS has faced calls for revisions or alterations to existing IP protection standards, both for the introduction of ever-higher standards and for wider exceptions and allowances to reflect shifts in society. It is also of little surprise that due to a lack of results achieved by TRIPS, as well as the lack of convergence and agreement, some of the Member States of the WTO took it upon themselves to develop so-called ‘TRIPS-Plus’ provisions to address the problem areas they felt had arisen since the finalisation of TRIPS.

It is widely acknowledged that the creation, development, and proliferation of TRIPS-Plus provisions have been necessitated by the fact that lawmaking under the WTO has stalled.<sup>25</sup> The development of new markets and technology quickly contributed to making TRIPS outdated. The primary cause of TRIPS falling out of sync with global trends was in the phrasing of TRIPS itself. Although TRIPS was an international document, it was more regionally focused, or, as Dinwoodie and Dreyfuss suggest, ‘the drafters of TRIPS were heavily focused on local infringement’ rather than the global scale of infringement and engagement, which would later develop.<sup>26</sup> The strength and effectiveness of TRIPS were subject to further challenge by the then unforeseen rise of the world wide web. In this respect, Yu suggests that ‘the arrival of the World Wide Web had rendered TRIPS obsolete even before it entered into effect’.<sup>27</sup>

Similarly, Hamilton states that TRIPS was already outdated by the time it arrived ‘despite its broad sweeps and its unstated aspirations’.<sup>28</sup> The effectiveness of TRIPS

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Round' (2007) 45(4) *Journal of Common Market Studies*, 789; Sungjoon Cho, 'The Demise of Development in the Doha Round Negotiations' (2010) 45 *Texas International Law Journal* 57.

<sup>24</sup> Annika Glatz, 'Interest Groups in International Intellectual Property Negotiations' 2012 SECO / WTI Academic Cooperation Project Working Paper Series 7 / 2012 WI paper, 17 <[http://www.wti.org/fileadmin/user\\_upload/wti.org/7\\_SECO-WTI\\_Project/Publications/Paper%20Draft1%20Annika%20Glatz%20WTI.pdf](http://www.wti.org/fileadmin/user_upload/wti.org/7_SECO-WTI_Project/Publications/Paper%20Draft1%20Annika%20Glatz%20WTI.pdf)>.

<sup>25</sup> Stephan Castle and Mark Landler, 'After 7 Years, Talks Collapse on World Trade' <[http://www.nytimes.com/2008/07/30/business/worldbusiness/30trade.html?\\_r=0](http://www.nytimes.com/2008/07/30/business/worldbusiness/30trade.html?_r=0)>.

<sup>26</sup> Graeme B. Dinwoodie and Rochelle C. Dreyfuss, 'Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond' (2009) 46 (4) *Houston Law Review* 1187, 1217.

<sup>27</sup> Peter K Yu, 'The International Trade Cat and the Digital Copyright Mouse' in Bryan Mercurio and Kuei-Jung Ni (eds), *Science and Technology in International Economic Law* (Routledge, 2015) 187

<sup>28</sup> Marci Hamilton, 'TRIPS: Imperialistic, Outdated, and Overprotective' (1996) 29 *Vanderbilt*

was further called into question following the WTO Dispute Settlement Body (DSB)<sup>29</sup> interpreting the flexibilities ‘so narrowly that Member States cannot otherwise adapt their laws to new circumstances’.<sup>30</sup>

The inability for the DSB to adapt and adjust the provisions of the WTO treaties led many nations to look elsewhere as ‘market forces and technology have moved beyond our current laws and are now in conflict with them’.<sup>31</sup> In recent years, a number of developed countries have taken steps to redress the stalled law-making process within the WTO by negotiating outside of its structures. There have been increased efforts to advance IP protection through TRIPS-Plus provisions, coming from developed nations who feel TRIPS did not go far enough and are seeking stronger revisions in light of current and projected future economic trends. In other words, this can be considered an attempt by many developed nations to compete with the economies of developing nations.<sup>32</sup> Developed nations, through multinational corporations and a process of knowledge sharing, put forward the argument that IP is part of their trade and economic power, that it is ‘symbolically significant as it reinforces the impression that ‘intellectual property’ is a coherent object and that it has an inherent relationship with trade’.<sup>33</sup> Rather than compete against the labour costs of developing nations, developed countries are seeking to use IP to gain a competitive edge,<sup>34</sup> and the desire to increase IPRs is a means of consolidating and concretizing this competitive edge.<sup>35</sup>

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Journal of Transnational Law 613, 614–615.

<sup>29</sup> Previously governed by the GATT, and later by the WTO, the Dispute Settlement Body is responsible for mediating and resolving disputes between members regarding alleged violations of agreements or commitments made in the WTO. This is now considered to be one of the core aspects of the WTO. The DSB is authorised to suspend concessions, following the non-compliance of its recommendation and rulings on the disputed matter.

<sup>30</sup> Graeme B. Dinwoodie and Rochelle C. Dreyfuss, ‘Designing a Global Intellectual Property System Responsive to Change: The WTO, WIPO, and Beyond’ (2009) 46(4) *Houston Law Review* 1187, 1191.

<sup>31</sup> William Patry, *How to Fix Copyright* (Oxford University Press 2011) 2.

<sup>32</sup> Carolyn Deere, *The Implementation Game. TRIPS and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009) 107.

<sup>33</sup> Alexandra George, *Constructing Intellectual*, (Cambridge University Press 2014) 44.

<sup>34</sup> Developed nations are unable to compete with developing nation in the production of goods due to lower labour and manufacturing costs in the developing nation. As such, many developed nations are seeking to use IP as a means of preserving their economic competitive edge. As new technology is become an ever increasingly important part of production, many developed nations are seeking to develop technology and hold the patents on such technology to prevent its use by developing nations.

<sup>35</sup> Susan Sell, ‘Industrial Strategies for Intellectual Property and Trade: The Quest for TRIPS, and Post TRIPS Strategies’ (2002) 10 *Cardozo Journal of International and Comparative Law* 79.

### **3. Overview of International Intellectual Property Law**

Having highlighted the growing importance of IP in the global economy and the need for regulation at the global level, this section examines the development of international IP law chronologically. It briefly examines the most important milestones, building upon the general discussion carried out in Section 2, and highlights the role of different international organisations (namely the World Intellectual Property Organisation -WIPO and the WTO) in these developments.

#### ***3.1. Historical Origins of International Intellectual Property Law***

Starting in the 19<sup>th</sup> century with the Paris Convention<sup>36</sup> and the subsequent Berne Convention,<sup>37</sup> the possibility of drafting international conventions to regulate and codify IP protection came to the forefront of discussions in international fora.

The first international treaty addressing IP issues was the Paris Convention signed in 1883 by Belgium, Brazil, France, Guatemala, Italy, the Netherlands, Portugal, El Salvador, Serbia, Spain and Switzerland. The Paris Convention, which was amended several times following its initial approval, applies to industrial property including but not limited to patents, trademarks, industrial designs, utility models, service marks, trade names and geographical indications. This broad scope illustrates the early links between the commercial aspects of IP and the protections afforded. The Convention set out three main substantive obligations. First, the Parties must respect the concept of national treatment and apply equal protection to national and non-nationals in respect of the protection afforded to industrial property within the jurisdiction. Furthermore, the contracting parties are obligated to provide for the right of priority in relation to patents, trademarks, and industrial designs. This right implies that the applicant may, within a certain period of time (12 months for patents and utility models; 6 months for industrial designs and marks), apply for protection in any of the other States Parties. Such subsequent registration is, however, considered valid from the date of registration in the

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<sup>36</sup> Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883, last revised at Stockholm on 14 July 1967 and amended in 1979, 828 U.N.T.S 306).

<sup>37</sup> Berne Convention for the Protection of Literary and Artistic Works (Berne, September 9 1886, last revised at Paris on July 14 1967 and amended in 1979, 1161 U.N.T.S. 30).

primary State Party. In that regard, the Convention aims to simplify the process for establishing multi-jurisdictional protection of industrial property. Finally, the Paris Convention obliges States Parties to follow a number of common rules concerning the application and operation of protections afforded to the IP that the Convention protects.

The Berne Convention was subsequently approved and signed by Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia, and the United Kingdom. The Berne Convention came about as a result of the success of the Paris Convention, as well as of the dedicated and coordinated efforts by the *Association Littéraire et Artistique Internationale* (ALAI) to harmonise and coordinate the process and protections afforded through the copyright of literary work. Key elements of this process related to the standardisation of copyright terms between parties to the Convention, the mutual recognition of copyright recognised by Parties to the Convention, the automatic creation of copyright of the work upon creation and the prohibition of requiring authors to apply for the copyright. One interesting development within the Berne Convention was the different, and often culturally-specific, philosophical rationales for this new instrument that the parties brought to the table. This is particularly evident within the sharp division between the purely economic right of the author established in the United Kingdom and the French understanding of *droit d'auteur* (right of the author).

The Berne Convention is based on three main principles. First, literary and artistic works originating in one of the States Parties must be given the same protection in each of the other States Parties (principle of national treatment). Secondly, this protection must not be conditional upon compliance with any formality (principle of automatic protection). Thirdly, such a protection is independent from protection in the country of origin of the work (principle of independence of protection). Subject to certain limitations or exceptions, the exclusive rights that must be recognized include: the right to translate, the right to make adaptations and arrangements of the work, the right to perform and recite works in public, the right to communicate to the public the performance of those works, the right to broadcast and the right to make reproductions in any manner or form, as well as the right to use the work as a basis for an audiovisual work, and the right to reproduce that audiovisual work. Importantly, the Convention also provides for ‘moral rights’ (i.e.

the right to claim authorship of the work and the right to object to any modification of the work). In that, the Berne Convention has clearly opted for the French understanding (i.e. author's rights model).

From this origin, there has been a steady increase and revision in the level of protection of IPRs as a 'logical and welcome development in the view of the growing size and importance of international communication and trade'.<sup>38</sup> Repeated revisions of the Conventions were subsequently carried out as new technology arose, and new avenues of infringement opened. Such revisions sought stricter terms of IP to combat this ever-growing level of infringement.<sup>39</sup>

### ***3.2. The Set-up of the World Intellectual Property Organisation***

One of the most significant developments in the emergence of international IP law was the creation of the World Intellectual Property Organisation (WIPO) through the Convention Establishing the World Intellectual Property Organization in 1970.<sup>40</sup> The organisation itself serves as the successor to the United International Bureaux for the Protection of Intellectual Property (BIRPI), which had been created to administer the Berne Convention in 1893. Originally, WIPO continued to operate the mandate it had inherited from the BIRPI. However, in part as a response to the growing importance of IP, WIPO became a specialised agency of the UN in 1974. At that time, WIPO was assigned an ambitious and expanded objective of:

‘...promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development, subject to the competence and responsibilities of the United Nations and its organs, particularly the United Nations Conference on Trade and Development, the United Nations Development Programme and the United Nations Industrial

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<sup>38</sup> Henning Grosse Ruse-Khan and Annette Kur, 'Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection' Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-01 <<http://ssrn.com/abstract=1326429>>.

<sup>39</sup> For example, the exceptions to copyright protection afforded to news content were repeatedly narrowed during revisions to the Berne Convention, Sara Bannerman, *International Copyright and Access to Knowledge* (Cambridge University Press 2016) 84-95.

<sup>40</sup> Convention Establishing the World Intellectual Property Organization (Stockholm, 14 July 1967 828 U.N.T.S. 5).

Development Organization, as well as of the United Nations Educational, Scientific and Cultural Organization and of other agencies within the United Nations system'.<sup>41</sup>

Since its creation, the WIPO has continued to advance its objectives through various policy initiatives and treaties.<sup>42</sup> As it will be discussed further in subsection 3.6, in order to address the question of copyright infringement in relation to digital activities, in 1996, WIPO introduced what are informally referred to as the WIPO Internet Treaties. This encompassed the World Intellectual Property Organization Copyright Treaty (WCT)<sup>43</sup> and the WIPO Performances and Phonograms Treaty (WPPT).<sup>44</sup> It must be noted that the WIPO Internet Treaties were introduced under Article 20 of the Berne Convention.<sup>45</sup> The WIPO Internet Treaties intended to operate alongside the provisions of TRIPS, and enhance IP protection in the face of new challenges. On the whole, the WIPO, while within the remit of its mandate, focused on the task of ensuring protection for the rights holders of the IP in question, and disregarded broader trade issues. In doing so, it substantively endorsed the position and interests of developed countries.

### ***3.3. The Shift to the World Trade Organisation Forum and Towards a Trade-Related Conception of Intellectual Property Law***

As highlighted in Section 2, following long periods of transatlantic battles relating to the role of copyright within trade transactions,<sup>46</sup> the question of IP protection as

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<sup>41</sup> Article 1 of the Agreement between the United Nations and the World Intellectual Property Organization

<sup>42</sup> WIPO currently administers 25 International agreements divided across IP Protection, Global Protection Systems, and Classification Agreements. On these see generally Christopher May, *World Intellectual Property Organisation (WIPO): Resurgence and the Development Agenda* (Routledge, 2006); Sara Bannerman, 'The WIPO Development Forum and its Prospects for Taking into Account Different Levels of Development' in Jeremy de Beer (ed), *Implementing the World Intellectual Property Organization's Development Agenda* (Wilfrid Laurier University Press, 2009).

<sup>43</sup> WIPO Copyright Treaty (Geneva, 20 December 1996, 2186 U.N.T.S 121).

<sup>44</sup> WIPO Performances and Phonograms Treaty (Geneva, 20 December 2002, 2186 U.N.T.S 203).

<sup>45</sup> Article 20 of the Berne Convention states that the 'Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable'.

<sup>46</sup> Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle* (Princeton University Press 2014).

a means of creating barriers to trade came to the forefront of the GATT negotiations. For this reason, while WIPO should have been the natural forum for discussion, the growing trade-related aspects of IP determined that the debate moves within the broader commercial arena of the WTO,<sup>47</sup> and engaging in further forum shifting.<sup>48</sup> The adoption of the TRIPS was prompted by commercial disputes, which were underpinned by the discontent among certain nations regarding the national IP laws of other states. This discontent was largely due to differences in the standards of IP protection and enforcement measures. Prior to TRIPS, many developing nations had little to no IP protection and enforcement legislation, leading to claims by developed nations that this was a deliberate attempt to achieve an economic advantage by developing nations.

However, this conflict was not merely between developed and developing nations: two of the leading complaints submitted to the GATT Dispute Settlement Body, brought by Canada in 1981, and the former European Community (EC) in 1987, were against the U.S. These complaints concerned the application of Section 337 of the United States Tariff Act 1930 in instances of alleged patent infringement, as well as the domestic appeals body, the International Trade Commission (ITC). The purpose of the ITC is to resolve disputes regarding the application of US domestic law and international trade in a fair and transparent manner. Following revisions to

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<sup>47</sup> The WTO came into force on 1 January 1995, taking over and expanding the responsibilities which the GATT held since the end of the Second World War. The included an increased focus on services, as well as a comprehensive reform of the bedrock of the international trading system. Additionally, the WTO provides dispute resolution for trade disputes between its members.

<sup>48</sup> The process of forum shifting is altering the negotiation venue, from one body to another to mitigate or by-pass unfavourable restrictions or condition surrounding the negotiation or discussion, see generally John Braithwaite and Peter Drahos, *Global Business Regulations* (Cambridge University Press, 2000) 29-31; Jose E. Alvarez, 'International Organizations: Then and Now' (2006) 100 *American Journal of International Law* 324, 329; Kal Raustiala and David G. Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organisation* 277 279-280. For the concept of regime shift in relation to IP see Laurence R Helfer, 'Regime shifting: TRIPS and New Dynamics of International Intellectual Property Lawmaking' (2004) 29(1) *The Yale Journal of International Law* 2; Susan K. Sell, 'TRIPS was Never Enough; Vertical Forum Shift, FTAs, ACTA, and TTP' (2011) 18(2) *Journal of Intellectual Property Law* 448; Peter K. Yu, 'Six Secret (and Now Open) Fears of ACTA' (2011) 64(3) *SMU Law Review* 975, 1075; Kimberlee Weatherall, 'Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement' (2011) 33(2) *Sidney Law Review* 229, 237; Margot Kaminski, 'The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)' (2009) 34 *Yale Journal of International Law* 247; Eddan Katz and Gwen Hinze, 'The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of the U.S. Trade Representative for the Creation of Intellectual Property Enforcement Norms Through Executive Trade Agreements' (2009) 35 *Yale Journal of International Law* 24, 26.

the Act in 1974, the purpose of Section 337 was to serve as one of the primary tools to prevent the importation of goods allegedly infringing patents into the U.S.<sup>49</sup> This was seen as part of a broader policy of the US to counter what it perceived as inadequate IP protection under GATT.<sup>50</sup> These cases will be examined in turn within the following subsections.

### 3.3.1. US-Spring Assemblies<sup>51</sup>

The first complaint by Canada arose following a review by the ITC, which held that the importation of spring assemblies from Canada was a violation of Section 337 of the Trade Act 1974. The infringing goods were subsequently prohibited from entry to and sale within the United States, prompting Canada to request the establishment of a GATT panel, pursuant to Article XXIII(2) GATT. This was done in order to reconcile the differential treatment of imported goods, which resulted from the application of Section 337. Canada's argument consisted of three main points. Firstly, Canada argued that the term 'unfair methods of competition and unfair acts' went beyond the accepted exceptions of Article XX(d) GATT. It then argued that foreign producers and exporters received less favourable treatment than domestic producers. The Canadian state's rationale for this was that infringement disputes between two domestic producers were limited to the civil court of the United States, while foreign producers face the double jeopardy of claims having to be brought before both the civil court and before the ITC.<sup>52</sup> Finally, it argued against the many disadvantages facing foreign producers under Section 337 proceedings, when compared with a similarly-situated infringement claim facing domestic producers

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<sup>49</sup> Section 337 often operated in tandem with Section 301 of the Trade Act (1974), allowing the United States to withdraw from concessions agreed under existing trade agreements, or unilaterally impose a higher tariff if a country was said to be inadequately protecting IPRs. It must be noted this alleged inadequate level was judged by rights holders in the United States.

<sup>50</sup> Henning Grosse Ruse-Khan, 'Intellectual Property and Trade in a Post-TRIPS Environment' in in Hanns Ullrich, Reto M. Hilty, Matthias Lamping, and Josef Drexl (eds), *TRIPS plus 20* (Springer 2016) 167. Ruse-Khan notes the 'US felt its leading role in technological innovation threatened by quickly developing countries especially in Asia whose technological rise the US viewed as the result of free-riding on American innovations'. This was in part justification for the amendment to the US Trade Act in 1974, to allow the ITC to adjudicate on matters relating to alleged infringement by foreign producers.

<sup>51</sup> *United States - Imports of certain automotive spring assemblies*. Report of the Panel adopted on 26 May 1983 (L/5333 – 30S/107).

<sup>52</sup> *United States - Imports of certain automotive Spring assemblies*. Report of the Panel adopted on 26 May 1983 (L/5333 – 30S/107) 9. Moreover, Canada asserted, the United States was well aware that duplicative proceedings were internationally disfavoured.

in the civil court. Such disadvantages included the ITC utilising different rules of evidence and burdens of proof, inadequate time afforded to the foreign producer in comparison to domestic producers, and the exclusion of certain defences to the alleged infringement under the ITC.

The Panel held that Article XX(d) GATT excluded a threshold question, in that if the exclusion were found to be valid, no further investigation between the exclusion order and the General Agreement would be needed. The Panel ultimately found this to be the case, on the grounds that any remedy available through the civil courts would be inadequate.<sup>53</sup> Some scholars argued that, the Panel's action precluded a direct examination of the basis of the complaint, and that the decision resolved very little.<sup>54</sup> However, the Panel did observe that certain elements of Section 337 'appeared to be out of place in legislation used for the protection of private patent'.<sup>55</sup> Furthermore, the Panel did not remove the potential for Section 337 to come into conflict with Article XX GATT under a different application.

### 3.3.2. US-Section 337<sup>56</sup>

Following a ruling by the ITC which prohibited the importation of certain aramid fibres on the ground that these would infringe a patent if produced within the US, the foreign producers of the fibres lodged a complaint that the prohibition order amounted to an unlawful action by the ITC. The ITC held that the evidence of unlawful action was sufficient to warrant the establishment of a GATT panel on the operation of Section 337. This ruling led the EC to put forward the complaint, stating Section 337 subjected foreign producers to a treatment which was less favourable than similar treatment afforded to domestic producers in patent infringement suits. The EC argued that such actions amounted to a breach of the national treatment rule in Article III(4) GATT and could not be justified under the exceptions for IP in Article XX(d) GATT. The Panel assessed whether Section 338

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<sup>53</sup>*United States - Imports of certain automotive spring assemblies*. Report of the Panel adopted on 26 May 1983 (L/5333 – 30S/107) 59.

<sup>54</sup>Nathan G. Knight Jr., 'Section 337 and the GATT: A Necessary Protection or an Unfair Trade Practice?' (1988) 18 *Georgia Journal of International and Comparative Law* 47, 59.

<sup>55</sup>*United States - Imports of certain automotive spring assemblies*. Report of the Panel adopted on 26 May 1983 (L/5333 - 30S/107) 70.

<sup>56</sup>*United States- Section 337 of the Tariff Act of 1930*. Report by the Panel adopted on 7 November 1989 (L/6439 - 36S/345).

negatively affected the conditions of competition for foreign producers compared to domestic producers, to determine if there was a less favourable treatment in operation.

The Panel found that negative treatment of this kind constituted a breach of Article III(4) GATT regarding the number of remedies available against alleged patent-infringing foreign producers before the ITC as stated under Section 337. The first remedy related to the choice of the forum regarding the importation of allegedly infringing goods. Under Article III(4) GATT, any domestic firms said to hold a patent which had been infringed could bring the matter before the ITC or through the civil court system. However, foreign firms that held a patent infringed by a domestic firm, where the infringement occurred within the U.S., were not able to avail of similar options. The second remedy related to the time-frame afforded to the instance of infringement of a patent by a foreign firm or product. Domestic firms were not subject to a similarly restrictive timeframe, raising the possibility of discrimination between the two. The third instance related to the non-availability of opportunities for foreign producers to raise a counterclaim, as was afforded to domestic producers of allegedly infringing goods. The fourth issue related to the possible general exclusion order as a result of the case before the ITC. No comparable remedy was available in cases brought against domestic producers. The fifth remedy related to the automatic application of the general exclusion order if the foreign producer was held to have infringed upon a patent. While domestic producers could seek an injunction for instances of infringement, such a process was not automatically granted upon the finding of infringement. The sixth, and final issue, related to the possibility that foreign producers may be required to defend their products before both the ITC and the civil court system for the same alleged infringement. This requirement was not the case for domestic producers, who would only be liable within the civil court system.<sup>57</sup> It is important to note that these are the same grounds Canada brought against Section 337 in 1981.

The Panel then turned to examine whether the general exception rule under Article XX(d) GATT could justify the inconsistencies with Article III(4). As Section 337 sought to 'secure compliance with' US law, the necessity of Section 337 was

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<sup>57</sup> *United States- Section 337 of the Tariff Act of 1930*. Report by the Panel adopted on 7 November 1989 (L/6439 - 36S/345) 5.19-5.20.

required to be proven to justify its existence under the general exception rule.<sup>58</sup> It held that the burden to prove the justification fell on the defendant, to show that no ‘alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it’.<sup>59</sup> The Panel further held, that in the event that no measures consistent with GATT are reasonably available, ‘a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions’.<sup>60</sup> It held that the US was unable to show the necessity of the discriminatory aspects of Section 337 in ensuring compliance with patent law. The Panel did not entirely rule out that in some circumstances, there may be an objective reason for the exclusion orders.

Further, it was suggested that the US could become compliant with the GATT obligations by providing equivalent remedies to foreign procedures alleged to have infringed a patent. The same was found for the other aspects of the complaint, that the US had not provided a specific explanation of the necessity of the discriminatory practices to ensure compliance with U.S. law under Article XX(d) GATT. As such, Section 337 was held to be in breach of the United States' obligations under GATT.

### *3.3.3. Intellectual Property and Trade*

The above cases left the core question about the link between IP and trade unresolved. They did not, for example, address whether substantive standards of IP protection are capable of breaching GATT standards. The disputes surrounding the use of IP protection to limit trade outlined above also highlights that the divide between developed and developing nations was far from clear-cut. However, they are of fundamental importance for the purpose of this thesis and the analysis it is conducting because, as a result of these disputes, certain countries sought to introduce higher levels of IP protection both at the domestic and international level.

The growing link between IP and trade was also a response to the shift in the

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<sup>58</sup> *United States- Section 337 of the Tariff Act of 1930*. Report by the Panel adopted on 7 November 1989 (L/6439 - 36S/345) 5.22.

<sup>59</sup> *United States- Section 337 of the Tariff Act of 1930*. Report by the Panel adopted on 7 November 1989 (L/6439 - 36S/345) 5.26–5.27.

<sup>60</sup> *United States- Section 337 of the Tariff Act of 1930*. Report by the Panel adopted on 7 November 1989 (L/6439 - 36S/345) 5.26–5.27.

economies of the developed world from economies based on physical capital to economies based on IP capital.<sup>61</sup> Drahos highlights that this shift can be considered the true beginning of global IP protection.<sup>62</sup> All of these factors are said to have come together in an era of an ‘increasingly fragmented international landscape of distinct standards of intellectual property protection and enforcement which raise the potential for intellectual property serving as trade barrier’, ultimately leading to the introduction of TRIPS.<sup>63</sup>

### **3.4. The TRIPS Agreement**

As highlighted above, the TRIPS Agreement was implemented under the Uruguay Round of negotiations of GATT following years of intense negotiation, development, and conflict.<sup>64</sup> Its entry into force, in 1994, was seen as a milestone in the process of development of international IP law and an important step in reducing the disharmony among the various IP regimes that existed between WTO members in order to better facilitate international trade. It must be noted that the TRIPS did not entail a complete harmonisation or codification of IP, as it did include a degree of regional and local flexibilities, as well as additional flexibilities for developing nations to offset the implementation costs associated with TRIPS. Parties were obliged to protect IP as well as to prevent the ‘creation of barriers to legitimate trade and to provide for safeguards against their abuse’.<sup>65</sup> TRIPS covers copyright and neighbouring rights (i.e. the rights of performers, producers of sound

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<sup>61</sup> Annika Glatz, 'Interest Groups in International Intellectual Property Negotiations' SECO / WTI Academic Cooperation Project Working Paper Series 7 / 2012 WI paper 6 citing Francis Gurry, 'The Growing Complexity of International Policy in Intellectual Property' (2004) 11(1) Science and Engineering Ethics 13,14.

<sup>62</sup> Peter Drahos, 'Thinking Strategically About Intellectual Property Rights' (1997) 21(3) Telecommunications Policy 201, 202  
<[http://www.wti.org/fileadmin/user\\_upload/wti.org/7\\_SECO-WTI\\_Project/Publications/Paper%20Draft1%20Annika%20Glatz%20WTI.pdf](http://www.wti.org/fileadmin/user_upload/wti.org/7_SECO-WTI_Project/Publications/Paper%20Draft1%20Annika%20Glatz%20WTI.pdf)>. Others going as far as attributing the change in directly to the actions of the developed nations. Annika Glatz, 'Interest Groups in International Intellectual Property Negotiations' SECO / WTI Academic Cooperation Project Working Paper Series 7 / 2012 WI paper 11. Glatz suggests that TRIPS was a ‘direct result of intransitives in the US to link intellectual property with trade and achieve a stronger protection of intellectual property rights’.

<sup>63</sup> Henning Grosse Ruse-Khan, 'Intellectual Property and Trade in a Post-TRIPS Environment' in Hanns Ullrich, Reto M. Hilty, Matthias Lamping, and Josef Drexel (eds), TRIPS plus 20 (Springer 2016) 169.

<sup>64</sup> Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round and Globalization-A Critique* (Zed Books, 2000) 69. Dunkley notes the negotiation of TRIPS as the ‘most contentious and anomalous component of the Uruguay Round’.

<sup>65</sup> TRIPS Article 41(1).

recordings and broadcasting organisations); trademarks, geographical indications, industrial designs, and patents. It also covers undisclosed information, such as trade secrets and test data. For each of these IPRs, TRIPS defines the subject-matter to be protected, the rights to be conferred and the exceptions to those rights. It also identifies the minimum duration of protection. In doing so, it partially incorporates the obligations stemming from the WIPO conventions (i.e. the Paris Convention and the Berne Convention).<sup>66</sup> TRIPS also engages with the enforcement of IPRs in its Section 3. This engagement is primarily rooted in obligations of ensuring effective enforcement is possible under Article 41(1),<sup>67</sup> and such effective enforcement does not create barriers to legitimate trade (Article 41(2) TRIPS).<sup>68</sup> While TRIPS does permit the implementation of a more extensive standard of IP protection,<sup>69</sup> this implementation must be done in a manner that does not conflict with or contravene the Agreement as a whole. Aleman has suggested that there have been no provisions which provide extensive protection which would be contrary to TRIPS, and this lacuna may arguably mean that current trends are advancing towards this point.<sup>70</sup> Finally, as TRIPS was developed within the WTO system, it is subject to the DSB as any other agreement within the WTO would be. Members can bring a complaint related to the breach of TRIPS obligations, which could result in the suspension of broader trade benefits. Thus, the threat of such suspension encourages the fulfilment of its obligations and aims to ensure the application of the TRIPS standard.

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<sup>66</sup> Article 2(1) and 9(1) respectively.

<sup>67</sup> Article 41(1) of the TRIPS reads as follows: 'Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse'.

<sup>68</sup> Article 41(2) of the TRIPS reads as follows: 'Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays'.

<sup>69</sup> TRIPS Article 1(1) 'Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'.

<sup>70</sup> Marco M. Aleman, 'Impact of TRIPS-Plus Obligations in Economic Partnership and Free Trade Agreements on International IP Law' in Josef Drexler, Henning Grosse Ruse-Khan, and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer, 2014) 63.

The introduction of TRIPS was initially welcome. However, as mentioned above in Section 2, this agreement was incapable of fully addressing the challenges encountered within this arena. Consequently, it fell short of the expectations of many states and stakeholders. Since developing nations sought lower levels of IP protection than those sought by developed nations, a question arose as to whether TRIPS would act as a floor, a ceiling, or combination of both for IPRs. For many of the developed countries (including the EU as a whole), the minimum level introduced was merely a starting point rather than the conclusion of all discussion on the matter. Sell notes this was always the viewpoint of those seeking increased IP protection.<sup>71</sup> Developed nations were aware of the ratcheted nature of IPRs going into proceedings, that ‘once rights have been inscribed into the text of an intellectual property convention, they basically become sacrosanct for now and the future’.<sup>72</sup> This approach has led some scholars to question the overall relevance for many developing nations of TRIPS to which they had nonetheless agreed.<sup>73</sup> The agreement offered minimal benefits to the IP industries of the developing nations compared to the cost of introducing legislation to meet the standard of TRIPS.<sup>74</sup>

### ***3.5. Beyond TRIPS: TRIPS-Plus Standards***

The dissatisfaction generated by the TRIPS led several nations, as well as the EU, to undertake bilateral (and, later, multilateral) negotiations seeking expanded and higher levels of IP protection and enforcement provisions within trade-based agreements.<sup>75</sup> Article 1 of TRIPS permits higher levels of IP protection and

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<sup>71</sup> Susan K. Sell, 'The Global Intellectual Property Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play' PIJIP Research Paper no. 15 <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>>, 4 Sell notes the traditional position of parties with ‘IP maximalists always have seen TRIPS as a floor, not a ceiling’.

<sup>72</sup> Henning Grosse Ruse-Khan and Annette Kur, 'Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection' Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-01 <<http://ssrn.com/abstract=1326429>>.

<sup>73</sup> Laurence R Helfer, 'Regime Shifting: TRIPS and New Dynamics of International Intellectual Property Lawmaking' (2004) 29(1) *The Yale Journal of International Law* 2 83.

<sup>74</sup> Susan K. Sell, 'The Global Intellectual Property Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play' PIJIP Research Paper no. 15 <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>> Sell notes the position of TRIPS as ‘the high-water mark for multilateral hard law as it is both binding and enforceable’.

<sup>75</sup> Bryan Mercurio, ‘TRIPS-Plus Provisions in FTAs: Recent Trends’ in Lorand Bartels and Federico Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (Oxford

enforcement on the condition that they do not conflict with those of TRIPS. These negotiations gave rise to TRIPS-Plus standards. As discussed in the Introduction to this thesis,<sup>76</sup> there is not a set definition of TRIPS-Plus. Rather, scholars have used ‘TRIPS-Plus’ as a collective term for standards beyond those found in TRIPS.<sup>77</sup> In that regard, Drachos, while discussing the bilateral agreements started by the US in the Middle East in the late 1990s, notes that the TRIPS-Plus agreement acts as a ‘bilateral agreement that requires a Member to implement a more extensive standard; or which eliminates an option for a Member under a TRIPS standard’.<sup>78</sup> Aleman provides the example of TRIPS-Plus in relation to extensions to patent protection:

‘when the TRIPS expressly establishes a minimum standard, for instance, a 20-year patent term, and two countries decide to bilaterally adopt a higher standard, e.g., allowing a patent extension under certain circumstances, the patent law goes “beyond” the standard required by the TRIPS Agreement’.<sup>79</sup>

Aleman further suggests that TRIPS-Plus norms ‘have the proviso of not contravening the Agreement provisions; those norms can only be drafted using the flexibility that allows Members to increase the level of protection’.<sup>80</sup>

### ***3.6. The Most Recent Developments in the WIPO***

Following the global adoption of the internet, TRIPS came under pressure to adapt and adequately protect IPRs in this new technological landscape. It struggled,

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University Press, 2006) 215.

<sup>76</sup> See *supra* Introduction Section 4.

<sup>77</sup> Among others Marco M. Aleman, ‘Impact of TRIPS-Plus Obligations in Economic Partnership and Free Trade Agreements on International IP Law’ in Josef Drexl, Henning Grosse Ruse-Khan, and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer, 2014) 63.

<sup>78</sup> Peter Drachos, ‘BITS and BIPS: Bilateralism in Intellectual Property’ (2001) 4(6) *The Journal of World Intellectual Property* 791, 793.

<sup>79</sup> Marco M. Aleman, ‘Impact of TRIPS-Plus Obligations in Economic Partnership and Free Trade Agreements on International IP Law’ in Josef Drexl, Henning Grosse Ruse-Khan, and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer, 2014) 63.

<sup>80</sup> Marco M. Aleman, ‘Impact of TRIPS-Plus Obligations in Economic Partnership and Free Trade Agreements on International IP Law’ in Josef Drexl, Henning Grosse Ruse-Khan and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer, 2014) 63.

however, particularly due to the challenges stemming from software and technologies developed specifically for circumventing IP protection.<sup>81</sup> This challenge led the WIPO to take on a far more significant role in this domain. After the shift towards the WTO, the introduction of the WIPO Copyright Treaty (WTC) and the WIPO Performances and Phonograms Treaty (WPPT) were also meant to centre the WIPO as the core forum for addressing the technological concerns of the 21<sup>st</sup> century. Both treaties followed the principle of national treatment which ‘allows countries the autonomy to develop and enforce their own laws while meeting the demand for intellectual protection’.<sup>82</sup> As will be discussed further in Part II of this thesis, the EU adopted three Directives to meet the obligations created within these treaties.<sup>83</sup> These same Directives, while similar to the WTC and WPPT, go beyond their obligations to a standard which the EU has viewed as the desired level. This level of protection is what would then be sought in the EU bilateral trade agreements, despite both the EU and its trading partners also ratifying the WTC and WPPT.

The most recent agreement adopted within the WIPO framework is the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (Marrakesh VIP Treaty).<sup>84</sup> This treaty came into force in September 2016, after having been signed in 2013. The Marrakesh VIP Treaty was a significant development in relation to copyright protection and enforcement within WIPO. A key aspect of the Marrakesh VIP Treaty is that it has been the very first treaty focusing on the public interest and human rights elements

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<sup>81</sup> Article 27 of the TRIPS states that ‘patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application’ allowing the patent of software, as either the code itself or the object of the code. In addition, Article 4 of the WIPO Copyright Treaty states ‘Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.’ While these treaties do offer protection to software, both the code and the object, the broad interpretation is still a matter of conflict. This has led to the growing problems of patent trolls and the associated costs.

<sup>82</sup> Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, Oxford University Press 2004) 5.

<sup>83</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; Council Directive 91/250/EEC of 14 May 1991 later replaced by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

<sup>84</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (WIPO Doc VIP/DC/8).

of IP protection, rather than the commercial aspects of the IPRs. The Treaty obligates parties to implement mandatory limitations, and exceptions to copyright protection for the benefit of the blind, visually impaired and otherwise print disabled (VIPs). These limitations and exceptions include permission to facilitate the reproduction, distribution and the making available of published works in formats designed to be accessible to VIPs.<sup>85</sup> The Treaty also operated on a broad definition of what amounts to work, including material ‘in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media’.<sup>86</sup> For the purposes of this thesis, it is worth noting that the Treaty was the first to be ratified by the EU through the use of its exclusive external competence on copyright. This is discussed in Part II of this thesis. The Marrakesh VIP Treaty was subsequently implemented through both the use of Regulations,<sup>87</sup> and Directives,<sup>88</sup> to address the various aspects following some internal resistance on the matter.

### ***3.7. The Failure of ACTA***

In addressing the development of international IP law, particular consideration must be paid to the Anti-Counterfeiting Trade Agreement (ACTA). The overall purpose of ACTA was to provide a forum for this particular law-making process for nations seeking higher levels of IP protection and enforcement methods as a means to promote economic growth and development.<sup>89</sup> The enforcement measures in ACTA

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<sup>85</sup> Marrakesh VIP Treaty Article 2(b) “‘accessible format copy’ means a copy of a work in an alternative manner or form which gives a beneficiary person access to the work, including to permit the person to have access as feasibly and comfortably as a person without visual impairment or other print disability. The accessible format copy is used exclusively by beneficiary persons and it must respect the integrity of the original work, taking due consideration of the changes needed to make the work accessible in the alternative format and of the accessibility needs of the beneficiary persons’.

<sup>86</sup> Marrakesh VIP Treaty Article 2(a).

<sup>87</sup> Regulation 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled.

<sup>88</sup> Directive 2017/1564 Of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>89</sup> The ACTA preamble states a key objective of the agreement is that the ‘effective enforcement of intellectual property rights is critical to sustaining economic growth across all industries’.

can be considered as a reaction to the 'success' of the FTAs conducted during the 2000s leading to the levels been seen as the norm.<sup>90</sup>

Notably, ACTA was negotiated outside the WTO system. This was partly in response to the developing issues of the linkage of IP to general trade and the subsequent complications which stalled the revisions of TRIPS, but it also sought to mitigate and restrict the flexibilities afforded under the WTO system to developing nations. Once completed, ACTA would have been opened to the rest of the trading world for accession. However, this would have been on the completed terms and at the expense of many developing nations due to the strictness of the provisions concerning costs and the operation of the dispute settlement system.

Whether ACTA would promote the sustainable growth 'is not easily assessed'.<sup>91</sup> However, from the beginning of the negotiation process, the Agreement was met with criticism and controversy regarding its scope, application, legality, and the negotiation process itself. Such an approach is something which has become a hallmark feature of such radical attempts at reforming and strengthening IP protection measures. From the start, the intention was for it to operate in conjunction with TRIPS to provide additional levels of IP protection. From a normative perspective, 'ACTA does not represent a major departure from TRIPS'.<sup>92</sup> Rather, it was intended to operate as an enforcement treaty rather than a substantive treaty.<sup>93</sup> As such, the terms, specifically the enforcement and protection measures of ACTA, were never intended to be balanced in a manner similar to those within TRIPS.<sup>94</sup>

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<sup>90</sup> Timothy P. Trainer, 'Intellectual Property Enforcement: A Reality Gap (Insufficient Assistance, Ineffective Implementation)?' (2008) 8 *John. Marshall Review of Intellectual Property* 47, 54.

<sup>91</sup> Frederick M. Abbot, 'An Overview of the Agreement: Contents and Features' in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 32.

<sup>92</sup> Pedro Roffe and Xavier Seuba, 'Introduction: ACTA and The International Debate on Intellectual Property Enforcement', in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 19.

<sup>93</sup> Bryan Mercurio, 'Beyond the Text: The Significance of the Anti-Counterfeiting Trade Agreement' (2012) 15(2) *Journal of International Economic Law* 362, 369.

<sup>94</sup> Minutes of meeting of Council for Trade Related Aspects of Intellectual Property Rights, 8-9 June 2010, Intellectual Property/C/M/63, 4 October 2010, paragraph 327. Reviewing the proposed ACTA provisions, the TRIPS Council noted the differences at the core of TRIPS and ACTA, and how these differences shape the respective agreements in two diverging pathways. 'It was important to understand the ACTA was an enforcement treaty, not a substantive treaty, and it would therefore never affect the balance achieved in TRIPS between the rights of the right holders and the legitimate goal of disseminating innovations'.

This intention was stated in Article 3, which acknowledged that the Agreement does not 'create any obligation on a party to apply measures where a right in intellectual property is not protected under its laws and regulations'. Furthermore, sections of ACTA were said to have been transposed from TRIPS, suggesting the retention of the provisions of TRIPS as well as their operation.

Throughout the negotiation of ACTA, from leaked drafts to the final texts, opponents argued it had gone too far in its scope to increase IP protection and risked violating human rights across a wide variety of areas. For example, in earlier drafts of ACTA, the seizure of goods in transit if they were suspected of infringing IPRs was allowed. This was re-examined and redefined in light of broader IP obligations, namely those relating to the transportation of generic medicines, and to prevent abuse which may have served as a barrier to lawful trade. In the final draft, this provision was amended to allow for seizure of goods actually infringing IPRs and was not allowed for 'alleged' infringements as it would prove open to possible abuse. While ACTA excluded patents from its application, while still allowing the option of including patents if desired, all other forms of intellectual property infringement would have allowed generic medicines to be seized under violation of trademark.<sup>95</sup> Early drafts also sought to include a system of graduated response to prevent infringement. This proposal took the form of a three-strike policy, where if an individual was found to have infringed copyright protected material three times, their access to the internet would be terminated by their ISP. The EU had yet to legislate one way or another on the matter.<sup>96</sup> Hence, ACTA would have allowed

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<sup>95</sup>Henning Grosse Ruse-Khan, 'Legal Framework for Enforcement: Border Measures' in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 91; Henning Grosse Ruse-Khan, 'A Trade Agreement Creating Barriers to International Trade?: ACTA Border Measures and Goods in Transit, (2011) 26(3) American University International Law Review 646,674-677; Sean Flynn and Bijan Madhani 'ACTA and Access to Medicines' PIJIP Research Paper Series Paper 22. <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1024&context=research>> accessed 18 September 2015. This also raised, and remains unanswered, the question whether such temporary seizure could amount to a barrier to legitimate trade. This is problematic as this matter was brought before the DBS in European Union and A Member State- Seizures of Generic Drugs (2010). The fact this remained an unanswered question, showed a certain mindset of the negotiations and their goal.

<sup>96</sup>However, the European Union Data Protection Supervisor has highlighted the possible conflict between the three strikes process and legislation on data protection, that such a measure for be disproportionate. Letter of Article 29 Data Protection working party of 15 July 2010 to Mr. Karel de Gucht D (2010) <[http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2010\\_07\\_15\\_letter\\_wp\\_commissioner\\_de\\_gucht\\_acta\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2010_07_15_letter_wp_commissioner_de_gucht_acta_en.pdf)> accessed 19 September 2015

individual nations<sup>97</sup> to implement such a system into domestic law.<sup>98</sup> Notably, ACTA did not require due process to be respected in case of sanctions for IP infringements. Such positions further illustrate the one-sidedness of the negotiation process and the associated vagueness due to conflicting interests and a lack of desire to actually complete the agreement towards the end of the process. These drafts also included mechanisms for the disclosure of user information, such as intellectual property addresses. While those mechanisms were eventually removed from the final text, its inclusion, and more importantly, lack of accompanying limitations, showed the approach adopted in the negotiations.

In particular, ACTA would have undermined the right to participate in cultural life, which is well-rooted in international human rights law and is protected *inter alia* by Article 27 of the Universal Declaration of Human Rights (UDHR),<sup>99</sup> and Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>100</sup> by exposing individuals accessing cultural goods and services 'to unfair and repressive intellectual property enforcement measures'.<sup>101</sup>

The UN Sub-Commission on Human Rights reminded governments, in its

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<sup>97</sup>Legislation allowing a three-strike policy has been passed in France under law supporting the diffusion and protection of content on the internet No. 2009-669 of 12 June 2009, also known as the HADOPI ACT, in the United Kingdom under the Digital Economy Act 2011. A lighter version of the scheme has been put before the Belgian Government under Proposition de loi favourisant la protection de la creation culturelle sur internet (Proposal of Bill for Better Protection of Culture Creations on the Internet). Ireland has not passed legislation but has approved the inclusion of a three strikes system in agreements between ISP and right holders in a number of cases. However, this is an opt in process rather than mandated, allowing the ISP to enforce or ignore the three strikes policy. German and Spain have come out against such a system. Jacqui Cheng, 'Germany says 'nein' to three strikes infringement plan' [2009] <<http://arstechnica.com/tech-policy/2009/02/germany-walks-away-from-three-strikes-internet-policy/>> accessed 19 September 2015. Howell Llewellyn, 'Three-Strikes' Off Anti-Piracy Agenda in Spain' [2009] <<http://www.billboard.com/biz/articles/news/1269047/three-strikes-off-anti-piracy-agenda-in-spain>> accessed 19 September 2015.

<sup>98</sup>Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services Article 1.3(a) 'Measures taken by Member States regarding end-users access to, or use of, services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, as guaranteed by the European Union Convention for the Protection of Human Rights and Fundamental Freedoms and general principles of Community law'

<sup>99</sup> Universal Declaration of Human Rights (Paris, 10 December 1948 UNGA Res 217 A(III).

<sup>100</sup> International Covenant on Civil and Political Rights (New York, 16 December 1966, 999 U.N.T.S 171).

<sup>101</sup> Robert Ellis, 'Conflicts at the Intersection of ACTA & Human Rights: How the Anti-Counterfeiting Trade Agreement violates the right to take part in cultural life', Intellectual Property Brief 2, no. 3 (2011) 64-71.

Resolution 2000/7 on 'Intellectual Property Rights and Human Rights', that there is a duty to consider human rights obligations in the implementation of IP law-making and, in the event of conflict, human rights protection is said to take priority over IP.<sup>102</sup> However, this is far from the case with ACTA, as between the high levels of protection sought, which disrupt the provision of medicine, freedom of expression, and a large number of civil rights such as personal privacy, due process, and access to knowledge, the final text of ACTA has appeared to have ignored human rights obligations entirely.

While the EU served as a key player during the ACTA process, it would ultimately be the final nail in the coffin following the rejection of the agreement by the European Parliament on the 4<sup>th</sup> of July 2012. The rejection of ACTA was motivated by a number of grounds. Firstly, the possibility of criminalisation for the private individual under the enforcement provisions was perceived as contrary to the EU values and principles. Secondly, the EU was not satisfied with the role of the internet service provider under ACTA. Thirdly, the EU drew issue with the possibility of the seizure of generic medicines in transit and the interruption to trade. Lastly, the EU was unsure of the position of ACTA in relation to its commitment to the provision, protection, and enforcement of human rights. As ACTA sought to counter the rise in large scale global IP infringing, it is quite challenging to imagine how and why the definition of what amounted to commercial scale was left so vague.<sup>103</sup> The only possibility for this oversight is to assume the definition was in contention for the entirety of the law-making process and was intentionally left vague to allow the finalisation of the treaty.<sup>104</sup> Such approach was seen as

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<sup>102</sup> Intellectual property rights and human rights Sub-Commission on Human Rights resolution 2000/7 'Declares, however, that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other'.

<sup>103</sup> While this vagueness is not a new creation, it did reach new levels of its application and scope under ACTA. See generally Ainee Adams, 'What is 'commercial scale'?: A Critical Analysis of the WTO Panel Decision in WT/DS362/R' (2011) 33(6) *European Journal of Intellectual Property* 342

<sup>104</sup> From early on in the process, the public lead by NGOs and interest groups against the increase in intellectual property, openly criticised ACTA, both for its purpose and the manner in which the negotiation took place. This lead many of the parties engaged in the process to turn their attention elsewhere such as the TTIP, TTP, and CETA. Henning. Grosse Ruse - Khan 'Criminal Enforcement and International IP Law', in: Christophe Geiger (ed.), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2012); Bryan

problematic, as the concept of commercial scale has been addressed at the international level in the past. The WTO has adopted a fair and flexible definition of what amounts to commercial scale, allowing for differences in the product itself and the market it operates in.<sup>105</sup> Due to the ill-defined nature of commercial scale and the sensitivity of criminalisation for the general public, this became one of the criticised areas of ACTA.<sup>106</sup>

While ACTA, after much criticism and controversy, never came into being, with some declaring it 'failed agreement, and represents a failure of international law-making', there are a number of lessons the EU will take away from the process for future TRIPS-Plus provisions.<sup>107</sup> These lessons are important as the enforcement of IP is an ever-growing and challenging area<sup>108</sup> and 'the European Union and the

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Mercurio, ACTA: Anatomy of a failed agreement in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 329. Merucio argues that '...the priority became simply to conclude an agreement as opposed to conclude a meaningful agreement. 'This was change was visible across the later drafts and the final version that many of the provisions became 'uncertain and vague shadow of their earlier selves'. Kimberlee Weatherall, 'What was left out of ACTA' in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 339. Weatherall notes that this vague language contrasts with 'loose and open ended language in which [TRIPS is] cast' as TRIPS retained the ability and more importantly a strong desire to rectify conflicts in the interpretation'. Jerome Reichman, 'Enforcing the enforcement procedures of TRIPS' (1997) 37 *Virginia Journal of International Law* 2, 5.

<sup>105</sup> Report of the Panel, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, para. 7.577, WT/DS362/R (Jan. 26, 2009), [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm). defined commercial scale to apply to counterfeiting activities 'carried on at the magnitude or extent or typical or unusual commercial activity with respect to a given product in a given market. '

<sup>106</sup> Duncan Matthews, 'The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union ' Queen Mary School of Law Legal Studies Research Paper No. 127/2012 <<http://ssrn.com/abstract=2161764> > accessed 16 September 2015, 35. Matthews suggests the 'fact that 'commercial scale' was not defined clearly in Article 23.1 of ACTA contributed significantly to the uncertainty and public anxiety, and lead to further public mobilisation against ACTA since it was not made clear whether or not private acts by individuals would be excluded from its scope'.

<sup>107</sup> Bryan Mercurio, 'ACTA: Anatomy of a Failed Agreement' in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 329. See also Kimberlee Weatherall, 'Politics, Compromise, Text and the Failures of the Anti-Counterfeiting Trade Agreement' (2011) 33 *Sydney Law Review* 229, 240. Weatherall notes that 'for all the rhetoric of international cooperation and international trade, ACTA has been crafted with largely domestic enforcement processes in mind, and mostly civil processes'; Bryan Mercurio, 'Beyond the Text: The Significance of The Anti-Counterfeiting Trade Agreement' (2012) 15(2) *Journal of International Economic Law* 362, 373. Merurio in discussing ACTA's 'ultimate failure to meaningfully develop a new international standard'. Duncan Matthews and Petra Zikovska, 'The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union' (2013) 44 *IIC* 626 for an detailed commentary on the EU perspective of the failure of ACTA.

<sup>108</sup> Miriam Bitton, 'Re-thinking the ACTA enforcement measures' (2013)102 *Journal of Criminal Law and Criminology* 67, 69

United States have defined intellectual property rights enforcement as one of their core areas of transatlantic cooperation'.<sup>109</sup>

First, ACTA was negotiated in private, with the small amount 'contradicting and distorted information' made available to the public.<sup>110</sup> It would be important for the EU to open up its negotiations with third countries and make them more transparent. As yet, this lesson has not been learned fully.

Another lesson to take from the ACTA process relates to the global context in which the law-making develops. ACTA was far more than the trade agreement it claimed to be. Rather, it was the end point of forum shifting by the EU, to create an entirely new layer of global governance for IP matters,<sup>111</sup> in the form of a superstructure that replicates 'many of the responsibilities currently assumed by the World intellectual property organisation'.<sup>112</sup> This creates the problem of multiple overlapping systems, which is 'not good for government efficiency'<sup>113</sup> as the different interest groups and systems of balances would likely create conflicting requirements. While ACTA may represent 'the strongest intellectual property enforcement agreement to date, negotiated at the international level',<sup>114</sup> its failure serves to show the current 'intellectual property enforcement debate is probably less about the goals than the methods used to achieve those goals'.<sup>115</sup> These methods can be seen as an extension of the desires of intellectual property dependent industries<sup>116</sup>

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<sup>109</sup> Ermias Tekeste Biadgleng and Viviana Munoz Tellez, 'The Changing Structure and Governance of Intellectual Property Enforcement' [2008] South Centre Research Paper No. 15, 19. This has been reflected in the important position of intellectual property matters in the TTIP, TPP, and CETA discussions. While not the defining element of each negotiation, it was still an important element.

<sup>110</sup> Pedro Roffe and Xavier Seuba, 'Introduction: ACTA and The International Debate On Intellectual Property Enforcement' in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 4.

<sup>111</sup> Aaron Shaw, 'The Problem with the Anti-Counterfeiting Trade Agreement (and What to do about it)' [2008] <<http://www.keystudies.org/node/20>>.

<sup>112</sup> Michael Geist, 'Toward an ACTA Super-Structure: How ACTA May Replace WIPO' [2010] <<http://www.michaelgeist.ca/2010/03/acta-superstructure/>> .

<sup>113</sup> Kimberlee Weatherall, 'What was left out of ACTA' in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 343

<sup>114</sup> Miriam Bitton, 'Re-thinking the ACTA enforcement measures' (2013)102 *Journal of Criminal Law and Criminology* 67, 71.

<sup>115</sup> Pedro Roffe and Xavier Seuba, Introduction: ACTA and the international debate on intellectual property enforcement. in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 1.

<sup>116</sup> Pedro Roffe and Xavier Seuba, Introduction: ACTA and the international debate on intellectual property enforcement in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the*

and are highlighted in the inclusion of provisions to allow other nations, to accept ACTA. While this is intended as a higher benchmark for enforcement that countries can join on a voluntary basis ‘few countries will have the muscle to refuse an invitation to join’.<sup>117</sup> This forceful invitation goes hand in hand with the expansion of IP protection clauses that the EU has progressively included within its trade agreements.<sup>118</sup>

#### **4. The Controversial Nature of Intellectual Property Rights in International Law**

The development of international IP law can, therefore, be considered intimately linked to the debate surrounding both the nature of and conflict between, IPRs and other human rights. This debate on the nature of IP is briefly analysed in this section, to situate and frame the analysis in Part III of the thesis.

##### ***4.1. Intellectual Property as a Component of the Right to Participate in Cultural Life***

The nature of the right to the protection of intellectual creations has attracted a significant body of scholarly attention, and questions concerning whether IPRs should be equated to human rights persist.<sup>119</sup> In more recent years however, the belief that IPRs are not capable of being considered human rights but rather must be conceived of as ‘instrumental legal tools to further social and economic purposes’<sup>120</sup> has led scholars to focus primarily on the intersection between IP and

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*Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015))  
5. No debate in this area is complete without recognition of the fact that companies belonging to a wide range of sectors promote and trigger the adoption of specific intellectual property norms

<sup>117</sup> Robin Gross, ‘IP Justice White Paper on the Proposed Anti-Counterfeiting Trade Agreement (ACTA)’ [2008] <<http://www.ipjustice.org/digital-rights/ip-justice-white-paper-on-the-proposed-anti-counterfeiting-trade-agreement-acta/>>.

<sup>118</sup> This strength and ability of the EU to include these clauses are discussed in detail in Part III.

<sup>119</sup> Robert J. Gutowski, ‘The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven?’ (1999) 47 *Buffalo Law Review* 713, 745. Gutowski notes, while discussed in relation to TRIPS and criticism of the agreement, that ‘[w]estern industrialized countries contend that intellectual property rights are natural, human rights and are so recognized in the Universal Declaration of Human Rights (UDHR)’.

<sup>120</sup> Aurora Plomer, ‘The Human Rights Paradox: Rights of Access to Science and Intellectual Property Rights’, (2013) 35 *Human Rights Quarterly*, 143-175.

other human rights, such as freedom of expression or the right to education.

The debate on the nature of IP can then be traced back to the Universal Declaration of Human Rights (UDHR). In a holistic sense, the UDHR protects the right to property under Article 17, which states that ‘[e]veryone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property’. Although this provision does not mention IP, it is considered to encompass it. Any protection afforded to IPRs under Article 17 is qualified,<sup>121</sup> and the UDHR does not address the role of IP in cultural creation.<sup>122</sup> For this reason, Article 17 must be read in conjunction with Article 27 UDHR, which protects the right to participate in cultural life. This provision states:

‘1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

2. Everyone has the right to the protection of the *moral and material interests resulting from any scientific, literary or artistic production of which he is the author*’ (emphasis added)’.

According to Plomer, the drafting history of Article 27 UDHR shows that delegations from some socialist countries backed the French initiative to include rights of authors and inventors within the protection of their intellectual creations,<sup>123</sup> while the US, UK, and former Anglo-Saxon colonies opposed the proposal.<sup>124</sup>

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<sup>121</sup> It is provided that a person can be deprived of his/her property under certain circumstances, but not arbitrarily. The term ‘arbitrarily’ would seem to prohibit unreasonable interferences by states and the taking of property without compensation, but a precise and agreed upon definition does not appear in the preparatory documents.

<sup>122</sup> Peter K. Yu, ‘Ten Common Questions about Intellectual Property and Human Rights’ (2007) 23 Georgia State University Law Review 709,734 Yu argues that ‘article 17 [UDHR] is at best ambiguous about whether property rights provide the basis for the right to the protection of material interests in intellectual creations in article 27(2)’.

<sup>123</sup> For a general discussion of the drafting history of the UDHR, see generally, William A. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires. Volume I October 1946 to November 1947* (Cambridge University Press, 2013) 494, 506. Schabas includes the proposals in relation to what would be Article 27, including proposals from Nicaragua that the ‘The State guarantees and protects intellectual property, the rights of the author, of the inventor, and the artist. The law regulates their exercise and duration, and if it demands their expropriation, it will be by means of prior appraised indemnification’, or from Cuba ‘Every author or inventor shall enjoy exclusive ownership of his work or invention, with the limitations stipulated by law as to time and form’.

<sup>124</sup> Aurora Plomer, ‘The Human Rights Paradox: Rights of Access to Science and Intellectual Property Rights’, (2013) 35 Human Rights Quarterly, 143-175.

According to Chapman,<sup>125</sup> Article 27(2) instead reflected the ‘desire by some drafters to harmonize the UDHR with the provision on intellectual property in the American Declaration on the Rights and Duties of Man, 1948’.<sup>126</sup> It is apparent that Article 27 is indeed the result of a compromise in that while protecting the right of authors, it places the rights of everyone to share scientific advancement and its benefits in a prominent position. In doing so, Article 27 requires a balance between individual rights and public rights of access to science.

In the mid-1960s, a provision similar to Article 27(2) UDHR was included in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 15 ICESCR affirms that:

- ‘1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) *To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.* (emphasis added)
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields’.

Similar to Article 27 UDHR, the ICESCR places IPRs alongside the right to access culture, but does not explicitly address the relationship between IPRs and access to culture. Moreover, despite affirming the right of authors to benefit from IP, it fails

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<sup>125</sup> Audrey Chapman, *A Human Rights Perspective on Intellectual Property, Scientific Progress, And Access To The Benefits Of Science*, <[https://www.wipo.int/edocs/mdocs/tk/en/wipo\\_unhchr\\_ip\\_pnl\\_98/wipo\\_unhchr\\_ip\\_pnl\\_98\\_5.pdf](https://www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_5.pdf)>.

<sup>126</sup> Article 13 of the American Declaration reads as follows: ‘Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries. He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author’.

to answer the question of to what degree property could be considered to constitute a human right.<sup>127</sup> The inclusion and protection of such cultural-based rights are also seen within the context of the EU's development of IP as a human right.<sup>128</sup>

Article 27 UDHR, as well as Article 15 ICESCR, have been used to support the argument that IP is, in fact, a human right, despite being regulated, at the international level mostly within trade-related settings.<sup>129</sup> In particular, Article 27(2) UDHR and 15(1)(c) ICESCR have been considered to qualify the right of the author as a human right. Both provisions seek to protect the precise expression of the idea in the specific format, which were at the time, predominantly written works as opposed to audio or visual imagery. The importance of audio or visual imagery has significantly increased over the last fifty-plus years. This serves to highlight that the concurrent development of the IP and the moral right of the author remain at 'the centre of copyright as a human right lives in the moral rights arena'.<sup>130</sup> Additionally, it can be said that the 'international intellectual property system is not solely convened with economic imperatives', insofar as it takes the existence of the authors' rights into account.<sup>131</sup>

According to Chapman, the human right of the author is framed quite differently from how IP regimes protect it. Article 15 ICESCR requires IP law to assure that IP protections complement, fully respect, and promote other components of Article

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<sup>127</sup> Jakob Cornides, 'Human Rights and Intellectual Property: Conflict or Convergence?' (2004) 7 *The Journal of World Intellectual Property* 135, 139-143.

<sup>128</sup> The position of cultural rights, IPRs, and their intersection within the EU framework is discussed in Chapter Two.

<sup>129</sup> The literature on the topic is vast. Among many others see: Peter K. Yu, 'The Anatomy of the Human Rights Framework for Intellectual Property' (2016) 69 *Southern Methodist University Law Review* 37; J. Janewa Osei-Tutu, 'Humanizing Intellectual Property: Moving beyond the Natural Rights Property Focus' (2017) 20 *Vanderbilt Journal of Entertainment and Technology Law* 207; Robert L. Ostergard, Jr., 'Intellectual Property: A Universal Human Right?' (1998) 21(1) *Human Rights Quarterly* 156; Laurence R. Helfer 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5(1) *Minnesota Intellectual Property Review* 47; Laurence R. Helfer, 'Toward a Human Rights Framework for Intellectual Property' (2007) 40(3) *UC Davis Law Review* 971; Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40(3) *UC Davis Law Review* 1039; Peter K Yu, 'The International Enclosure Movement' (2007) 82(4) *Indiana Law Journal* 827J. Janewa Osei-Tutu, 'Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus' (2017) 20 *Vanderbilt Journal of Entertainment and Technology Law*. 207, 211.

<sup>130</sup> Ort Fischman Afori, 'Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law' (2004) 14 *Fordham Intellectual Property, Media and Entertainment Law Journal*. 497, 524.

<sup>131</sup> Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2012) 175.

15.<sup>132</sup> In this regard, ‘the rights of authors and creators should facilitate rather than constrain cultural participation on the one side and broad access to the benefits of scientific progress on the other’.<sup>133</sup>

The *General Comment No. 17* of the Committee on Economic, Social and Cultural Rights (CESCR Committee) did not offer a definitive solution to the nature of IPRs.<sup>134</sup> On the one hand, it distinguished the right provided for in Article 15(1)(c) from IPRs which are ‘of a temporary nature’ and could be ‘revoked, licenced or assigned to someone else’, whereas human rights are ‘timeless’.<sup>135</sup> The CESCR Committee also stated that the right provided for in Article 15(1)(c) protects ‘the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their material interests which are necessary to enable authors to enjoy an adequate standard of living’, while IPRs ‘primarily protect business and corporate interests and investments’.<sup>136</sup> However, the CESCR Committee identified prerogatives attached to Article 15(1)(c) which mirror those provided under IP regimes. For example, it suggested that Article 15(1)(c) encourages ‘the active contribution of creators to the arts and sciences and to the progress of society as a whole’ and requires that the material interests of authors must be protected effectively. *General Comment No. 17*, therefore, seems to suggest that the right of authors and creators is indeed a human right, although the economic prerogatives attached to it are not.

As with all other rights, IPRs do not exist in a vacuum. Rather, they are exercised within a community,<sup>137</sup> and this further acknowledged by Article 1(1) of the

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<sup>132</sup> Audrey Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)*, (2001) 35 *Copyright Bulletin* 4, 10–13.

<sup>133</sup> Audrey Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)*, (2001) 35 *Copyright Bulletin* 4, 10–13.

<sup>134</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author, Article 15(1)(c)*, U.N. Doc. E/C.12/GC/17 Jan. 12 2006.

<sup>135</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author, Article 15(1)(c)*, U.N. Doc. E/C.12/GC/17 Jan. 12 2006. paragraph 2

<sup>136</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author, Article 15(1)(c)*, U.N. Doc. E/C.12/GC/17 Jan. 12 2006. paragraph 2.

<sup>137</sup> J. Janewa Osei-Tutu, 'Humanizing Intellectual Property: Moving Beyond the Natural Rights Property Focus' (2017) 20 *Vanderbilt Journal of Entertainment and Technology Law*. 207, 212.

TRIPS.<sup>138</sup> As such, the right(s) of authors and creators must be balanced with other competing rights.

#### ***4.2. Intellectual Property as a Human Right: Critical Views***

Despite a large body of scholarship arguing in favour of the human right's nature of IP, and despite this having been accepted by international treaty bodies and regional courts such as ECtHR,<sup>139</sup> several scholars remain sceptical.<sup>140</sup> Some scholars also argue that, even if IP is generally accepted as a human right, this will not necessarily yield a positive outcome or eliminate conflicts with other rights.<sup>141</sup> Qualifying IP as a human right could also compel developing nations to prioritise IP protection and enforcement at the expense of other (more pressing) human right issues.<sup>142</sup> Finally, in placing IP within the scope of human rights, this raises concerns regarding the inherent Western ideology on commodified IP embedded in the TRIPS, overshadowing the interpretation of other human rights aspects of IP.<sup>143</sup>

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<sup>138</sup> Article 1(1) of TRIPS states that 'Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice'.

<sup>139</sup> This case law and the development within the ECtHR is discussed in detail in Part II.

<sup>140</sup> Peter K Yu, 'Reconceptualizing Intellectual Property Interests in a Human Rights Framework' (2007) 40(3) UC Davis Law Review 1039, 1041.

<sup>141</sup> Ruth L. Gana, 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18(2) Law and Policy 315, 346. Gana notes '[t]he debate about the role of intellectual property is usually framed around the question of whether protection for intellectual property rights is a prerequisite for development. However, this question is not helpful unless the fundamental issue of differences in values that underlie political, social, and legal institutions in countries is factored into the models of protection for intellectual property'.

<sup>142</sup> This gives rise to the potential where the to protect the IP as a human right would open the nations to criticism and sanctions for their failure to protect human rights as a whole. For a comprehensive analysis of the risks and challenges of this potential issue see generally Carolyne Deere, *The Implementation Game* (Oxford University Press 2008).

<sup>143</sup> Ruth L. Gana, 'The Myth of Development, The Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18(2) Law and Policy 315, 340 Gana argues 'the modern intellectual property system is itself a reflection of values that are unique to and that derive from the historical processes which shaped western Europe and, later, the United States'. See also Keith Aoki, 'Neo-colonialism, Anticommons Property, and Biopiracy in the (Not-so-Brave) New World Order of International Intellectual Property Protection' (1998) 6 Industry Journal of Global Legal Studies 11; Margret Chon, 'Intellectual Property and the Development Divide' (2006) 27(6) Cardozo Law Review 2821; Graeme W. Austin, 'Valuing Domestic Self-Determination in International Intellectual Property Jurisprudence' (2002) 77(3) Chicago-Kent Law Review 1155; Peter K Yu, 'A Tale of Two Development Agendas' (2009) 35(2) Ohio Northern University Law Review 465.

A large degree of such criticism stems from the trade-focused position of the early international agreements such as the Paris and Berne Convention,<sup>144</sup> and the clear separation of human rights regimes from IP regimes in post-war Europe.<sup>145</sup> In fact, despite the efforts of numerous activists, IP regimes remained separated from international human rights law, as a result of a lack of overall political will.

Following TRIPS, the conflict between IP and human rights came to the forefront of discussions.<sup>146</sup> Furthermore, scholars argued that this new conflict was inherent within the different nature of the IP and human rights systems.<sup>147</sup> The conflict was determined by the expansion of IP in the 1990s on the one hand,<sup>148</sup> and by the development of the third generation of human rights on the other.<sup>149</sup> The latter addressed, in a newer and more comprehensive fashion, access to culture and education as well as minority and indigenous peoples' rights.<sup>150</sup> The TRIPS-Plus era subsequently increased tensions between the international IP regime and other international regimes, including human rights law.<sup>151</sup>

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<sup>144</sup> Peter Drahos, 'Intellectual Property and Human Rights' (1999) *Intellectual Property Quarterly*, 349, 351-3. Drahos suggest that 'a nation that has a comparative advantage in protecting IP is more likely to favour IPRs than one that does not'.

<sup>145</sup> Antoine Prost, and Jay Winter, *René Cassin and Human Rights: From the Great War to the Universal Declaration* (Cambridge University Press, 2013) 238. Prost and Winter note the immediate post-war goals of the U.N 'to repair damage of war, and to help construct the foundation of a just peace'.

<sup>146</sup> Louis Henkin, *The Age of Rights* (Columbia University Press 1990).

<sup>147</sup> Audrey Chapman, *Approaching Intellectual Property as a Human Right: Obligations Related to Article 15(1)(c)*, (2001) 35 *Copyright Bulletin* 4, 19-20; Laurence R. Helfer 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5(1) *Minnesota Intellectual Property Review* 47,48; Joo-Young Lee, *A Human Rights Framework for Intellectual Property, Innovation and Access to Medicines* (Farnham: Ashgate Publishing, 2015) 191; Willem Grosheide, 'General Introduction' in Willem Groshied (ed), *Intellectual Property and Human Rights: A Paradox* (Edward Elgar Publishing, 2010) 5.

<sup>148</sup> U.N. Economic and Social Council, Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual Property and Human Rights*, Resolution. 2001/21, U.N. Doc. E/CN.4/Sub.2/RES/2001/21 (Aug. 16, 2001) A resolution by the Sub-Commission that identifies a widening set of conflicts between TRIPS and human rights, including 'the rights to self-determination, food, housing, work, health and education, and in relation to transfers of technology to developing countries'.

<sup>149</sup> Erica-Irene Daes, 'Intellectual Property and Indigenous Peoples' (2001) 95 *American Society of International Law* 143, 147.

<sup>150</sup> U.N. Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (Apr. 20, 1994). See also U.N. Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People*, Final Report of the Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1995/26, Annex 1 (June 21, 1995).

<sup>151</sup> Amy Kapczynski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property' (2008) 117 *Yale Law Journal* 804. Kapczynski refers to this as the 'new politics of intellectual property'. See also Jerome H. Reichman, 'Intellectual Property in the Twenty-First Century: Will the Developing Countries Lead or Follow' (2009) 46(4) *Houston*

The debate was fostered when the UN addressed the TRIPS-Plus agenda of the 2000s, discussing in particular how it was encroaching the arena of human rights. This debate ultimately led to Resolution 2000/7,<sup>152</sup> becoming a line in the sand for the UN as to whether human rights should take priority in the event of a conflict with the operation of IP protection measures, in particular, the TRIPS-Plus measures. This Resolution, while criticising the TRIPS-Plus agenda and the conflict it created,<sup>153</sup> also suggested that:

‘[g]overnments and national, regional, and international economic policy forums [need] to take international human rights obligations and principles fully into account in international economic policy formation’.<sup>154</sup>

This tallies with the *General Comment No. 17* released by the CESR Committee which, as mentioned above, stated that:

‘any intellectual property regime that makes it more difficult for a State party to comply with its core obligations in relation to health, food, education, especially, or any other right set out in the Covenant, is inconsistent with the legally binding obligations of the State party’.<sup>155</sup>

### ***4.3. Moving Away from a Polarized Debate***

This thesis, building on the aforementioned debate, embraces the view that the right(s) of the authors and creators is a human right.<sup>156</sup> Thus, it situates IP within

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Law Review 1115.

<sup>152</sup> U.N. Economic and Social Council, Sub-Commission on Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights, Resolution. 2000/7, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000) paragraph 3 ‘Reminds all Governments of the primacy of human rights obligations over economic policies and agreements’.

<sup>153</sup> U.N. Economic and Social Council, Sub-Commission on Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights, Resolution. 2000/7, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000) paragraph 11 ‘actual or potential conflicts exist between the implementation of the TRIPS Agreement and the realization of economic, social and cultural rights’

<sup>154</sup> U.N. Economic and Social Council, Sub-Commission on Promotion and Protection of Human Rights, Intellectual Property Rights and Human Rights, Resolution. 2000/7, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000) paragraph 4 ‘Requests all Governments and national, regional and international economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation’.

<sup>155</sup> U.N. Economic and Social Council, Committee on Economic, Society and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C12/2001/15 (Dec. 14, 2001). para 14.

<sup>156</sup> Henning Gross Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press 2016) 212 Ruse-Khan suggesting that ‘[c]reators’ human rights as we

the realm of human rights.<sup>157</sup> In this thesis, the economic nature of certain IPRs and the trade-related nature of international IP law is not seen *a priori* an obstacle to their qualification as human rights. As argued by some scholars, the trade liberalisation 'creates wealth for all participants and thereby helps to generate the resources needed for the fuller realisation of [human rights]'.<sup>158</sup> Furthermore, IP norms globalised by the WTO rules, especially by TRIPS, are regarded as a complementary tool to a right to property.<sup>159</sup>

However, this thesis recognises the existence of a complex conflict between IP and other human rights, for example, the right to access cultural material,<sup>160</sup> which is discussed below in Section 5. In that regard, this thesis embraces the view that the classification of IP (i.e. the right of authors and creators) as human rights may offer some guidance on how to resolve, or at least how to mitigate the conflict with other human rights, through the 'balancing' of rights.<sup>161</sup>

## **5. The Conflict between Intellectual Property and Human Rights at the International Level**

The conflict between IPRs and human rights is complex, as is the debate surrounding it. This section does not try to comprehensively investigate and unfold this debate. Rather, this section briefly highlights the most significant aspects of the conflict, which are relevant to the analysis conducted in Part III of the thesis, in the

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have them now appear almost as an accident of history'.

<sup>157</sup> See *supra* Introduction Section 6.5 for the discussion on why it falls within the 3<sup>rd</sup> generation of human rights.

<sup>158</sup> Robert D. Anderson and Hannu Wager, 'Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy' (2006) 9 (3) *Journal of International Economic Law* 707, 708.

<sup>159</sup> Ernst-Ulrich Petersmann, 'Human rights and International Trade Law: Defining and Connecting the Two Fields' in Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford University Press 2005).

<sup>160</sup> Caterina Sganga, 'Right to Culture and Copyright: Participation and Access' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 358. See also Céline Romainville, 'Defining the Right to Participate in Cultural Life as a Human Right' (2015) 34(5) *Netherlands Quarterly of Human Rights* 405, 433.

John Morijn, 'The Place of Cultural Rights in the WTO System' in Martin Scheinin (ed), *Cultural human rights* (Martinus Nijhoff Publishers 2008), 293. Morijn takes the view that access to knowledge and culture is the 'most strictly challenged by international trade liberalization'.

<sup>161</sup> Jonas Christoffersen, 'Human Rights and Balancing: The Principle of Proportionality' in C Geiger, *Research Handbook on Human Rights and Intellectual Property*, (Edward Elgar Publishing, 2015).

realm of EU international agreements.

### ***5.1. Balancing Intellectual Property with Human Rights***

The need to balance IP protection with other interests was somewhat reflected in Article 7 of TRIPS which states that:

‘[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’.

However, this provision remains quite general in tone and does not endeavour to expand upon how to achieve this balance between competing rights. In 2005, the CESCR Committee in *General Comment No. 17* tried to find such a balance and affirmed that:

‘States parties thus have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning materials, from undermining the rights of large segments of the population to health, food and education. Moreover, States parties should prevent the use of scientific and technical progress for purposes contrary to human rights and dignity, including the rights to life, health and privacy, e.g. by excluding inventions from patentability whenever their commercialization would jeopardize the full realization of these rights’.<sup>162</sup>

The interaction between IP and the right to health, to food, to education, freedom of expression and the rights of indigenous peoples respectively remains quite controversial and is, to a certain extent, intertwined with the debate surrounding the principle of sustainable development.<sup>163</sup> The subsections below seek to map the

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<sup>162</sup>Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author, Article 15(1)(c), U.N. Doc. E/C.12/GC/17 Jan. 12 2006. Para 35.

<sup>163</sup> Gro Harlem Brundtland and Khalid Mansour. 1987. Report of the World Commission on Environment and Development. United Nations Document: A/42/427, 43 Brundtland and Mansour define sustainable development as ‘development that meets the need of the present

growing overlap and intersection between IP and these human rights. They do not endeavour to provide a comprehensive analysis, which would be outside the scope of this thesis. Rather, these subsections highlight the most controversial issues surrounding the rights and provide a suitable background for the discussion conducted in Part III.

## ***5.2 The Right to Health and Intellectual Property***

The first, and possibly the most contested, overlap between IP and human rights are in the context of the right to health, and in particular, access to vital medicines.<sup>164</sup> The recognition of the right to health has been formalised in a large body of international human rights conventions.<sup>165</sup> While Article 25(1) UDHR does address the right to health, it is locatable within the broader right to an adequate standard of living.<sup>166</sup> Article 12 ICESCR is the most prominent international provision to

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without compromising the ability of future generations to meet their own needs’.

<sup>164</sup> The literature on the topic is wide. See *inter alia* Benjamin Coriat, Fabienne Orsi and Cristina d’Almeida, 'TRIPS and the International Public Health Controversies: Issues and Challenges' (2006) 15(6) *Industrial and Corporate Change* 1033; Peter Feldschreiber and Alasair Breckenridge, 'After Thalidomide – Do We Have the Right Balance Between Public Health and Intellectual Property' (2015) 10(1) *Reviews on Recent Clinical Trials* 15; Olasupo Owoeye, 'International Patents Law and Public Health: Revisiting the TRIPS Compulsory Licensing Regime and the Doha Paragraph 6 System' (2015) 37(12) *European Intellectual Property Review* 782; Johanna Gibson, *Intellectual Property, Medicine and Health Current Debates* (Routledge 2017); Yves Beigbeder, *International Public Health Patients' Rights vs. the Protection of Patents* (Routledge 2017); Kyung-Bok Son and Tae-Jin Lee, 'The Trends and Constructive Ambiguity in International Agreements on Intellectual Property and Pharmaceutical Affairs: Implications for Domestic Legislations in Low- and Middle-Income Countries' (2018) 13(9) *Global Public Health* 1169; Desmond McNeill, Pepita Barlow, Carolyn Deere Birkbeck, Sakiko Fukuda-Parr, Anand Grover, Ted Schrecker, and David Stuckler, 'Trade and Investment Agreements: Implications for Health Protection' (2017) 51(1) *Journal of World Trade* 159; Laurence Helfer, 'Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Legal Order on Access to Medicines' in Terence C. Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 2015); Roma Patel, 'A Public Health Imperative The Need for Meaningful Change in the Trans-Pacific Partnership's Intellectual Property Charter' (2015) 16(1) *Minnesota Journal of Science and Technology* 477.

<sup>165</sup> The right to health has been recognised across a large body of international Conventions; Article 24 of the Convention on the Rights of the Child; Article 5(e) of the Convention on the Elimination of All Forms of Racial Discrimination; Article 11 of Convention on the Elimination of All Forms of Discrimination against Women; Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (the Protocol of San Salvador); Article 16 of the African Charter; Article 11 of the European Social Charter.

<sup>166</sup> 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control’.

address the right to health explicitly and affirms that:

‘1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness’.

Due to the controversies surrounding this provision, the CESR Committee adopted the *General Comment No 14 on the Right to Health* in 2000.<sup>167</sup> In doing so, it marked a turning point in the discussion surrounding the right to health, leading to the rapid development of its normative content. For this analysis, it is essential to note that the Committee broadly interpreted the right to health as:

‘extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health’.<sup>168</sup>

The right to health encompasses *inter alia* the right to access essential medicines. In that regard, the Committee stated that:

‘[f]unctioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary

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<sup>167</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) U.N. Doc. E/C.12/2000/4 Aug.11, 2000.

<sup>168</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) U.N. Doc. E/C.12/2000/4 Aug.11, 2000. para 11.

depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs'.<sup>169</sup>

This aspect is the one that immediately places itself at odds with IP and in particular, patents. Patent holders might charge high licencing prices to manufacturers reducing production and, consequently, access to that medicine. In this respect, TRIPS was brought under the microscope as the main cause of limited access to medicines. Article 27(1) TRIPS requires 'new, involve an inventive step and are capable of industrial application' for a patent to be granted, recognised, and protected, to be expanded beyond the tangible medical product but also to the overall pharmaceutical production process.<sup>170</sup> In the post-TRIPS era 'so long as an invention meets the technical requirements of patentability, a patent must be granted for an innovative product, including a pharmaceutical compound, even if it would negatively impact the accessibility of drugs'.<sup>171</sup> The difficulties such additional protective provisions placed on many of the developing nations were recognised, with the introduction of ten years grace period to allow and ideally facilitate the implementation of this protection.<sup>172</sup>

Moreover, the question of 'parallel importation' of medicine within TRIPS-bound nations came to the forefront of discussions, a by-product of this ever more globalised world.<sup>173</sup> On this matter, as with many others, TRIPS was deliberately

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<sup>169</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) U.N. Doc. E/C.12/2000/4 Aug. 11, 2000. para 12.

<sup>170</sup> Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (Sweet and Maxwell, 2<sup>nd</sup> Ed 2003) 218–219.

<sup>171</sup> Cynthia M. Ho, 'A New World Order for Addressing Patent Rights and Public Health' (2007) 82 Chicago-Kent Law Review 1469, 1476.

<sup>172</sup> However, in 2005, following the completion of the grace period, Developing nations found themselves facing standards face beyond those of TRIPS. Many of which were accepted as part broader Trade Agreements. How this situation develops is a current concern in the global health movement and a driving concern in the interaction between intellectual property and human rights.

<sup>173</sup> Cynthia M. Ho, 'A New World Order for Addressing Patent Rights and Public Health' (2007) 82 Chicago-Kent Law Review 1469, 1501 noting how the process appears to 'favor consumer interests and access to medicine, because countries are free to import products from the country

ambiguous, merely stating that nothing in the Treaty ‘shall be used to address the issue of exhaustion of intellectual property’.<sup>174</sup> This lingering ambiguity was addressed at the turn of the millennium with the Doha Declaration, stating that each WTO Member States was ‘free to establish its own regime for exhaustion without challenge’.<sup>175</sup> The Doha Declaration went further, clarifying Articles 30<sup>176</sup> and 31 TRIPS,<sup>177</sup> provisions on the exceptions and limitations of patents respectively. It

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where they are legitimately sold for the lowest possible price. Pharmaceutical manufacturers are strongly opposed to international exhaustion since their business model relies upon price differentiation amongst different countries. If consumers could freely buy the cheapest product available, companies would not be able to discriminate amongst different markets’.

<sup>174</sup> Article 6 of TRIPS

<sup>175</sup> Doha Declaration of the TRIPS Agreement and Public Health (Doha, 14 November 2001, WT/MIN(01)/DEC/2), paragraph 5(d).

<sup>176</sup> Article 30 states that the – ‘Exceptions to Rights Conferred Members’ may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.

<sup>177</sup> Article 31 states that ‘Other Use Without Authorization of the Right Holder’ reads as follows: ‘Where the law of a Member allows for other use (7) of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected: (a) authorization of such use shall be considered on its individual merits; (b) such use may only be permitted if, prior to such use, the proposed user has made efforts to obtain authorization from the right holder on reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable period of time. This requirement may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. In situations of national emergency or other circumstances of extreme urgency, the right holder shall, nevertheless, be notified as soon as reasonably practicable. In the case of public non-commercial use, where the government or contractor, without making a patent search, knows or has demonstrable grounds to know that a valid patent is or will be used by or for the government, the right holder shall be informed promptly; (c) the scope and duration of such use shall be limited to the purpose for which it was authorized, and in the case of semiconductor technology shall only be for public non-commercial use or to remedy a practice determined after judicial or administrative process to be anti-competitive; (d) such use shall be non-exclusive; (e) such use shall be non-assignable, except with that part of the enterprise or goodwill which enjoys such use; (f) any such use shall be authorized predominantly for the supply of the domestic market of the Member authorizing such use; (g) authorization for such use shall be liable, subject to adequate protection of the legitimate interests of the persons so authorized, to be terminated if and when the circumstances which led to it cease to exist and are unlikely to recur. The competent authority shall have the authority to review, upon motivated request, the continued existence of these circumstances; (h) the right holder shall be paid adequate remuneration in the circumstances of each case, taking into account the economic value of the authorization; (i) the legal validity of any decision relating to the authorization of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member; (j) any decision relating to the remuneration provided in respect of such use shall be subject to judicial review or other independent review by a distinct higher authority in that Member; (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anti-competitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur; (l) where such use is authorized to permit the exploitation of a patent (“the second patent”) which cannot be exploited without

stated that patent terms ‘can and shall be interpreted and implemented in a manner supportive of WTO Members’ rights to protect public health and, in particular, to promote access to medicines for all’.<sup>178</sup> While the Doha Declaration was rightfully hailed as a breakthrough from the perspective of protecting the right to health,<sup>179</sup> it was not without its flaws.<sup>180</sup> Facing active resistance from many Western and developed nations, the TRIPS Council introduced a waiver on the requirement for domestic use of compulsory licensing for essential medicine. However, this was subject to a series of dense and complex rules and regulations.<sup>181</sup> While there were attempts in 2005 to make the waiver a permanent feature of the TRIPS process, it has not achieved the required two-thirds ratification to come into force. Therefore, it has remained an administrative and bureaucratic burden for developing nations to overcome.<sup>182</sup>

Following the ‘global drug gap’<sup>183</sup> where most of the pharmaceutical resources only supply developed nations,<sup>184</sup> the need to re-frame the patent debate away from its current IP (economic) dominated perspective to a human right perspective became all the more pressing. Efforts to address broader impact factors will, however, also be required, as simply:

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infringing another patent (“the first patent”), the following additional conditions shall apply: (i) the invention claimed in the second patent shall involve an important technical advance of considerable economic significance in relation to the invention claimed in the first patent; (ii) the owner of the first patent shall be entitled to a cross-licence on reasonable terms to use the invention claimed in the second patent; and (iii) the use authorized in respect of the first patent shall be non-assignable except with the assignment of the second patent’.

<sup>178</sup> Doha Declaration of the TRIPS Agreement and Public Health (Doha, 14 November 2001, WT/MIN(01)/DEC/2), paragraph 4.

<sup>179</sup> Fredrick M. Abbot, ‘The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO’ (2002) 5 *Journal of International Economic Law* 469.

<sup>180</sup> Although the rights to science and culture does not establish a human right to patent protection, it does provide a human right framework within which to consider patent policy.

<sup>181</sup> Fredrick M. Abbott, ‘The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health,’ (2005) 99 *American Journal of International Law* 317, 326–48.

<sup>182</sup> Frederick M. Abbott and Jerome H. Reichman, ‘Doha Round’s Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines under the Amended TRIPS Provisions’ (2007) 10 *Journal of International Economic Law* 921, 932; Jessica L. Greenbaum, ‘TRIPS and Public Health: Solutions for Ensuring Global Access to Essential AIDS Medication in the Wake of the Paragraph 6 Waiver’ (2008) 25 *Journal of Contemporary Health Law and Policy* 142, 151–52.

<sup>183</sup> Michael R. Reich, ‘The Global Drug Gap’ (2000) 287 *Science* 1979.

<sup>184</sup> *Médecins sans Frontières*, Access to Essential Medicines Campaign & Drugs for Neglected Diseases Working Group, *Fatal Imbalance: The Crisis in Research and Development for Drugs for Neglected Diseases* 10 (2001), available at <<http://www.msf.org/source/access/2001/fatal/fatal.pdf>> noting that ‘only 10 percent of the global health research is devoted to conditions that account for 90 percent of the global disease burden’.

‘removing the patent barrier will not miraculously produce access to medicines. There will still be the need for funding for drugs, for effective health systems, and for wise selection of medicines’.<sup>185</sup>

### ***5.3. The Right to Food and Intellectual Property***

Tangential, and often discussed in conjunction with the right to health, is the right to food. Several instruments under international law recognise the human right to adequate food.<sup>186</sup> As with the right to health, the broad classification of the right to an adequate standard of living under Article 25 UDHR included the right to food. It was not until the ICESCR that the right to food was expressly addressed under its own merit. Article 11(1) ICESCR requires that States parties recognise ‘the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions’. The CESCR Committee, in its *General Comment No. 12*,<sup>187</sup> affirmed that:

‘[t]he right to adequate food is realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement’.<sup>188</sup>

According to the CESCR Committee, the right to adequate food, like other human rights, imposes obligations to respect, to protect, and to fulfil. For the purpose of this thesis, it is worth noting that ‘the obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food’.<sup>189</sup> The ‘intersection of intellectual property and the human

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<sup>185</sup> Sean Flynn, ‘Legal Strategies for Expanding Access to Medicines’ (2003) 17 *Emory International Law Review* 535, 539.

<sup>186</sup> The Convention on the Elimination of All Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989)<sup>11</sup> and the Convention on the Rights of Persons with Disabilities (2006). The right to food is also recognized in some regional instruments, such as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador (1988),<sup>13</sup> the African Charter on the Rights and Welfare of the Child (1990) and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003).

<sup>187</sup> UN Committee on the Rights of the Child (CRC), *General Comment No. 12* (2009): *The Right of the Child to Be Heard*, 20 July 2009, CRC/C/GC/12.

<sup>188</sup> UN Committee on the Rights of the Child (CRC), *General Comment No. 12* (2009): *The Right of the Child to Be Heard*, 20 July 2009, CRC/C/GC/12 para 6.

<sup>189</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5 May 12 1999.

right to food raises contentious and unresolved issues of international law and politics'.<sup>190</sup> In fact, unlike other human rights, the right to food is concerned with the practical aspects relating to access and sustainability.

In so far as IPRs deal with the large-scale facilitation, production, and research on of plant genetic resources (PGR), as well as the associated industries, they directly affect the right to food. The proper scope and modalities of protection for plant-related innovations have given rise to the so-called 'seed wars'.<sup>191</sup> These seed wars, the conflict over the PGR, have existed in various forms for decades relating to the development process of the seeds themselves. This development process is divided into three stages. The first concerns seeds in their raw or natural state. The second concerns seeds found and held as research material at global seed banks. The third stage encompasses seeds which have been 'worked' or 'developed' through human innovation. The IP protection measures concerning PGR industries is primarily intended to prevent free-riding by competitors of the developers of PGR and as a method to allow the developer to recoup the research and development costs of developing new seed types. Thus, it concerns the second and third phases of the development process. This IP protection has been questioned from a human rights perspective for a variety of reasons. For example, it has been viewed as overemphasising the protection for the commercial aspect at the potential expense of the protection of biodiversity or bio-health of seeds. In that regard, IP frustrates the right of people to have sufficient food corresponding to their cultural traditions. It has also been argued that the use of these protective measures is disproportionately used by developed nations,<sup>192</sup> aggravating the breach of human rights in developed nations.

Prior to TRIPS, tensions concerning the right to food had been raised but were rarely addressed by the U.N. However, following TRIPS, the CESCR Committee's *General Comment No. 17* considered the use of IP (from a human rights perspective) as a limitation on the rights of food.<sup>193</sup> Further, this limitation would

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<sup>190</sup> Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2012) 364.

<sup>191</sup> Keith Aoki, *Seed Wars: Controversies and Cases on Plant Genetic Resources and Intellectual Property* (Carolina Academic Press 2008).

<sup>192</sup> Kerstin Mechlem and Terri Raney, 'Agricultural Biotechnology and the Right to Food' in Francesco Francioni (ed), *Biotechnologies and International Human Rights* (Hart Publishing 2007) 131–133.

<sup>193</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right

only be applicable regarding the royalties paid for seeds and plant material and not the food product itself.<sup>194</sup> This emphasis on the relationship between the right to food and IP for plant-based innovation was again put forward in 2008 by the Special Rapporteur on the Right to Food.<sup>195</sup> In this regard, the Special Rapporteur highlights how the framework encompassing the right to food, incorporates the concept of sustainability, as well as ensuring the accessibility of food for future generations.

It is worth mentioning for the purpose of this analysis the creation<sup>196</sup> and development of the International Union for the Protection of New Varieties of Plants (UPOV) and its standards.<sup>197</sup> On the one hand, the UPOV is seen as having created more difficulties than it has generated benefits such as the limitations on end use of the seeds by the farmers. At the same time, some scholars claim that to adhere to the terms of the UPOV creates an unworkable burden on some developing nations.<sup>198</sup> François Meienberg suggests that due to the resource intensive obligations required to adhere to the UPOV "at some point, protection starts to thwart development".<sup>199</sup> On the other hand, one can argue that protection of seed varieties contribute to the innovative aspects related to IP.<sup>200</sup> The debate around the UPOV well exemplifies the challenge to balance the protection of innovation and the need to allow people to benefit from that innovation, which is a salient feature in the discussion of IP clauses in EU trade agreements.

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of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author, Article 15(1)(c), U.N. Doc. E/C.12/GC/17 Jan. 12 2006.

<sup>194</sup> Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2012) 402.

<sup>195</sup> Olivier De Schutter, U.N. Special Rapporteur on the Right to Food, Address at High-Level Conference on World Food Security: The Challenges of Climate Change and Bioenergy (June 3–5, 2008).

<sup>196</sup> For an overview of the substantive developments in the 1991 Act see Barry Greengrass, "The 1991 Act of the UPOV Convention" (1991) 13(12) *European Intellectual Property Review* 466.

<sup>197</sup> Graham Dutfield, 'Turning Plant Varieties into Intellectual Property: The UPOV Convention', in Geoff Tansey and Tasmin Rajotte (eds), *The Future Control of Food: A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security* (Earthscan, 2008) 33

<sup>198</sup> For a similar discussion at the macro level application of IPRs protection obligation and the burdens in places on developing nations, see Carolyn Deere, *The Implementation Game. TRIPS and the Global Politics of Intellectual Property Reform in Developing Countries* (Oxford University Press 2009).

<sup>199</sup> François Meienberg, 'Infringement of Farmers' Rights' D+C <[www.inwent.org/ez/articles/169301/index.en.shtml](http://www.inwent.org/ez/articles/169301/index.en.shtml)>.

<sup>200</sup> For a similar discussion at the macro level application of IPRs protection as a restriction or an enhancement of trade see *infra* Chapter Five, Section 3 and Section 4.

#### ***5.4. The Freedom of Expression and Intellectual Property***

The right to freedom of expression is a long-recognised right, tracing its origin to post-war Europe and the collapse of fascist regimes of the period. As such, the right to freedom of expression was recognised within Article 19 UDHR that:

‘[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’.

Again, as a response against fascism, this right was expanded further under Article 19 of the ICCPR:

- ‘(a) Everyone shall have the right to hold opinions without interference;
- (b) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice;
- (c) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may, therefore, be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (d) for respect of the rights or reputations of others;
  - (e) for the protection of national security or of public order (*ordre public*), or of public health or morals’.

However, the drafters of Article 19 ICCPR did not envision this as an absolute right and included the ability to restrict the freedom of expression within strictly tested conditions.<sup>201</sup> The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue also makes clear that:

‘any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or

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<sup>201</sup> UN Human Rights Council ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ (4 June 2012) U.N Doc, A/HRC/20/17 para 24.

other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application'.<sup>202</sup>

Further, both Articles were drafted in a broad manner in order for those provisions to be able to remain valid and address changes in media forms and how technological developments could alter the ability to express or hold information. As a result, the framework relating to the protection of this right is equally applicable in the digital environment.

The conflict between the right to freedom of expression and IP matters centres on several interrelated areas, such as the protected IP in forms of expression, how new technology facilitate the freedom of expression while potentially infringing IP, and how the freedom of expression operates concerning language as a whole. From the IP rightsholder's perspective, this can be seen concerning both copyright and trademark. With the former, this related to expression through the use of unauthorised material protected by copyright and the rights holder suppressing the expression with injunctive measures.<sup>203</sup> With the latter, the trademark closes or restricts the use of signs and indications within an expression. Essentially removing them from the public domain for commercial exploitation.<sup>204</sup>

The CESCR Committee's *General Comment No. 21* stressed the importance of expression as part of the right to cultural life, going so far as to classify expression as 'an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future'.<sup>205</sup> Further, the importance of the non-

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<sup>202</sup> UN Human Rights Council 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (4 June 2012) U.N Doc. A/HRC/20/17 para 24.

<sup>203</sup> Laurence Helfer and Graeme Austin, *Human Rights and Intellectual Property. Mapping the Global Interface* (New York: Cambridge University Press, 2011), 221.

<sup>204</sup> Martin Senftleben, 'Free Signs and Free Use: How to Offer Room for Freedom of Expression Within the Trademark System' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 355-356. On this, Senftleben notes the importance of the 'need to keep certain signs free from trademark protection leads to a public domain of signs that are unencumbered by trademark rights'. See also Martin Senftleben, 'Trademark Law and The Public Domain' in Dana Beldiman (ed), *Access to Information and Knowledge: 21<sup>st</sup> Century Challenges in Intellectual Property and Knowledge Governance* (Edward Elgar 2012); Jacqueline Lipton, *Internet Domain, Names, Trademarks and Free Speech* (Edward Elgar, 2010) 5. Lipton notes the increased imbalance and the associated risks with such restrictions in the digital environment.

<sup>205</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of everyone to take part in cultural life* (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights) U.N Doc. E/C.12/GC/21 Dec. 21 2009. para 12.

commercial aspects of cultural expression must also be highlighted.<sup>206</sup> However, in doing so, *General Comment No. 21* did not make attempts or offer suggestions on how to address this matter in conflict with IP protection obligations.

### ***5.5. The Right to Education and Intellectual Property***

At the international level, the right to education was recognised early on with the UHDR, ICESCR and the United Nations Convention on the Rights of the Child (UNCROC).<sup>207</sup> Article 26 of the UDHR states as follows:

‘1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

3. Parents have a prior right to choose the kind of education that shall be given to their children’.

Article 13 ICESCR includes a similarly broad formulation,<sup>208</sup> and the various

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<sup>206</sup>Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of everyone to take part in cultural life* (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights) U.N Doc. E/C.12/GC/21 Dec. 21 2009. Para 43.

<sup>207</sup> Convention on the Rights of the Child (New York, 2 September 1990 1577 U.N.T.S 3).

<sup>208</sup> ‘1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace. 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) Primary education shall be compulsory and available free to all; (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education; (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or

conceptual components to the right to education were subsequently addressed under the CESCR Committee's *General Comment No. 11*.<sup>209</sup>

From the beginning, certain exemptions to copyright protections have existed for education purposes.<sup>210</sup> Ginsburg notes the early emphasis of the introduction of copyright was not on the protection of the author, but rather 'enacting a copyright law formed part of a grander scheme of public education'.<sup>211</sup> Further, Helfer and Austin suggest that '[c]onceptually and textually, there exists venerable connections between education and intellectual property'.<sup>212</sup> Building on this discussion, the CESCR Committee's *General Comment No. 13* stressed the importance of the learning material.<sup>213</sup> *General Comment No. 13* was then followed in the 2007 report,

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completed the whole period of their primary education; (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved. 3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions. 4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State'.

<sup>209</sup> Committee on Economic, Social and Cultural Rights, General Comment No 11: Plans of Action for Primary Education (Article 14) U.N. Doc. E/C.12/1999/4 May 10, 1999. para 2. The General Comment notes how the concept of education moves between civil and political elements as well as social and cultural right that 'the right to education epitomizes the indivisibility and interdependence of all human rights'. Yoram Rabin, 'The Many Forms of the Right to Education' in Daphne Barak-Erez and Aeyal M. Gross (eds), *Exploring Social Rights: Between Theory and Practice* (2007) 267. Rabin notes the various components of what encompasses education as a practical concept.

<sup>210</sup> Joel Spring, *The Universal Right to Education: Justifications, definition, and Guidelines* (Routledge, 2000).

<sup>211</sup> Jane C. Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1989) 64 *Tulane Law Review* 991, 1009.

<sup>212</sup> Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2012) 316

<sup>213</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 13: The Right to Education (Art. 13 of the Covenant) U.N Doc. E/C.12/1999/10 Dec. 8 1999. para 6. 'While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:2 (a) Availability - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology; (b) Accessibility - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions: (i) Non-discrimination - education must be

*A Human Rights Approach to Education for All*, which described learning material as ‘fundamental prerequisite of education’.<sup>214</sup> This was again recognised and restated by the UN Committee on the Rights of the Child (CRC), in *General Comment No. 1 on the UNCROC Article 29(1)*.<sup>215</sup> The right to access material for the benefit of education and the protection of the material from the perspective of the author may, however, conflict. In that connection, Foster notes that:

‘[t]he critical problem of potential conflict arises from the fact that the educational material, in which authors may have a material interest, are critical to the realization of the right to education’.<sup>216</sup>

Moreover, the CESCR Committee, in *General Comment No. 17*,<sup>217</sup> noted that the obligation for States to protect the rights of the author, should ‘constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education’.<sup>218</sup> Further, the CESCR Committee stressed the duty to ‘prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production, or for schoolbooks and learning

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accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination); (ii) Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme); (iii) Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education; (c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4)); (d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.

<sup>214</sup> UNESCO, *A Human Rights-Based Approach to Education for All: A Framework for the Realization of Children’s Right to Education and Rights within Education* (UNESCO, 20007) 77.

<sup>215</sup> UN Committee on the Rights of the Child (CRC), *General Comment No. 1* (2001), Article 29 (1), *The Aims of Education*, U.N. Doc. CRC/GC/2001/1 Apr. 17 2001. ‘

<sup>216</sup> Sharon E Foster, ‘The Conflict between the Right to Education and Copyright’ in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer, 2008) 288.

<sup>217</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author*, Article 15(1)(c), U.N. Doc. E/C.12/GC/17 Jan. 12 2006.

<sup>218</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author*, Article 15(1)(c), U.N. Doc. E/C.12/GC/17 Jan. 12 2006. para 35.

materials’.<sup>219</sup> However, it did not offer guidance on how parties should achieve these competing goals.

### ***5.6. The Rights of Indigenous Peoples and Intellectual Property***

Over the past two decades, there have been significant efforts made by indigenous peoples to assert control over their own culture. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>220</sup> which was adopted by the General Assembly on 13 September 2007 and is the most comprehensive international instrument on the rights of indigenous peoples, includes several explicit references to indigenous culture. In particular, this Declaration, which provides for minimum standards for the survival, dignity, well-being and rights of the indigenous peoples, pays particular attention to cultural rights and identity. Article 3 UNDRIP, which provides for the right to self-determination, affirms that by virtue of that right, indigenous peoples shall be able to ‘freely determine their political status and freely pursue their economic, social and *cultural* development’ (emphasis added). Article 5 UNDRIP states that:

‘[i]ndigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and *cultural institutions*, while retaining their right to participate fully, if they so choose, in the political, economic, social and *cultural* life of the State’.

Moreover, Article 8 UNDRIP affirms that indigenous peoples and individuals ‘have the right not to be subjected to forced assimilation or destruction of their culture’, while Article 11(1) protects the right of indigenous peoples ‘to practise and revitalize their cultural traditions and customs’. Article 11(1) also encompasses:

‘the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites,

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<sup>219</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He is the Author, Article 15(1)(c), U.N. Doc. E/C.12/GC/17 Jan. 12 2006. para 35.

<sup>220</sup> United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295. However, the non-binding nature of the Declaration must be acknowledged at this point. In part, this nature would appear to be one of the reasons why it has not been as visible within the agreements discussed in Part III in comparison to legally binding international Treaties.

artefacts, designs, ceremonies, technologies and visual and performing arts and literature’.

Article 12(1) UNDRIP further states that:

‘[i]ndigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons’.

Other provisions within the Declaration protect and develop indigenous peoples’ customs, religious practices, languages and educational systems, and, more broadly, their traditional knowledge.<sup>221</sup> Another particularly relevant element in respect of IP is Article 24(1) UNDRIP, which states that:

‘[i]ndigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services’.

IP provisions has the immediate potential to significantly encroach upon the rights that these Articles seek to establish. This risk is particularly true when one examines the system as it currently exists under TRIPS. One of the most contested areas remains the exploitation of indigenous traditional knowledge by (western) pharmaceutical industries. Scholars have noted that such industries, through the use of patents, have economically exploited indigenous cultural production.<sup>222</sup> Free-riding or appropriation of traditional knowledge by pharmaceutical industries<sup>223</sup> has additional drawbacks as indigenous peoples do not share in the technological and medical benefits arising from such exploitation.<sup>224</sup>

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<sup>221</sup> See *inter alia* Articles 13, 14, 15, 16, 31 UNDRIP.

<sup>222</sup> Johanna Gibson, *The Lay of the Land: The Geography of Cultural Expression*, in Christoph Beat Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Edward Elgar, 2008) 185; Johanna Gibson, *The Logic of Innovation Intellectual Property, and What the User Found There* (Ashgate 2014) 17-26 for a broader examination of the use and the question of trading of its value.

<sup>223</sup> Laurence R. Helfer, ‘Human Rights and Intellectual Property: Conflict or Coexistence?’ (2003) 5 *Minnesota Intellectual Property Law Review* 47, 52–53.

<sup>224</sup> Molly Torsen, ‘Anonymous, ‘Untitled, Mixed Media: Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expression’ (2006) 54 *American Journal of Comparative Law* 173.

On the other hand, Torsen puts forward the argument that IP systems of the past and present are a poor fit for the task of protecting cultural elements associated with indigenous people.<sup>225</sup> For example, the association of a particular expression with a particular indigenous culture is a difficult issue in and of itself. The current IP sphere is designed with a defined author or authors rather than the informal collective structure/group approach the classification of indigenous peoples would suggest.

Moreover, the current system requires that protected work is in a set or fixed medium for the protective provisions to be raised, with the cultural expressions of indigenous communities often falling outside of the scope of this requirement or that assigning a fixed medium could run contrary to the purpose of that community's unique cultural expression. Coombe goes so far as to accuse Developed Nations 'of having an inappropriate individual bias towards a Eurocentric model of the author, being predominate market-orientated, and unduly emphasising or enabling the privatisation of knowledge with respect to resources'.<sup>226</sup> More importantly, the platforms of many different indigenous groups reflect this sentiment. Furthermore, many of whom now openly view the IP protection system as a modern form of colonialization.<sup>227</sup>

In an attempt to solve the conflict between IP and indigenous rights, indigenous activists have also made significant use of IPRs themselves. This attempt has seen

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<sup>225</sup> Molly Torsen, 'Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues' (2008) 3 *Intercultural Human Rights Law Review* 199, 201.

<sup>226</sup> Rosemary J. Coombe, 'Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative Form of Sustainable Development?' (2005) 17 *Florida Journal of International Law* 115, 120.

<sup>227</sup> Maui Solomon, *Intellectual Property Rights and Indigenous Peoples' Rights and Responsibilities* in Mary Riley (ed), *Indigenous Intellectual Property Rights: Legal Obstacles and Innovative Solutions* (AltaMira Press 2004) 221 (2004); Graeme W. Austin, 'Re-Treating Intellectual Property? Proceeding and the Heuristics of Intellectual Property Law' (2003) 11 *Cardozo Journal of International and Comparative Law* 333; Peter K. Yu, 'Cultural Relics, Intellectual Property, and Intangible Heritage' (2008) 81 *Temple Law Review* 433, 455–59; Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, 2012) 463. Helfer and Graeme suggest that for many indigenous groups, there is awareness with a high degree of truth to it that, 'in the past, the overlay of western legal forms and institutions resulted in the abrogation of ownership and context over indigenous lands and property'. Also see generally Stuart Banner, 'Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand' (2000) 34 *Law and Society Review* 47 (2000); Stuart Banner, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23 *Law and History Review* 95. This also raises the concept of protecting in relation to indigenous peoples, which may question the state sovereignty, through the laws of internationalisation of intellectual property rights.

indigenous activists seeking development, recognition, and more importantly protection under aspects of IP which have previously been ignored, such as traditional knowledge. The use of IPRs to protect indigenous groups' culture is still a relatively recent phenomenon,<sup>228</sup> and as a result, it is difficult to suggest how successful these campaigns have been in terms of their overall and direct impact. Munzer and Rustiala, reflecting on this new trend and the history of interaction, categorise IP protection of traditional knowledge, as an uneasy situation.<sup>229</sup> This trend is founded on an overarching scepticism from previous attempts to expand IPRs into new areas and to further the 'enclosure of the intellectual commons is increasingly the practice in both international and national law'.<sup>230</sup>

## **6. The Role of the European Union in the Development of International Intellectual Property Law**

After having traced, in a general fashion, the development of international IP law and having discussed the nature of IPRs and their relationship with human rights, this section examines the specific role played by the EU in the overall development of IP law and in shaping a trade-oriented international IP law. It is evident that, while the EU has recognised the rights of authors and creators as fundamental rights in the internal sphere, at the global level the Union has primarily focused on trade-related aspects of IP law.

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<sup>228</sup> WIPO had previously attempted to reinforce the protection of traditional cultural expressions and traditional knowledge. However, these efforts have not progressed since consultations in 2010. In a similar manner, there has been significant pushback regarding the expansion of protections afforded to genetic knowledge under the CBD. See generally G. Kristin Rosendal, "The Convention on Biological Diversity: Tensions with the WTO Trips Agreement Over Access to Genetic Resources and the Sharing of Benefits" in Regina S. Axelrod and Stacy D. Van Deveer (eds) *The Global Environment Institutions, Law, and Policy* (Sage Publishing 4<sup>th</sup> ed, 2008).

<sup>229</sup> Steven R. Munzer and Kal Rustiala, 'The Uneasy Case for Intellectual Property Rights in Traditional Knowledge' (2009) 27 *Cardozo Arts and Entertainment Law Journal*. 37, 38.

<sup>230</sup> Steven R. Munzer and Kal Rustiala, 'The Uneasy Case for Intellectual Property Rights in Traditional Knowledge' (2009) 27 *Cardozo Arts and Entertainment Law Journal*. 37, 40-42. See also James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (Yale University Press 2008). Further the question of stewardship of cultural property and the issues it would raise, especially in relation to stewardship versus ownership can be seen in Michael F. Brown, 'Culture, Property, and Peoplehood: A Comment on Carpenter, Katyal, and Riley's "In Defense of Property"' (2010) 17 *International Journal of Cultural Property* 569, 572.

### ***6.1. The European Union in the World Trade Organisation and the ‘Forum Shifting’***

The influence of the EU in the development of international IP law must be considered in light of its position in the WTO system. Its Member States are members of the WTO following its ratification in 1995. At the same time, the EU is also a recognised member of the WTO. Hence, both are subject to the WTO obligations, and this has influenced the decision-making and policy agenda of the EU.<sup>231</sup> Both the EU and the WTO share broad goals of trade liberalisation between their members, which amounts to a significant portion of global trade.<sup>232</sup>

By becoming a member of the WTO in 1995, following its previous observation of GATT provisions,<sup>233</sup> the EU has been able to bring its agenda (including its IP agenda) to the forefront of discussions. In particular, for the purpose of this analysis, it is worth noting that the EU was able to frame and guide the negotiations of the late 1990s to include a greater focus on the issue of IP protection. By shifting the forum to the WTO from the previous WIPO system, the EU found itself in a stronger position to dictate and develop the processes and fora for international IP protection law-making. In combination with the U.S, the EU maintains a formidable presence in the WTO, due to its economic weight, allowing it a disproportionate degree of influence compared to individual Member States or third-countries who are members of the WTO. Additionally, under the rules of the WTO, the EU was enabled to engage in the process of forum shifting,<sup>234</sup> to move discussion outside the WTO negotiation when the Doha Development Round negotiations ran into difficulties. This periodic revision and development of the GATT ran from 2001-2008 primarily focused on reducing trade barrier to facilitate and encourage global trade. As with all Development Rounds, the discussions focus on general trade matters rather than on a specific issue, such as conflicts relating to agricultural

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<sup>231</sup> Gráinne De Búrca and Joanne Scott, ‘The Impact of the WTO on EU Decision-making’, in Gráinne De Búrca and Joanne Scott (eds), *The EU and the WTO Legal and Constitutional Issues* (Hart Publishing, 2001).

<sup>232</sup> JL Mortensen, ‘The World Trade Organization and the European Union’ in KE Jorgensen (ed), *The European Union and International Organisations* (Routledge 2009) 80.

<sup>233</sup> Jacques HJ Bourgeois, ‘The European Court of Justice and the WTO: Problems and Challenges’ in JHH Weiler (ed), *The EU, WTO and NAFTA: Towards a Common Law of International Trade?* (Oxford University Press 2000) 71. Bourgeois noting how the EU had acted with the status of a party to the GATT for all practical purposes but did not have voting power outside its Member States.

<sup>234</sup> See above note 44.

tariffs or issues relating to pharmaceutical patents.

This change of forum facilitated the linkage of trade and IP protection to further this leverage and operate as part of ‘global package deals’ where the higher IP standards must be accepted to benefit from the trade-based concessions such as the reduction of tariffs. By altering the forum, the EU bypassed what can be perceived as two major problem areas. First, the nature of the ‘one nation one vote’ policy of the WIPO prevents those seeking higher IP protection from passing their agenda through a voting contest. While the WTO also operates on the one nation one vote policy, this is mitigated by the stronger bargaining position of the EU. Secondly, the transfer to the WTO allowed the EU to bring IP protection issues to the DSB of the WTO, which offers stronger sanctions and remedies for breaches of obligation than those found under the settlement system of WIPO. This sanction-based mechanism primarily relates to the ability of the DSB to partially or fully suspend preferential tariffs. The economic impact of such rulings would result in prompt resolution of a purported breach.

The process of changing forum has facilitated the development of treaties which contain higher levels of IP protection and enforcement measures than those found within TRIPS. Where the subsequent agreements TRIPS-Plus agreements are building on the foundation of TRIPS.<sup>235</sup> It has also led to a change in the nature of regimes from the closed nature regimes<sup>236</sup> to a more complex regime,<sup>237</sup> or regime conglomerates.<sup>238</sup> This change relates to the actual forum and structure of the negotiations, their objectives, and the context in which they are developed. In particular, how the regimes operate concerning broader obligations and development goals. The EU has been able to use its negotiating powers across multiple forums to seek higher IP protection in exchange for objectives or

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<sup>235</sup> Article 31(3)(C) of the Vienna Convention ‘any relevant rules of international law applicable in relations between the parties ‘should be taken into account. US-Gasoline, that the WTO rules of covered agreements, should not be ‘read in clinical isolation from public international law. ‘WTO, WT/DS2/AB/R Appellate Body Report page 12.

<sup>236</sup> Robert O Keohane and Joseph S. Nye, Jr, ‘The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy’ in Robert B Porter (ed), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Brookings Institution Press 2001) 264, 266. Where regimes were isolated and separated ‘from the rest of the system, in the sense that they operated without close links to other regimes in other issue-areas’.

<sup>237</sup> Kal Raustiala and David G. Victor, ‘The Regime Complex for Plant Genetic Resources. International Organization’ (2005) University of California, Los Angeles School of Law Research Paper Series No. 03-19 < <http://ssrn.com/abstract=441463>>.

<sup>238</sup> David W. Leebron, ‘Linkages’ (2002) 96 *The American Journal of International Law* 1, 24.

concessions that are not deemed a priority.

## ***6.2. The Role of the European Union from Forum Shifting to TRIPS-Plus***

This conscious decision to change forum can be viewed as an attempt to achieve what the EU considers ‘an adequate and effective level of protection and enforcement of intellectual property rights’.<sup>239</sup> In recent years, the EU has sought to make its own internal rules the standard within its bilateral trade agreements.<sup>240</sup> Over the last two decades the EU, being dissatisfied with the current protections offered concerning the development of technology and the expansion of IP that it brings, has sought to change forums to those that best suit this interests.<sup>241</sup> Some scholars have suggested that this process can be used to prevent the upward ratcheting of IP protection sought by the EU and other IP maximalists by relocating to more human rights-focused forums.<sup>242</sup> However, one must then consider the bargaining position of the parties who are seeking the introduction of higher levels of IP protection. Further, due to their global influence, it may not be possible to introduce less restrictive levels of IP protection and enforcement once the standards have been raised.<sup>243</sup>

Within the last decade, increased efforts by the EU have been observed, in conjunction with other developed nations,<sup>244</sup> to create a continuously shifting forum

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<sup>239</sup> A term used consistently by the EU in its various trade agreements over a twenty plus year period.

<sup>240</sup> Josef Drexler, 'Intellectual Property and Implementation of Recent Bilateral Trade Agreements in the European Union' Max Planck Institute for Innovation and Competition; <<http://ssrn.com/abstract=2102530> > 9.

<sup>241</sup> Kal Raustiala and David G. Victor, 'The Regime Complex for Plant Genetic Resources. International Organization' (2005) University of California, Los Angeles School of Law Research Paper Series No. 03-19 < <http://ssrn.com/abstract=441463> > 8.

<sup>242</sup> Laurence R Helfer, 'Regime shifting: TRIPS and New Dynamics of International Intellectual Property Lawmaking' (2004) 29(1) The Yale Journal of International Law 2, 8. Helfer notes that ‘the endpoint of certain forms of intellectual property regime shifting by developing countries appears to be a return to the WTO or WIPO suggests that one or two regimes-perhaps those with stronger enforcement authority or better linkage capability than the others-will ultimately benefit from the increased demand for regimes that issue density engenders’.

<sup>243</sup> Henning Grosse Ruse-Khan and Annette Kur, 'Enough is Enough - The Notion of Binding Ceilings in International Intellectual Property Protection' Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-01<<http://ssrn.com/abstract=1326429> > 13-14. Ruse-Khan and Kur noting that it is ‘easy to imagine that once a substantial portion of trading partners have agreed to observe some standards as those enshrined in present US/EU legislation, there is no way back to a meaningful lessening of what appears as widely accepted rules’.

<sup>244</sup> Laurence R Helfer, 'Regime shifting: TRIPS and New Dynamics of International Intellectual Property Lawmaking' (2004) 29(1) The Yale Journal of International Law 2,8.

of discussion to the point of some negotiations lasting for an indefinite period of time.<sup>245</sup> While the EU was a key player during the ACTA process, it would ultimately prove to be the final nail in its coffin following the rejection of the agreement by the European Parliament on the 4<sup>th</sup> of July 2012. The rejection of ACTA is arguably due to several different factors. Firstly, the possibility of criminalisation for the private individual under the enforcement provisions and the lack of clarity regarding 'commercial scale' within ACTA. Then, the EU was not satisfied with the role of the internet service provider under ACTA. Thirdly, the EU took issue with the possibility of the seizure of generic medicines in transit and the interruption to trade. Lastly, the EU was unsure of the position of ACTA in relation to its commitment to the provision, protection, and enforcement of human rights. As ACTA sought to counter the rise in large scale global IP infringement, it is quite difficult to rationalise why the definition of what constitutes a 'commercial scale' was left so vague.<sup>246</sup> It is, however, possible that the definition was left intentionally left vague to allow the finalisation of the treaty<sup>247</sup> - a point that may ultimately have proven to be the Agreements undoing in this instance. This trend continued with the collapse of the TTIP agreement as well as the U.S withdrawal from the TTP negotiations. As a result, the EU has moved to the forefront of developing the international TRIPS-Plus agenda. One which is ever more present in the EU

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<sup>245</sup> Peter Drahos, 'Four Lessons for Developing Countries from the Trade Negotiation Over Access to Medicine' (2007) 28 *Liverpool Law Review* 11, 35.

<sup>246</sup> While this vagueness is not a new creation, it did reach new levels of its application and scope under ACTA. See generally Ainee Adams, 'What is 'Commercial Scale'?: A Critical Analysis of the WTO Panel Decision in WT/DS362/R' (2011) 33(6) *European Journal of Intellectual Property* 342.

<sup>247</sup> From early on in the process, the public lead by NGOs and interest groups against the increase in IP, openly criticised ACTA, both for its purpose and the manner in which the negotiation took place. This lead many of the parties engaged in the process to turn their attention elsewhere such as the TTIP, TTP, and CETA. Henning. Grosse Ruse - Khan, 'Criminal Enforcement and International IP Law' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2012); Bryan Mercurio, 'ACTA: Anatomy of a Failed Agreement' in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 329. Mercurio notes that 'the priority became simply to conclude an agreement as opposed to conclude a meaningful agreement'; Kimberlee Weatherall, 'What was Left Out of ACTA' in Pedro Roffe and Xavier Seuba (eds), *The ACTA and the Plurilateral Enforcement Agenda: Genesis and Aftermath* (Cambridge University Press 2015) 339, noting the gradual reduction of scope within was 'visible across the later drafts and the final version that many of the provisions became 'uncertain and vague shadow of their earlier selves'. Jerome H. Reichman, 'Enforcing the enforcement procedures of TRIPS' (1997) 37 *Virginia Journal of International Law* 2, 5. Reichman notes that this vague language contrasts with 'loose and open ended language in which [TRIPS is] cast' as TRIPS retained the ability and more importantly a strong desire to rectify conflicts in the interpretation.

agreements post-2010.<sup>248</sup>

## **7. Concluding Remarks**

From its origin, in the 19<sup>th</sup> century, the international IP framework has developed at an unprecedented scale, in an attempt to address the challenges posed by globalisation and in light of rapid technological developments. From the 2000s onward, IPR has primarily been addressed through the use of bilateral and multilateral agreements. Following a stalemate of the negotiations conducted within the WTO, many developed nations have achieved significant degrees of success in this regard, leading to the proliferation of the TRIPS-Plus provisions present today. This is discussed in Part III.

The largely trade-related nature of international IP law has hardened the debate over the nature of IPRs and, even more, over the conflict between IP and human rights. The latter remains a very contested area.

This thesis embraces the view that the rights of authors and creators are human rights, first within the EU jurisprudence but also at the international level. In doing so, it builds on the debate surrounding the need to strike a for a more appropriate balance between IP and other competing rights.

The EU has played a major role in the development of international IP law but has not addressed within international fora (such as the WTO) aspects related to the human rights nature of IPRs, focusing mostly on trade-related aspects. This approach has not dramatically changed in bilateral negotiations. However, the use of TRIPS-Plus has gone hand in hand with the protection of human rights.<sup>249</sup>

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<sup>248</sup> This development is discussed in Part III.

<sup>249</sup> This includes a shift in for a from specific references to IP Treaties to specific references to Human Rights Treaties such as the CBD. This is shift and inclusion is discussed in detail in Part III.

## **Part II**

# **The European Union Legal Framework**

# -Chapter Two-

## The European Union and Intellectual Property

### 1. Introduction

From the founding of the European Economic Community (EEC) in 1957, the overarching goal of what is now the European Union (EU) has been to ‘preserve peace and liberty and to lay the foundations of an ever-closer Union among the peoples of Europe’.<sup>1</sup> To achieve this goal, the EU took the initial steps of forming the Customs Union and the development of common policies for domestic areas such as transport, trade, and agriculture. This cooperation was aimed to achieve market integration as a core feature of the EU.<sup>2</sup> This process of development and expansion of market integration was characterised by a constitutional ‘spillover’ through the reform of the founding treaties by the Treaties of Maastricht,<sup>3</sup> Amsterdam,<sup>4</sup> Nice,<sup>5</sup> and Lisbon.<sup>6</sup>

As will be discussed further in this Chapter, the EU has started to ‘govern’ IP matters since its inception within the scope of the construction of the internal market. However, a certain:

‘deference towards national IP systems emerged from [former] Article 30 EC [now Article 36 TFEU], which admitted derogations to the freedom of circulation of goods and services when required to protect industrial and commercial property, and in Article 243 EC [now Article 345 TFEU],

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<sup>1</sup> Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.

<sup>2</sup> Single European Union Act, 17 February 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506.

<sup>3</sup> Maastricht Treaty, Treaty on European Union, 7 February 1992, 1992 O.J. (C191) 1, 31 I.L.M. 253.

<sup>4</sup> Treaty of Amsterdam Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997, 1997 O.J. (C340) 1, 37 I.L.M. 253.

<sup>5</sup> Treaty of Nice Amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 26 February 2001, 2001 O.J. (C80) 1.

<sup>6</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007 O.J. (C306) 1.

which stated that the Treaty left unprejudiced the Member States' systems of property ownership'.<sup>7</sup>

The first of such remarkable changes occurred in 2000, following the introduction of an explicit reference to IP as an aspect of the right to property within the Article 17 of the Charter of Fundamental Rights of the European Union (EU CFR). Article 17(2) EU CFR addresses IPRs, including patents, copyright, and trademarks within the context of the right to property and the right to peaceful enjoyment of one's possessions.<sup>8</sup> Article 6 TEU recognises the rights, freedoms and principles set out in the EU CFR (including Article 17(2) EU CFR), 'which shall have the same legal value as the Treaties'. Moreover, the current Treaties have included more substantive provisions on IP and conferred upon the EU a more explicit competence on this matter. In particular, the Treaty of Lisbon has conferred on the EU new and considerable powers to 'establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements'.<sup>9</sup> This reference to expanding the Union's competence to encompass IPRs is significant, as Article 6 TEU explicitly stated that the recognition of the Charter would not create or facilitate the expansion of competence afforded to the EU.

Against this background, this chapter aims to discuss the development of the EU competence on IP matters in a chronological manner. Further, this chapter discusses the most relevant pieces of legislation and case law of the Court of Justice of the European Union (CJEU). Alongside the changes to the Treaties, the case law of the CJEU offers a clear indication of the scope of the provisions of the Treaties and their impact on the development of IP. However, it also underlines the confines and limits of the EU competence over IP.

Harmonising legislation has also played a growing role in shaping EU IP law. Due to the relatively limited EU competence in respect of IPRs, the role of harmonising

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<sup>7</sup> Caterina Sganga 'Towards a More Socially Oriented EU Copyright Law: A Soft Paradigm Shift After Lisbon' in Delia Ferri and Fulvio Cortese (eds), *The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU* (Routledge 2019) 231.

<sup>8</sup> Article 1 Protocol 1 to the European Convention of Human Rights.

<sup>9</sup> Article 118 TFEU.

legislation was less prominent at first but has progressively increased over time.<sup>10</sup> The principle of primacy of EU legislation over conflicting national law,<sup>11</sup> together with the principle of consistent interpretation which obliges national courts to interpret provisions, as far as possible, to avoid conflicts with EU law,<sup>12</sup> have contributed to strengthening the EU role in governing IP.

Against this background, this chapter will chart the development of the EU competence on IP matters and IP legislation within the EU, from the Treaty of Rome to the Treaty of Lisbon and beyond, by looking to the Treaties themselves, but also to relevant secondary legislation. The chapter aims to highlight that EU legislation has moved beyond the traditional elements of IP, such as copyright, patents, and trademark, to regulate novel concepts such as geographical indication, folklore or traditional knowledge, taking into account access to IP from a non-holder perspective. This chapter will also analyse the interaction between IP provision and the free movement of goods within the EU, whether the interaction between the two is positive, negative, or both and the influence such interaction would have on the development of policy matters.

This analysis will provide the necessary context to understand the extent of the Union's external competence on IP, which is discussed in Chapter Four, and ultimately the scope of TRIPS-Plus provision in the various agreements, which is examined in Part III.<sup>13</sup> Bearing in mind that the 'principle of conferral' and the 'principle of parallelism' developed since the *ERTA* case,<sup>14</sup> a discussion of how EU IP law has developed is a necessary starting point in understanding how IP provisions feature in the Union's external action.

Further to these introductory remarks, Section 2 discusses IP within the EU constitutional framework, firstly by examining the position of IP within the Treaties and how has developed over the previous sixty years. It also seeks to provide an analysis of IP within the EU CFR and what influence this development will have

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<sup>10</sup> Annette Kur and Thomas Dreier, *European Union Intellectual Property Law Text, Cases and Materials* (Edward Elgar Publishing, 2013) 58.

<sup>11</sup> Judgment of the Court of 15 July 1964, *Costa v. E.N.E.L*, Case C-6/64, EU:C:1964:66. See also Judgment of the Court of 9 March 1978, *Amministrazione delle finanze dello Stato v Simmenthal*, Case C-106/77, EU:C:1978:49, paragraph 17.

<sup>12</sup> Judgment of the Court of 13 November 1990, *Marleasing v Comercial Internacional de Alimentación*, Case C-106/89, EU:C:1990:395, paragraph 8.

<sup>13</sup> This is discussed in Part III.

<sup>14</sup> Judgment of the Court of 31 March 1971, *Commission v. Council*, Case 22/70 EU:C:1971:32.

going forward. Section 3 then moves on to discuss the specific IP elements within the EU and how they developed. This discussion will primarily centre on CJEU case law and how this has shaped IP law within the EU. It also considers the growing scope of new forms of IP within the EU. Section 4 will then build on the previous two sections by examining the intersection of IP and the concept of free movement within the EU. Section 5 briefly underlines the Union's international IP obligations, including how these have been implemented within the EU legal order, their effects, as well as the influence of WTO Dispute Settlement body's jurisprudence and its influence on the CJEU case law. Section 6 provides some concluding remarks.

## **2. Intellectual Property in the Current European Union Constitutional Framework**

### ***2.1. The Treaties***

Following the entry into force of the Treaty of Lisbon, the EU has been empowered to create unitary EU IPRs through Article 118 TFEU,<sup>15</sup> while retaining harmonisation powers under Article 114 TFEU. Beginning in 2011, based on that provision, the Commission put forward several proposals to harmonise IPRs with the EU, in particular, harmonising patent and copyright legislation.<sup>16</sup> However, the competence of the EU is not unfettered. Article 345 TFEU affirms the principle of non-interference with the property regimes of the Member States (MS) and provides that '[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership'. The primary purpose of this provision is to protect the prerogative of the Member States to choose nationalised industries and property over private property (subject to limits that have been elaborated by the

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<sup>15</sup> Article 118 TFEU reads as follows: 'In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements. The Council, acting in accordance with a special legislative procedure, shall by means of regulations establish language arrangements for the European intellectual property rights. The Council shall act unanimously after consulting the European Parliament'.

<sup>16</sup> Commission Communication 'A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first-class products and services in European Union' COM (2011) 287 final.

CJEU in the various ‘golden share’ cases).<sup>17</sup> Nevertheless, the power to grant private property rights, including IPRs, is, at least implicitly, included within this provision.

Moreover, Article 36 TFEU recognises ‘the protection of industrial and commercial property’ as a derogation from free movement.<sup>18</sup> Barnard argues that this provision, in combination with Article 345 TFEU, reinforces the concept of maintenance of IPRs at the national level.<sup>19</sup> Hence, these provisions express a tension between IP national laws and EU legislation, as well as the need to reconcile such tension and to balance the interests of IPRs holders with the interests of market integration. This concept of market integration and its related objectives are addressed when it comes to the external action under Article 207 TFEU will be discussed in detail in Chapter Four.

## ***2.2. Intellectual Property in the Charter of Fundamental Rights***

The previous chapter briefly underlined the degree to which IP can be considered a human right and highlighted that there is no common position within the existing scholarship.<sup>20</sup> As mentioned, this thesis, however, embraces the view that the right of authors and creators is a human right and thus situates IP within the realm of human rights. This position is further reflective of how the EU constitutional framework deals with IP, with particular regard to its inclusion within the EU CFR.<sup>21</sup> The position of IP as a human right within the Charter does not, however, affect the scope of EU competences. At no point does the Charter expand the competences afforded to the EU in areas the Charter would encompass if these are not reflected elsewhere within the Treaties.<sup>22</sup> Moreover, the notion of IP as a human right does not eliminate the commercial and trade-related nature of EU secondary

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<sup>17</sup>Judgment of the Court of 4 June 2002, *Commission v Portugal*, Case C-367/98, ECLI:EU:C:2002:326; Judgment of the Court of 4 June 2002, *Commission v Belgium*, Case C-504/99, ECLI:EU:C:2002:328; Judgment of the Court 22 October 2013, *Commission v Germany*, Case C-95/12, ECLI:EU:C:2013:676

<sup>18</sup> This issue has been resolved by the CJEU through the existence-exercise dichotomy and is discussed *infra* Chapter Two Section 3.

<sup>19</sup> Catherine Barnard, *The Substantive Law of the European Union* (Oxford University Press, 2007), 173.

<sup>20</sup> This is discussed *infra* Chapter Four.

<sup>21</sup> This is discussed *infra* Chapter Three.

<sup>22</sup> Article 6 TEU.

legislation on IP.

As mentioned above, IP is included within Article 17 EU CFR, which reads as follows:

- ‘1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected’.

The inclusion of property within the Charter echoes Article 17 UDHR provision, and Article 1 Protocol 1 to the ECHR.<sup>23</sup> However, Article 17(2) EU CFR differs from both those provisions insofar as it expressly includes IP within the scope of protection. As the commentary on the drafting of Article 17 EU CFR notes, the distinction between traditional property and IP stems from the position of IP within the national legislative frameworks.<sup>24</sup> Moreover, as noted in the Explanation to the Charter,<sup>25</sup> the protection of IP is explicitly mentioned in paragraph 2:

‘because of its growing importance and Community secondary legislation. Intellectual property covers not only literary and artistic property but also patent and trademark rights and associated rights. The guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property’.<sup>26</sup>

Article 17(2) EU CFR differs from Article 27(2) UDHR and Article 15(1)(c) ICESCR, discussed above in Chapter One, not only because it does not connect IP

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<sup>23</sup> Article 17 UDHR reads as follows: ‘Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property’.

<sup>24</sup> Notes from the Praesidium, Draft Charter of Fundamental Rights of the European Union – Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50, Brussels, October 11, 2000 p. 20. ‘This is a fundamental right common to all national constitutions. It has been recognised on numerous occasions by the case law of the Court of Justice, initially in the Hauer judgment (13 December 1979, ECR [1979] 3727). The wording has been updated but, in accordance with Article 52(3), the meaning and scope of the right are the same as those of the right guaranteed by the ECHR and the limitations may not exceed those provided for there’.

<sup>25</sup> Explanations (\*) Relating to The Charter of Fundamental Rights (2007/C 303/02) OJ [2007]C 303/18.

<sup>26</sup> Explanations (\*) Relating to The Charter of Fundamental Rights (2007/C 303/02) OJ [2007]C 303/18.

to the right to take part in cultural life, but also in that it provides a wider form of protection. Article 27(2) UDHR and Article 15(1)(c) ICESCR,<sup>27</sup> affirm that:

‘[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’.

This formulation places emphasis on the protection of the creator of the work, rather than on broader protection of IP as Article 17(2) EU CFR does. The latter provision suggests a higher standard of protection for IP than traditional or real property, as there is no explicit reference to any limitations in respect of IP protections. This approach would appear to be supported by the Commission, which speaks of a 'high level of protection of IPRs at any cost and to set up a rigorous and effective system'.<sup>28</sup> It could be also argued that the lack of explicit limitations to IP in Article 17(2) EU CFR endorses an economically-driven (rather than human-rights driven)<sup>29</sup> model of IPRs, and may endanger other rights within the EU CFR, such as the freedom of the arts and sciences (Article 13 EU CFR), or the right to education (Article 14 EU CFR), or the protection of cultural and linguistic diversity (Article 22 EU CFR). However, these fears would appear to be largely unsubstantiated. First, the CJEU, even before the enactment of the Charter, has highlighted that IPRs are created for the purpose of fulfilling certain social goals.<sup>30</sup> Secondly, IPRs can, in fact, be derogated from, and these limitations should respect what is provided for in Article 52 EU CFR and comply with the principle of

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<sup>27</sup> This is discussed *supra* Chapter One.

<sup>28</sup> Green Paper from the European Commission of Copyright in the Knowledge Economy, COM (2008) 466 final, Brussels, 16 July 2008, 4.

<sup>29</sup> Among other Martin Husovec suggests that Article 17(2) ‘is of purely economic character’. Martin Husovec, 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' (2019) 20(6) German Law Journal 840, 843

<sup>30</sup> Opinion of Advocate General Tesauro of 22 January 1998, *Metronome Musik GmbH v Music Point Hokamp GmbH*, Case C-200/96, EU:C:1998:18, paragraph 32.

proportionality.<sup>31</sup> Moreover, Article 54 EU CFR is designed to prevent abuse.<sup>32</sup> In *Scarlet Extended*, the CJEU held that ‘[t]here is [...] nothing whatsoever in the wording of that provision or in the Court’s case law to suggest that that right is inviolable and must for that reason be absolutely protected’.<sup>33</sup> This was subsequently reiterated in *SABAM v. Netlog*,<sup>34</sup> *Luksan v. Petrus*,<sup>35</sup> and *Telekabel*.<sup>36</sup> In *Bayer CropScience SA-NV*<sup>37</sup> in relation to the protection of industrial and commercial interests, the Court once again made clear that Article 17 EU CFR:

‘may be subject to certain limitations, as long as they are provided for by law, respect the essence of those rights and freedoms, are necessary and genuinely meet objectives of general interest recognised by the European Union’.<sup>38</sup>

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<sup>31</sup> Article 52 reads as follows: ‘1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties. 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. 4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions. 5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality. 6. Full account shall be taken of national laws and practices as specified in this Charter. 7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States’.

<sup>32</sup> Article 54 reads as follows: ‘Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein’.

<sup>33</sup> Judgment of the Court of 24 November 2011, *Scarlet Extended*, Case C-70/10, EU:C:2011:771, paragraph 43.

<sup>34</sup> Judgment of the Court of 16 February 2012, *SABAM*, Case C-360/10, ECLI:EU:C:2012:85, paragraph 41.

<sup>35</sup> Judgment of the Court of 9 February 2012, *Luksan*, Case C-277/10, ECLI:EU:C:2012:65, paragraph 68.

<sup>36</sup> Judgment of the Court of 27 March 2014, *UPC Telekabel Wien*, Case C-314/12, ECLI:EU:C:2014:192, paragraph 61.

<sup>37</sup> Judgment of the Court of 23 November 2016, *Bayer CropScience and Stichting De Bijenstichting*, Case C-442/14, EU:C:2016:890.

<sup>38</sup> Judgment of the Court of 23 November 2016, *Bayer CropScience and Stichting De Bijenstichting*, Case C-442/14, EU:C:2016:890, paragraph 98.

### **3. Intellectual Property Law within the European Union**

#### ***3.1. Introductory Overview***

Despite its initial lack of competence on IP,<sup>39</sup> the EU has adopted several pieces of secondary legislation mostly on the basis of former Article 95 EC (now Article 114 TFEU), within the realm of the internal market, and has made significant progress in this respect. The EU legislature and the CJEU have developed over time a legal framework for a ‘European intellectual property’ respectively through positive and negative integration. This framework is far from complete and is still considered to be ‘under construction’ in a number of key areas. However, the EU has been relatively successful in creating a uniform Community trademark and in harmonising national trademark laws of the Member States.<sup>40</sup> In a similar vein, it has attempted to harmonise patent law.<sup>41</sup> At the same time, copyright law has been heavily regulated by the EU - albeit never to the same extent as trademark law, as the Member States maintain a greater degree of divergence in relation to their national copyright laws. The following subsections succinctly analyse the development of these IP elements within the EU, and in light of ongoing legislative changes in the field of IP. Each section is further complimented with a non-exhaustive overview of related CJEU case law, for the respective elements of IP. The purpose of this overview is to chart the development of the elements how it is then reflected in the agreements in Part III as they progress through the eras.

#### ***3.2. European Union Trademark Law: An Overview***

##### ***3.2.1. The European Union Trademark Legal Framework***

Within the EU, trademark law is now governed by a series of regulations: the European Union Trademark Regulation (EUMTR),<sup>42</sup> the European Union Trademark Delegated Regulation (EUTMDR),<sup>43</sup> and the European Union

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<sup>39</sup> Ana Ramahlo, *The Competence of the European Union in Copyright Lawmaking*, (Springer, 2016) 9-13

<sup>40</sup> Tobias Cohen Jehoram and Constant van Nispen, *European Trademark Law: Community Trademark Law and Harmonized National Trademark Law* (Kluwer Law International 2010).

<sup>41</sup> On the new unitary patent system, see the collection of essays in Justine Pila and Chris Wadlow (eds), *The Unitary EU Patent System* (Bloomsbury, 2015).

<sup>42</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trademark [2017] OJ L 154/1.

<sup>43</sup> Commission Delegated Regulation (EU) 2018/625 of 5 March 2018 Supplementing

Trademark Implementing Regulation (EUTMIR).<sup>44</sup> These regulations are complemented by the Directive Approximating the Laws of the Member States Relating to Trademarks.<sup>45</sup> These regulations recast the previous Trademark Directive (TMD),<sup>46</sup> and the Community Trademark Regulation (CTMR).<sup>47</sup>

Stemming from their industrial and commercial nature of trademarks, as well as the economically based origins of the EU, trademarks have long enjoyed strong protection. While the previous system of trademark regulation, registration, and protection was seen as a success in its operation, it was nonetheless revised in 2010 and again in 2017. Each revision served in further refining and streamlining the overall process and codifying the case law which had developed up until that point in time. The purpose of the most recent revision was to broadly update and re-address concerns over IP matters in relation to trademark applications, including centralisation of the process and updating the fee structure, institutional changes within the EU, to enhance the interaction with IP offices in the Member States, and the general operation and remit of the European Union Intellectual Property Office (EUIPO)

Under the CMTR and the new EUTMR, the EU has established a uniform system regulating trademarks which extended throughout the EU. This system created an IP right that defies the territoriality issue which had previously existed in this area and persists to this day in relation to intra-EU trading.

The system led to a decline in the number of trademark applications at the national level, and a corresponding rise in the number under the CTMR and now under the EUTMR. Currently, applications under the EUTMR allow for an internal appeal

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Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union Trade Mark, and Repealing Delegated Regulation (EU) 2017/1430, [2018] OJ L 104/1.

<sup>44</sup> Commission Implementing Regulation (EU) 2018/626 of 5 March 2018 Laying Down Detailed Rules for Implementing Certain Provisions of Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union Trade Mark, and Repealing Implementing Regulation (EU) 2017/1431 [2018] OJ L 104/37.

<sup>45</sup> Council Directive 2015/2436/EC of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks, [2005] OJ L 336/1.

<sup>46</sup> First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member State relating to trademarks, [1989], OJ L 159/60, now enacted as Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member State relating to trademarks (Codified version), [2008], OJ L 299/25.

<sup>47</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark, [1994], OJ L 11/1, now enacted as Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trademark (Codified version), [2009], OJ L 78/1.

within the rules and regulations of the EUIPO.<sup>48</sup> The purpose of this appeal is to allow for administrative or procedural issues in the application process to be resolved. However, for clarification or dispute over points of law, the matter is referred to the CJEU. The CJEU can also discuss regulatory matters stemming from trademarks subject to a request for preliminary rulings allowed under Article 267 TFEU. As such, decisions taken by the CJEU are not only relevant to the EUTMR, but also for the national trademark systems of the Member States. This will have a further effect in relation to the mutual recognition of trademarks between the EU and its third country trading partners, which is discussed in detail in Part III

### *3.2.2. The Role of the CJEU in Shaping European Union Trademark Law*

The CJEU has taken active steps in the development of what is and (perhaps more importantly) what is not a trademarkable element. The case law discussed in this section serves to illustrate the development of trademark law within the EU. At the same time, this internal development has a significant effect on the level of protection the EU wishes to attach to trademarks in the international sphere through IP protection clauses in trade agreements.

The early questions referred to the CJEU focused primarily on whether there had been adequate adoption and implementation by the Member States of the Trademark Directive, with a significant portion of these cases relating to cross-border restrictions or the adequate level of harmonisation between the Member States for the same trademarked element. This question was addressed, *inter alia*, in *BMS v. Paranova*,<sup>49</sup> concerning repackaging of blister packs for a different use, and the potential health risks as a result of incorrect storage based on this new labelling.<sup>50</sup> The CJEU held that Article 7(1) of the Trademark Directive prevented

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<sup>48</sup> Formerly, the Office for Harmonization in the Internal Market (OHIM) and amended Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trademark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trademark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trademarks and Designs), [2015] OJ L 331/21.

<sup>49</sup> Judgment of the Court of 11 July 1996, *Bristol-Myers Squibb and Others v Paranova*, Case C-427/93, Case C-429/93 and C-436/93, ECLI:EU:C:1996:282.

<sup>50</sup> Repackaging had already been addressed in *Hoffman La Roche*. Judgment of the Court of 23 May 1978, *Hoffman-La Roche v Centrafarm*, C-102/77, EU:C:1978:108. the CJEU held that a trade mark owner could prevent the repackaging of a trade-marked product, unless (a) that

the rightsholder from prohibiting the importation and marketing of the good as it was available in the market of another Member State (principle of the exhaustion of the rights conferred by a trademark). Further, while such prohibitions were possible under the express conditions prescribed under Article 7(2) of the Trademark Directive, the CJEU did not consider the repackaging to give rise to a real risk and would fall outside this justification. According to Article 7(2), exhaustion does not apply if there are ‘legitimate reasons for the proprietor to oppose further commercialisation of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market’.<sup>51</sup> This decision shows that the trademark owner’s exclusive right to affix a trademark to a product must, in certain circumstances, be regarded as exhausted in order to allow an importer to market products which were put on the market in another Member State by the owner or with his consent.<sup>52</sup>

In subsequent cases and mirroring challenges arising at the international level, the CJEU also addressed a number of instances where the rights holder would not be permitted to prevent the use of the trademark in the course of lawful business, but also discussed the ‘legitimate reason’ for the proprietor of a trademark to oppose further commercialisation.<sup>53</sup> In *Christian Dior v Evora*, the Court held that a trademark proprietor would have to show that the use of his trademark by the reseller seriously damaged the reputation of the mark in order to be able to impede further commercialisation.<sup>54</sup> In *BMW v Deenik*, the Court focused on the

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would lead to the artificial partitioning of the markets between the Member States, (b) the repackaging could not adversely affect the original condition of the product, (c) there was prior notification of the fact that the repackaged product would be put on sale, and (d) it was stated on the new packaging by whom the product had been repackaged, in order to determine whether the repackaging, account must be taken of the nature of the product and the method of repackaging.

<sup>51</sup> In this instance, in interpreting this provision, the Court held that the trademark owner could not legitimately oppose the further marketing of a repackaged pharmaceutical product if: (a) repackaging is necessary to market the product in the country of importation; (b) repackaging does not affect the original condition of the product inside the packaging; (c) the new packaging clearly states who repackaged the product and the name of the manufacturer; (d) the presentation of the repackaged product is not liable to damage the reputation of the trademark or of its owner; and (e) the importer gives notice to the trademark owner before the repackaged product is put on sale, and, on-demand, supplies him with a specimen of the repackaged product.

<sup>52</sup> See also Judgment of the Court of 26 November 1996, *F.lli Graffione SNC v Ditta Fransa*, Case C-313/94, ECLI:EU:C:1996:450.

<sup>53</sup> *Inter alia* Judgment of the Court of 20 March 1997, *Phytheron International v Bourdon*, Case C-352/95, EU:C:1997:170.

<sup>54</sup> Judgment of the Court of 4 November 1997, *Parfums Christian Dior v Evora*, Case C-337/95, EU:C:1997:517. The CJEU permitted a restriction on the use of the trademark in such a manner if it would bring serious harm to the reputation of the trademark.

consumers' perception.<sup>55</sup> It was held that the use of the trademark must not create an impression to the consumer of linkage or commercial connection with the rightsholder nor cause significant damage to the reputation of the good. In these cases, the CJEU focused strongly on the commercial aspects of trademark protection, rather than the use of trademark in relation to the public interest. However, this can (at least in part) be attributed to the inherent commercial nature of trademarks, as well as the EU consumer protection driven agenda.

The CJEU also addressed a number of the practical aspects of the use of a trademark across a number of key issues. Firstly, the CJEU addressed the question of the use of trademarks across the Member States.<sup>56</sup> While the CJEU held that the registration requires the trademark in question to possess a distinctive character through the territories of the Member States, this threshold is tested across a significant proportion of the EU and not in its entirety.

Moreover, the CJEU addressed the ability to restrict further or refuse the registration of a trademark. This included instances where the trademark application was refused as it was made entirely of customary or standardised language of the trade in question,<sup>57</sup> or if the applicant had acted in bad faith during the registration process.<sup>58</sup> In interpreting the application and operation of trademarks, the CJEU required the trademark to possess a distinctive element including images, lines, and characters.<sup>59</sup>

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<sup>55</sup> Judgment of the Court of 23 February 1999, *BMW v Ronald Karel Deenik*, Case C-63/97, EU:C:1999:82.

<sup>56</sup> *Inter alia* Judgment of the Court of 12 February 2004, *Koninklijke KPN Nederland*, Case C-363/99, EU:C:2004:86. While the CJEU held that the registration requires the trademark in question to possess a distinctive character through the territories of the Member States, this threshold is tested across a significant proportion of the EU and not in its entirety Judgment of the Court of 7 September 2006, *Bovemij Verzekeringen*, Case C-108/05, EU:C:2006:530; Judgment of the Court of 14 September 1999, *General Motors*, Case C-375/97, EU:C:1999:408; Judgment of the Court of 4 October 2001, *Merz & Krell*, Case C-517/99, EU:C:2001:510; Judgment of the Court of 6 October 2009, *PAGO International*, Case C-301/07, EU:C:2009:611 Judgment of the Court of 6 October 2009, *PAGO International*, Case C-301/07, EU:C:2009:611. Judgment of the Court of 4 October 2001, *Merz & Krell*, Case C-517/99, EU:C:2001:510; Judgment of the Court of 12 February 2004, *Koninklijke KPN Nederland*, Case C-363/99, EU:C:2004:86.

<sup>57</sup> Judgment of the Court of 4 October 2001, *Merz & Krell*, Case C-517/99, EU:C:2001:510; Judgment of the Court of 12 February 2004, *Koninklijke KPN Nederland*, Case C-363/99, EU:C:2004:86.

<sup>58</sup> Judgment of 11 June 2009, *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, C-529/07.

<sup>59</sup> Judgment of the Court of 12 December 2002, *Sieckmann*, Case C-273/00, EU:C:2002:748. Subsequently, this was expanded to include composed elements and the juxtaposition of a descriptive word and letter sequence which gives rise to a distinctive element, see generally

The CJEU has also identified limit as to what constitutes a distinctive element. For example, the use of non-native languages being appropriate if they do not form a descriptive meaning or relevant parties in the Member States in which the registration is sought, are capable of identifying the meaning.<sup>60</sup> Further, the CJEU has required that a trademark must be a clear representation of the sign, it must be precise and self-contained, and it must be intelligible and objectively understandable for the average consumer. Concerning the existence of a distinctive element, the CJEU has also examined the wide scope of what this could encompass in relation to signs and the (re)packaging of a product.<sup>61</sup>

Without discussing in detail the extensive jurisprudence of the Luxembourg Court, it suffices to point out the core tenets elaborated by the CJEU. First, with regard to the question of shape, the CJEU took an expansive definition of shape of the trademark, including the packaging in instances where it was intrinsically linked to the trademark itself.<sup>62</sup> However, the CJEU did not provide an absolute allowance on the ability to trademark the shape and created a series of limitations. Where the shape is an essential function of the good, it cannot be considered a distinctive element. This definition includes instances where the shape is a result of the good's technical function,<sup>63</sup> where the shape is required to achieve this technical function,<sup>64</sup> or where it is a generic function which consumers may seek in competitors' products.<sup>65</sup> Where the shape is comprised entirely of clear or see-through material, this will not be considered a distinctive element for the trademark.<sup>66</sup> Where the shape of the product gives or attaches significant value to the good as a result of the shape.<sup>67</sup> Secondly, like the shape of the trademark and

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Judgment of the Court of 6 October 2005, *Medion*, Case C-120/04, ECLI:EU:C:2005:594.  
Judgment of the Court of 15 March 2012, *Strigl and Securvita*, Case C-90/11 and C-91/11, ECLI:EU:C:2012:147.

<sup>60</sup> Judgment of the Court of 9 March 2006. *Matratzen Concord*, Case C-421/04, ECLI:EU:C:2006:164

<sup>61</sup> Judgment of the Court of 23 April 2002, *Merck, Sharp & Dohme*, Case C-443/99, EU:C:2002:245.

<sup>62</sup> Judgment of the Court of 12 February 2004, *Henkel*, Case C-218/01, EU:C:2004:88. The CJEU held that the packaging of a product which is linked to the very nature of the product, must be considered as a distinctive element of the product.

<sup>63</sup> Judgment of the Court of 18 June 2002, *Philips*, Case C-299/99, EU:C:2002:37.

<sup>64</sup> Judgment of the Court of 16 September 2015, *Société des Produits Nestlé*, Case C-215/14, ECLI:EU:C:2015:604.

<sup>65</sup> Judgment of the Court 18 September 2014, *Hauck*, Case C-205/13, EU:C:2014:2233

<sup>66</sup> Judgment of the Court of 25 January 2007, *Dyson*, Case C-321/03, EU:C:2007:51.

<sup>67</sup> Judgment of the Court of 20 September 2007, *Bentton Group*, Case C-371/06, ECLI:EU:C:2007:542.

the packaging, the CJEU addressed the colour of the trademark as a distinctive element. In this regard, the colour (or the combination of colours) of the trademark, including its packaging, would constitute a distinctive element.<sup>68</sup> This is conditional upon the use of the colour in a graphical representation in a manner that is clear, precise, and objectively determinable. In this regard, the distinctive element is not the use of the colour in itself. Rather the distinctive element is a result of the association of the public with the colour.<sup>69</sup> However, the CJEU must test this distinctiveness against the general interest as to not unjustly restrict or prohibit the use of the colours by other economic actors for similar goods or services.<sup>70</sup>

The CJEU has also interpreted the scope of sound as a distinctive element. The Courts held that sound signs are capable of satisfying the distinctive element requirement, as long as they are capable of being represented with a graphic.<sup>71</sup> Again, this graphical representation must be clear, precise, self-contained and objective.<sup>72</sup> Secondly, the CJEU has held that aural similarity between trademarks may give rise to the likelihood of confusion.<sup>73</sup> In doing so, the CJEU tests this

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<sup>68</sup> Judgment of the Court of 24 June 2004, *Heidelberger Bauchemie*, Case C-49/02, EU:C:2004:38; Judgment of the Court 18 July 2013, *Specsavers International Healthcare and Others*, Case C-252/12, EU:C:2013:497

<sup>69</sup> Judgment of the Court 18 July 2013, *Specsavers International Healthcare and Others*, Case C-252/12, EU:C:2013:497. The CJEU further held that the test of association by the public would equally apply to a combination of colours amounting to a distinctive element in this regard; Judgment of the Court 19 June 2014, *Banco Santander and Santander Consumer Bank*, Case C-217/13 and C-218/13, ECLI:EU:C:2014:2012. The CJEU held that where the colour of the trademark exists without contours, the ability to identify the trademark as a distinctive element is tested at a 70% recognition requirement

<sup>70</sup> Judgment of the Court of 6 May 2003, *Libertel*, Case C-104/01, EU:C:2003:244; Judgment of the Court of 24 June 2004, *Heidelberger Bauchemie*, Case C-49/02, EU:C:2004:384.

<sup>71</sup> Judgment of the Court of 27 November 2003, *Shield Mark*, Case C-283/01, ECLI:EU:C:2003:641.

<sup>72</sup> Judgment of the Court of 27 November 2003, *Shield Mark*, Case C-283/01, ECLI:EU:C:2003:641, paragraphs 61-62. The CJEU provided further conditions of what satisfies and what does not satisfy these conditions for sound signs. 'As regards, last, musical notes, which are a common method of representing sounds, a sequence of notes without more, such as 'E, D#, E, D#, E, B, D, C, A', does not constitute a graphical representation for the purposes of Article 2 of the Directive either. Such a description, which is neither clear, nor precise nor self-contained, does not make it possible, in particular, to determine the pitch and the duration of the sounds forming the melody in respect of which registration is sought and which constitute essential parameters for the purposes of knowing the melody and, accordingly, of defining the trade mark itself. On the other hand, a stave divided into bars and showing, in particular, a clef (a treble clef, bass clef or alto or tenor clef), musical notes and rests whose form (for the notes: semibreve, minim, crotchet, quaver, semiquaver, etc.; for the rests: semibreve rest, minim rest, crotchet rest, quaver rest, etc.) indicates the relative value and, where appropriate, accidentals (sharp, flat, natural) — all of this notation determining the pitch and duration of the sounds — may constitute a faithful representation of the sequence of sounds forming the melody in respect of which registration is sought'.

<sup>73</sup> Judgment of the Court of 22 June 1999, *Lloyd Schuhfabrik Meyer*, Case C-342/97,

against a high benchmark. Thirdly, where there was or could exist a likelihood of aural confusion between the trademark and the indication of geographical origin within another Member State. In such matters, the trademark holder may prevent the use of the indication on the condition that the indication was not used in good faith to market the good.<sup>74</sup>

The CJEU also examined the question of geographical names and whether they could satisfy the distinctive element criteria.<sup>75</sup> However, this registration of a geographical name carries the additional requirement that there exists no association of the geographical location and the nature of the good in question. Overall, the CJEU held that the recognition of trademarks requires the average consumer or user engaged in the commercial operation to identify the trademarked product or service on face value, devoid of any additional abilities to analyse on the matter or to perform examinations at the technical levels. Again, this is for the purpose of preventing confusion in a commercial advertisement.

From the above caselaw discussion, the expansion of the protection of trademarks within the EU presents interesting features. The purpose of trademarks is inherently commercially focused, and the limitations on the protection do not fully account for the public interest in the use of signs and packaging. Instead, those limitations are interpreted in way to best protect future commercial enterprises.

The CJEU also examined the requirement of the ‘genuine use’ of the trademark during its lifecycle. The CJEU determined that the genuine use of the trademark would encompass the essential function of the protection afforded under the trademark, the ability to create a market share for the trademarked good, and the ability to maintain this market share.<sup>76</sup> The CJEU would then continue to refine and re-evaluate the concept of ‘genuine use’ in a series of cases, creating a limitation of what genuine use of a trademark would encompass. Firstly, genuine use of the trademark requires active and ongoing use of the protection it affords in the course of the commercial exploitation. This would require use beyond token use or use

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ECLI:EU:C:1999:323.

<sup>74</sup> Judgment of the Court of 7 January 2004, *Gerosteiner Brunnen*, Case C-100/02, ECLI:EU:C:2004:11.

<sup>75</sup> Judgment of the Court of 4 May 1999, *Windsurfing Chiemsee*, Case C-108/97 and C-109/97, ECLI:EU:C:1999:230.

<sup>76</sup> Judgment of the Court 19 December 2012, *Leno Marken*, Case C-149/11, EU:C:2012:816.

merely to ensure the continuous operation of the trademark.<sup>77</sup> Secondly, the use of the trademark must be made in good faith by the rightsholder.<sup>78</sup> Thirdly, ‘genuine use’ requires the trademarked goods or service to be available within the EU. The CJEU took a broad interpretation of what availability or offering within the EU, delimiting the term rather than mandating its scope. A trademark is said not made available where it was imported into the EU from a Third Country without it actually being sold to the public within the EU territories.<sup>79</sup> This availability includes the entry into the EU during transit or storage of goods from a Third Country.<sup>80</sup>

The CJEU has greatly enhanced trademark protection within the EU and has set the limitations on the scope and the grounds for the use of trademarks. A key aspect of such limitations has been where the CJEU has limited the protections afforded by the trademark is comparative advertising. A third party may make use of the trademark, provided it satisfies the Comparative Advertising Directive,<sup>81</sup> and does not provide an economic advantage to the third party by comparison to the trademarked good or service.<sup>82</sup> The purpose of the original trademark, such as a badge of support or non-commercial affiliation, is not taken into account in determining these conditions.<sup>83</sup> The CJEU also interpreted the limitations of the operation of the trademarks as noted above these limitations remain an important feature, as they prevent the abuse of the trademark by the rights holder. However, as the case law suggests, this appears to be related to ensuring the good in question is commercial exploitable, more so than ensuring the public interests.

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<sup>77</sup> Order of the Court of 27 January 2004, *La Mer Technology*, Case C-259/02, ECLI:EU:C:2004:50. However, this condition may be satisfied with the use in conjunction with another trademark in the commercial exploitation beyond mere or token use. Judgment of the Court 18 April 2013, *Colloseum Holding*, Case C-12/12, EU:C:2013:253.

<sup>78</sup> Judgment of the Court 27 June 2013, *Malaysia Dairy Industries*, Case C-320/12, EU:C:2013:435. In this case the CJEU affirmed that knowledge of the third party using the trademark for a period without attempt to prevent its exploitation until a later date will be considered exploitation in bad faith.

<sup>79</sup> Judgment of the Court of 30 November 2004, *Peak Holding*, Case C-16/03, EU:C:2004:759.

<sup>80</sup> Judgment of the Court of 18 October 2005, *Class International*, Case C-405/03, EU:C:2005:616.

<sup>81</sup> Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L 376/21. See also Judgment of the Court of 12 June 2008, *O2 Holdings ET O2 (UK)*, Case C-533/06, EU:C:2008:339

<sup>82</sup> Judgment of the Court of 18 June 2009, *L'Oréal and Others*, Case C-487/07, ECLI:EU:C:2009:378.

<sup>83</sup> Judgment of the Court of 12 November 2002, *Arsenal Football Club*, Case C-206/01, EU:C:2002:651.

On the whole, this brief (and not exhaustive) discussion shows the seminal role of the CJEU in ‘tracing the boundaries’ of EU trademark law. The purpose of this section was to provide a general overview of the development of trademark protection within the EU.

For the subsequent analysis in Part III, it is important to note that the Court has sought to strike a balance between the trademark owner’s rights and the need to ensure market integration. In the internal EU sphere, the CJEU case law shows that trade-related (or more broadly, commercial) considerations play a major role in the cases examined (albeit this is linked, as already mentioned, to the very nature and purpose of trademarks).

### ***3.3. European Union Copyright Law: An Overview***

#### *3.3.1. The European Union Copyright Legal Framework*

The EU has adopted a number of measures aimed at ensuring copyright protection and enforcement within the internal market. The so-called ‘Copyright Directives’ deal with a range of specific issues. The first of these directives concerned the protection of computer programmes and how existing copyright protections could be extended to this complex and growing area.<sup>84</sup> This expansion was followed by a series of directives expanding the existing copyright protection to new and developing media trends, technological shifts, and overall changes in society. These directives address a wide and varied scope of topics such as rental and lending rights,<sup>85</sup> satellite broadcasting and cable transmission,<sup>86</sup> increasing and harmonising

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<sup>84</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, [1991], OJ L 122/42, republished as Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), [2009], OJ L 111/16.

<sup>85</sup> Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, [1992], OJ L 346/61, republished as Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), [2006], OJ L 376/28.

<sup>86</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [1993], OJ L 248/15

the duration of copyright,<sup>87</sup> and the protections afforded to databases.<sup>88</sup> In doing so, it aligns the EU's internal position on the respective areas to those the EU had sought during the TRIPS negotiation.

Following developments at the global level, which have been traced in Chapter One, and in order to comply with the obligations established in the WIPO Internet Treaties, the EU began to embrace the perspective of IP as a trade commodity. This new perspective was reflected both internally and, as it will be discussed in Section III, externally. Internally, the idea of IP as a commodity is embraced by Directive 2001/29/EC (Information Society Directive- InfoSoc).<sup>89</sup> In comparison to the previous Copyright Directives, the InfoSoc Directive was significantly more comprehensive in both objectives and its contents.<sup>90</sup> The purpose of the InfoSoc Directive was to harmonise the main exclusive rights (reproduction, communication and making available to the public, and distribution). This was achieved by providing a high level of protection, as well as the related system of related exceptions and limitations. It is important to note that, the InfoSoc Directive was meant to align EU copyright law with and implement into EU legal order the WIPO Treaties,<sup>91</sup> and (indirectly) to ensure compliance with the Berne Convention.

Through the InfoSoc Directive, in substance, the EU deprived the Member States of their competence to implement the relevant provisions of the Berne Convention. As noted by Rosati, this Directive 'had somehow marked a departure from earlier policy of piecemeal approximation'.<sup>92</sup> The Directive was in fact meant to put an

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<sup>87</sup> Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, [1993], OJ L 290/9, republished as Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), [2006], OJ L 372/12, and amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011, [2011], OJ L 265/1.

<sup>88</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996], OJ L 77/20.

<sup>89</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001], OJ L 167/10.

<sup>90</sup> The Directive contained a robust regulation of rights for the author and owners of related rights, as well as non-exhaustive but nonbinding list of limitations to these new rights. In addition, the traditional aspects of copyright were extended with the creation of provisions relating to the circumvention of protective measures and the administration and collection of data.

<sup>91</sup> The development and implementation of the WIPO Treaties have been discussed in Part I.

<sup>92</sup> Eleonora Rosati, 'Copyright in the EU: In Search of (In)Flexibilities' (2014) 9(7) *Journal of Intellectual Property Law and Practice* 585, 588.

end to significant differences in copyright protection, which could result in restrictions on the free movement of goods and services and lead to fragmentation of the internal market. The Resale Right Directive was subsequently passed to complement the InfoSoc Directive.<sup>93</sup> The Orphan Works Directive,<sup>94</sup> allowing the use of orphan works within the Member States for a specific purpose, has been one of the latest pieces of legislation. The most recent, the Directive on Copyright in the Digital Single Market (DSM). The DSM came into effect in April 2019. The purpose of this Directive is to address the ‘value gap’ in the digital market, as well as codifying the case law in relation to digital copyright protection. It aims to modernise the EU copyright framework to adapt it to the challenges of the digital age and is intended to harmonise copyright exceptions in the areas of research, education and cultural preservation but also to ensure that creators can derive economic value for the online use of their content. Its overall goal is to enhance the Digital Single Market, and codify case law of the CJEU. However, it also expands the related enforcement measures in an attempt to allow new technological developments or significant alterations of use of previous technology. Two key and controversial aspects included the expansion of enforcement measures for user-generated content and the sharing of news content through hyperlinks. Finally, a Directive and a Regulation to implement the Marrakesh VIP treaty in EU law were adopted.<sup>95</sup>

### *3.2.2. The Role of the CJEU in Shaping European Union Copyright Law*

In interpreting the copyright directives, the CJEU has addressed a number of different aspects, encompassing many areas such as the technical operation of the

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<sup>93</sup> The motivation for the Directive stemmed from the moral right for artist and the resale of their work. This concept of moral or social rights in relation to IP is discussed in detail in a later Chapter.

<sup>94</sup> Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works. Text with EEA relevance, [2012], OJ L 299/5.

<sup>95</sup> Regulation 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and Directive 2017/1564/EU of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society. OJ L 242/6.

copyright protection,<sup>96</sup> how it adapts to new technologies,<sup>97</sup> and how the Member States respect and uphold the concept of fair or adequate remuneration.<sup>98</sup> Without discussing all of these elements, which have been widely examined by legal scholarship,<sup>99</sup> it is important to note that the CJEU has addressed in several decisions the general scope afforded to the protection of copyright, as well as the limitations imposed on this protection, also with the intent of avoiding divergences among the Member States. In terms of the material scope of protection, the CJEU has consistently held that a ‘work’ that can be protected by copyright consists of a subject matter that is original in the sense that it is the author’s own intellectual creation; only expressions of the author’s own intellectual creation may be classified as ‘works’.<sup>100</sup> A ‘work’ must be expressed in a manner which makes it identifiable with sufficient precision and objectivity.<sup>101</sup> The CJEU has also examined the scope of copyright concerning other digital media, testing the scope of technical provisions or where the application of protection was operating beyond its original intention. This was seen in relation to the application of copyright to computer-based activities such as programming languages and online communication. In *SAS Institute*,<sup>102</sup> the CJEU examined the programming language itself, and its functionality did not constitute a form of expression, thereby falling

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<sup>96</sup> Judgment of the Court of 6 June 2002, *Ricordi*, Case C-360/00, EU:C:2002:346.

<sup>97</sup> Judgment of the Court 27 March 2014, *UPC Telekabel Wien*, Case C-314/12, EU:C:2014:192.

<sup>98</sup> Judgment of the Court of 6 February 2003, *SENA*, Case C-245/00, EU:C:2003:68; Judgment of the Court of 14 July 2005, *Lagardère Active Broadcast*, Case C-192/04, EU:C:2005:475; Judgment of the Court of 21 October 2010, *Padawan*, Case C-467/08, EU:C:2010:620.

<sup>99</sup> Caterina Sganga, 'The Eloquent Silence of *Soulier* and *Doke* and its Critical Implications for EU Copyright Law' (2017) 12(4) *Journal of Intellectual Property Law and Practice* 321; Caterina Sganga and Silvia Scalzini, 'From Abuse of Right to European Copyright Misuse: A New Doctrine for EU Copyright Law' (2017) 48(4) *International Review of Intellectual Property and Competition Law* 405; Eleonora Rosati, 'Copyright in CJEU case law: what legacy?' (2019) 14(2) *Journal of Intellectual Property Law and Practice* 79; Caterina Sganga, 'EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots' in Roberto Caso and Federica Giovanella (eds), *Balancing Copyright Law in the Digital Age* (Springer, 2015); Christophe Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating and Sometimes Disrupting Copyright Law in the European Union' in Irini A. Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016).

<sup>100</sup> Judgment of the Court of 16 July 2009, *Infopaq International*, Case C-5/08, EU:C:2009:465.

<sup>101</sup> In a recent decision the Court held that this condition is not fulfilled by the taste of a food product, which will mainly be identified on the basis of subjective taste sensations. These sensations and experiences depend on factors such as age, food preferences and consumption habits, as well as on the environment or context in which the product is consumed. There are currently no reliable technical means to precisely and objectively identify a taste, and to distinguish it from the taste of other comparable products. Judgment of the Court of 13 November 2018, *Levola Hengelo*, Case C-310/17, EU:C:2018:899

<sup>102</sup> Judgment of the Court 2 May 2012, *SAS Institute*, Case C-406/10, EU:C:2012:259.

outside the copyright protection.<sup>103</sup> In *UsedSoft*,<sup>104</sup> the copyright protection afforded to computer programmes was said to have been exhausted in instances where the author of the work granted permission to download the work in exchange for remuneration.

The Court discussed thoroughly the extent of protection afforded under EU law and the limitations to this protection. The following discussion of selected cases (mostly related to the InfoSoc Directive) serves to illustrate the internal market perspective adopted by the CJEU, which, on the one hand, aims to strike a balance between copyright restrictions and freedom of movement, on the other tries to offer a high level of protection to authors and creators. In *Tod's and Tod's France*,<sup>105</sup> the CJEU restated the general principle of non-discrimination on the grounds of nationality within Article 18 TFEU. From the perspective of copyright protections, the CJEU interpreted this as precluding the copyright protections afforded to the author of a work, from being conditional on criteria such as the country of origin of the work in question. This decision is exemplary insofar as it illustrates the willingness of the Court to protect the functioning of the internal market, and to ban any discriminatory restriction on the ground of nationality.

The interpretation of the principle of exhaustion of the distribution rights with regard to material copies of a copyrighted work throughout the EU,<sup>106</sup> once such copies have been lawfully marketed in one Member State either by the owner himself or with his consent, has led the Court to afford a high level of protection rights of the author, but has also led the CJEU to adopt a particular 'EU centred' view and the willingness of the Court to prevent Member States from retaining

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<sup>103</sup> Additionally, the lawful owner of a copy of the programme is entitled to study and test the underlying function of the programme on the condition this does not actively infringe the exclusive rights afforded to the author. Such study or testing often involved the reverse engineering of the code and the coding language to determine the function.

<sup>104</sup> Judgment of the Court 3 July 2012, *UsedSoft*, Case C-128/11, EU:C:2012:407.

<sup>105</sup> Judgment of the Court of 30 June 2005, *Tod's and Tod's France*, Case C-28/04, EU:C:2005:418.

<sup>106</sup> Article 4(1) of Directive 2001/29 enshrines the exclusive right for authors, in respect of the original of their works or of copies thereof, to authorise or prohibit any form of distribution to the public by sale or otherwise. Article 4(2) contains the rule pertaining to the exhaustion of that right. According to that provision, the distribution right is not to be exhausted in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightsholder or with his consent. The distribution right in question is exhausted when two conditions are fulfilled: first, the original of a work or copies thereof must have been placed on the market by the rightsholder or with his consent and, second, they must have been placed on the market in the EU.

legislation that might endanger (even indirectly) the internal market. In that connection, it is notable that the CJEU has precluded the Member States from retaining international exhaustion. In fact, in *Laserdisken*,<sup>107</sup> the CJEU held *inter alia* that national rules which allowed or facilitated the exhaustion of the distribution rights of copyright-protected work, when it was made available outside the EU, were precluded by Directive 2001/29. In *Art & Allposters International*,<sup>108</sup> the Court held that exhaustion of the copyright protection would not apply in relation to distribution where there is a reproduction of protected work within the EU and with the author's permission. Further, this does not apply where the work has been transformed and then placed on the market in a new format. According to Sasserath, in a timely annotation of the case, this interpretation is:

‘consistent with the principal objective of EU Directive 2001/29: to establish a high level of protection, allowing the copyright owner to obtain an appropriate reward for the use of their works’.<sup>109</sup>

Further, the CJEU has examined in several decisions the question of what can be considered ‘communication to the public’ and thereby infringing the copyright protection afforded to the work. Mariscal has highlighted that ‘CJEU case-law on the topic is currently overwhelming’.<sup>110</sup> The CJEU has interpreted quite widely (albeit not always consistently) the elements of which public communication is comprised - namely, the concept of ‘communication’ and the concept of ‘public’- to ensure adequate protection to the copyright holder. For example, in *SGAE*,<sup>111</sup> the CJEU held that placing television sets in the rooms of a hotel constituted an act of communication to the public by the hotel. By contrast, in *SCF* it held that, while the private nature of the facilities will not in itself be a defence for alleged infringement, the provision of copyrighted work in certain situations where the public is said not

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<sup>107</sup> Judgment of the Court of 12 September 2006, *Laserdisken*, Case C-479/04, EU:C:2006:549.

<sup>108</sup> Judgment of the Court of 22 January 2015, *Art & Allposters International*, Case C-419/13, EU:C:2015:27.

<sup>109</sup> Olivier Sasserath, 'Allposters ECJ Decision: No Exhaustion of Rights in Modifications of the Copyright Work' (Kluwer Copyright Blog, 27 January 2015) <[www.copyrightblog.kluweriplaw.com/2015/01/27/allposters-ecj-decision-no-exhaustion-of-rights-in-modifications-of-the-copyright-work/](http://www.copyrightblog.kluweriplaw.com/2015/01/27/allposters-ecj-decision-no-exhaustion-of-rights-in-modifications-of-the-copyright-work/)>.

<sup>110</sup> Patricia Mariscal, 'The Ten Commandments of Communication to the Public: A Brief Review of CJEU Case-law' (Kluwer Copyright Blog, 29 May 2017) <[www.copyrightblog.kluweriplaw.com/2017/05/29/ten-commandments-communication-public-brief-review-cjeu-case-law/](http://www.copyrightblog.kluweriplaw.com/2017/05/29/ten-commandments-communication-public-brief-review-cjeu-case-law/)>.

<sup>111</sup> Judgment of the Court of 7 December 2006, *SGAE*, Case C-306/05, EU:C:2006:764.

to have control over the communication, is said to fall outside this scope.<sup>112</sup> That case concerned the broadcasting of phonograms in a dental practice. The latter did not constitute an act of communication to the public because the public of a dental clinic would be comprised of a small group of people, who attended the clinic to receive a medical service. In *Svensson*,<sup>113</sup> the CJEU considered that the act of placing links on the Internet to content that had been made available to the public with the rightsholder's consent did not constitute an act of communication to the public.

Another key area of the CJEU jurisprudence relates to the interpretation of distribution through broadcasting transmissions. In this regard, the CJEU questioned the limits of the definition of broadcasting. In doing so, the CJEU addressed the technical differences, if any, that existed between traditional and digital broadcasting from the perspective of enforcement measures for copyrighted work. In *Football Association Premier League and Others*,<sup>114</sup> the author of a protected work can restrict or permit the transmission of digital fragments of a work of their own intellectual creation, where the fragments would subsequently be reformatted or reassembled through a satellite decoder and displayed upon a screen.<sup>115</sup> In *Airfield and Canal Digitaal*,<sup>116</sup> the CJEU examined the question of retransmission through satellite and cable. The CJEU found that such retransmissions would require the permission of the author and where this is granted, the retransmission will not be considered as communication to a new public. The technological aspects of retransmissions were further examined and defined in *ITV Broadcasting and Other*,<sup>117</sup> *C More Entertainment*,<sup>118</sup> *SBS Belgium*,<sup>119</sup> and *ITV Broadcasting and Others*.<sup>120</sup>

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<sup>112</sup> Judgment of the Court 15 March 2012, *SCF*, Case C-135/10, EU:C:2012:140.

<sup>113</sup> Judgment of the Court of 13 February 2014, *Svensson and Others*, Case C-446/12, EU:C:2014:76.

<sup>114</sup> Judgment of the Court of 4 October 2011, *Football Association Premier League and Others*, Case C-403/08, EU:C:2011:631.

<sup>115</sup> However, the near instantaneous re-formation and display process itself is considered a transient process and outside the ability of the author to permit or restrict.

<sup>116</sup> Judgment of the Court of 13 October 2011, *Airfield and Canal Digitaal*, Case C-431/09, EU:C:2011:648.

<sup>117</sup> Judgment of the Court of 7 March 2013, *ITV Broadcasting and Others*, Case C-607/11.

<sup>118</sup> Judgment of the Court of 26 March 2015, *C More Entertainment*, Case C-279/13, EU:C:2015:199.

<sup>119</sup> Judgment of the Court of 19 November 2015, *SBS Belgium*, Case C-325/14, EU:C:2015:764.

<sup>120</sup> Judgment of the Court of 1 March 2017, *ITV Broadcasting and Others*, Case C-275/15, EU:C:2017:144.

There is a large body of case law Article 5 of the InfoSoc Directive, which allows the Member States to adopt limitations and exceptions to copyright protection in their national laws but does not allow exceptions beyond those listed. On the one hand, Article 5 has non-mandatory nature, but, on the other hand, it needs to be applied consistently across the EU when it comes to the scope of the exceptions provided. A seminal case in that regard is *DR and TV2 Danmark*.<sup>121</sup> In this case, the CJEU took a broad interpretation of the meaning of ‘by their own facilities’ requirement for broadcasting organisations. According to the CJEU, Article 5(2)(d) of Directive 2001/29, read in the light of recital 41 in the preamble to that directive, must be interpreted as meaning that a broadcasting organisation’s own facilities include the facilities of any third party acting on behalf of or under the responsibility of that organisation. The CJEU however, made it clear that:

‘[A]lthough it is open to the Member States ... to introduce an exception in respect of ephemeral recordings into their domestic law, an interpretation according to which Member States which, exercising that option afforded to them by European Union law, have introduced an exception of that kind, are free to determine, in an un-harmonised manner, the limits thereof, inter alia as regards the facilities used to make those ephemeral recordings, would be contrary to the objective of that directive as set out in the preceding paragraph, inasmuch as the limits of that exception could vary from one Member State to another and would therefore give rise to potential inconsistencies’<sup>122</sup>

Most recently, the CJEU examined the position of copyright protection and fundamental rights in the trinity of long-awaited cases of *Pelham*,<sup>123</sup> *Spiegel Online*,<sup>124</sup> and *Funke Medien*.<sup>125</sup> Across the three cases, the question addressed by the Court relates to the balance between copyright protection and other competing rights in a satisfactory manner. More specifically, the CJEU discussed the extent to

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<sup>121</sup> Judgment of the Court 26 April 2012, *DR and TV2 Danmark*, Case C-510/10, EU:C:2012:244.

<sup>122</sup> Judgment of the Court 26 April 2012, *DR and TV2 Danmark*, Case C-510/10, EU:C:2012:244, paragraph 36.

<sup>123</sup> Judgment of the Court of 29 July 2019, *Pelham and Others*, Case C-476/17, EU:C:2019:624

<sup>124</sup> Judgment of the Court of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, Case C-516/17, EU:C:2019:625

<sup>125</sup> Judgment of the Court of 29 July 2019, *Funke Medien NRW*, Case C-497/17, EU:C:2019:623

which fundamental rights act as a ground for limiting copyright.<sup>126</sup> In *Funke Medien*, the Court went as far as stating that in addition to the limitations to copyright, Article 5 of the Infosoc Directive afforded the users rights. In doing so, making an explicit reference to the jurisprudence of the ECtHR and its criteria for striking a balance between copyright and the freedom of expression.<sup>127</sup> In *Spiegel Online*, the Court excluded the limitation to the right of reproduction for the purpose of reporting current events under Article 5 (3)(c) of the InfoSoc Directive, may be subject to the author's prior consent. The Court's rationale was such a requirement would likely constrict the freedom of expression of the press by preventing the dissemination of information.<sup>128</sup> Finally, in *Pelham*, the Courts examined partial reproduction under Article 2 InfoSoc. The Court held that the 2-second samples in questions and the reproductions are the functions of the right and the need to strike a fair balance between Article 17(2) CFREU, conflicting rights and the public interest, taking into account that Article 17(2) has not transformed copyright into an absolute and inviolable right.<sup>129</sup> In line with earlier case law, the CJEU did not permit the existence of external limits on the rights afforded to copyright beyond those specified under the Copyright Directive. The cases of *Funke Medien*, *Pelham* and *Spiegel Online* thus serves as an indication on the development of copyright within the EU; however, at present, they appear underdeveloped and somewhat fragmented. Overall, this short and non-exhaustive discussion evaluated the current legal regime for copyright protection within the EU.

While more flexible in its scope and limitations as a result of the French tradition, the EU system is still primarily rooted in the protection of commercial enterprise

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<sup>126</sup> Judgment of the Court of 29 July 2019, *Pelham and Others*, Case C-476/17, EU:C:2019:624, paragraph 47; Judgment of the Court of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, Case C-516/17, EU:C:2019:625, paragraph 63; Judgment of the Court of 29 July 2019, *Funke Medien NRW*, Case C-497/17, EU:C:2019:623 paragraph 62. In the three cases the CJEU held that by allowing the MS to derogate from Article 5 of the Directive, this would give risk of undermining the effectiveness of the Directive to harmonise legislation, but would also risk the legal certainty related to the limitations and exceptions. In line with earlier case law, the CJEU did not permit the existence of external limits on the rights afforded to copyright beyond those specified.

<sup>127</sup> Judgment of the Court of 29 July 2019, *Funke Medien NRW*, Case C-497/17, EU:C:2019:623, paragraph 70.

<sup>128</sup> Judgment of the Court of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, Case C-516/17, EU:C:2019:625, paragraph 71-73.

<sup>129</sup> Judgment of the Court of 29 July 2019, *Pelham and Others*, Case C-476/17, EU:C:2019:624, paragraph 33.

and endeavours. The CJEU case law highlights, in a similar vein to case law on trademarks, that copyright protection is strictly linked to the protection and enhancement of the internal market. Even most recent case law tends to focus on market integration aspects of copyright protection rather than on the protection on of the ‘human right’ aspect of the rights of the authors.

### ***3.4. European Union Patent Law: An Overview***

#### *3.4.1. The European Union Patent Legal Framework.*

While patent law is one of the oldest fields of IP discussed within the EU, it has proven more difficult to harmonise than other IPRs. This has given rise to a ‘parallel’ system of protection, deriving its power from the European Union Patent Convention (EPC),<sup>130</sup> and managed by the European Patent Office (EPO). The difficulties in regulating patents at the EU level also arise from the fact that:

‘fundamental changes in the kind and power technology development, the roles and impact of patents in the current socio-economic environment have little in common with the original concepts’.<sup>131</sup>

The EU process of harmonisation did manage some success, as two Regulations have been enacted within the pharmaceutical,<sup>132</sup> and the agro-chemical sectors.<sup>133</sup> Moreover, the EU, through the use of directives and some degree of difficulty, has achieved some success at harmonising patent law in the highly sensitive and often controversial field of biotechnological inventions.<sup>134</sup> Another aspect regulated at the EU level, and that has been dealt by the CJEU is that of supplementary protection certification (SPC). SPCs are a form of IPRs that serve as an extension

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<sup>130</sup> Currently, all the member states of the European Union together with Albania, Croatia, Macedonia, Iceland, Liechtenstein, Monaco, Norway, San Marino, Serbia, Switzerland and Turkey are members of the EPC.

<sup>131</sup> Annette Kur and Thomas Dreier *European Union Intellectual Property Law Text, Cases and Materials*. (Edward Elgar Publishing, 2013) 128. The EPC allows obtaining patent protection in 38 countries through a single procedure for the grant of patents,

<sup>132</sup> Regulation (EC) No 469/2009 of the European Parliament and of the Council of May 6, 2009 concerning the creation of a supplementary protection certificate for medicinal products, [2009], OJ L 152/1.

<sup>133</sup> Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products, [1996], OJ L 198/30

<sup>134</sup> Directive 98/44/EC of the European Parliament and of the Council of July 6, 1998 on the legal protection of biotechnological inventions, [1998], OJ L 213/13.

to a patent right. They apply to specific pharmaceutical and plant protection products that have been authorised by regulatory authorities. The EU, by means of two regulations, has endeavoured to provide for SPCs in order for these products (i.e. drugs and plants) to be better protected in the interest of public health and to encourage innovation in these areas to generate smart growth and jobs.<sup>135</sup>

As well as medical and pharmaceutical-based patent protection, there have been significant attempts to regulate software patents. These developments were sought in order to harmonise the application of software-based patents across the EU. However, these were met with firm resistance from interest groups active in the area and were ultimately abandoned.<sup>136</sup>

The lack of a harmonised EU system has led to multiple efforts to create a different, but still uniform based patent system. The Unitary Patent System (UPS) has been achieved within the scope of enhanced cooperation between the Member States.<sup>137</sup> The UPS creates a European patent with unitary effect (UP), which will be granted by the European Patent Office (EPO) like a classical European patent, but enforced by a new, centralized court system, the Unified Patent Court (UPC). The UPC will also have jurisdiction for litigation of classical European patents in ratified UPC States. The UPS is said to be linked to the Unified Patent Court, when finalised, it will enjoy jurisdiction over both Unitary Patents, as well as the more traditional European patents. At present, the ratification is subject to internal review by some of the Member States (Germany in particular). At present 16 Member States have ratified the UPC.<sup>138</sup>

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<sup>135</sup> Regulation (EC) No 469/2009 of the European Parliament and of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products (Codified version) (Text with EEA relevance) [2009] OJ L 152/1; Regulation (EC) No 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products [1996] OJ L 198/30.

<sup>136</sup> See generally Philip Leith, *Software and Patents in European Union rope* (Cambridge University Press, 2009) Chapter Four.

<sup>137</sup> On this development, see generally Robin Jacob, 'Creating the Community Patent and its Court', in David Vaver and Lionel Bently (eds), *Intellectual Property in the New Millennium* (Cambridge University Press, 2004) 79; Andrew Clay, 'A Unified European Patent Process and a Unified Way of Enforcing It' (2012) *Intellectual Property & Technology Law Journal* 15.

<sup>138</sup> Austria, Belgium Bulgaria, Denmark, Estonia, Finland, France, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Portugal, Sweden, and the United Kingdom.

### 3.4.2. The Role of the CJEU in Shaping European Union Patent Law

The CJEU has dealt, in several cases, with patents to various extents. The main strand of case law concerns the application and operation of the SPC.<sup>139</sup> The non-exhaustive discussion below serves as an indicative sample of issues brought before the CJEU in relation to the SPC, and establishes, once again, that the CJEU rationale is primarily market oriented. In *Yamanouchi Pharmaceutical v Comptroller-General of Patents, Designs and Trademarks*,<sup>140</sup> the grant of the SPC application can be made conditional on the valid authorisation to place the product on the market. This is primarily in relation to medical products due to health and safety concern. In *BASF*,<sup>141</sup> the application and creation of a SPC for the purpose of plant protection is said to cover the chemical element and their compounds irrespective of their source. Additionally, if two products are distinguished based solely on the proportion of the active chemical tested against the impurity of the end product, both must be considered the same product. The question of operation of the SPC was also tested firstly, in *Biogen v Smithkline Beecham Biologicals*,<sup>142</sup> where a product seeking a SPC is covered by multiple basic patents the approval of the SPC does not preclude or restrict the further granting of a SPC for each holder of the basic patent. The use of the SPC for medical products was subsequently expanded in *Farmitalia*,<sup>143</sup> where if the product was protected under a basic patent then the SPC would cover the use in any of the protected forms of this patent. The broad nature of the SPC and its relation to market authorisation was also seen in *Hogan Lovells International*,<sup>144</sup> where the protection of the SPC products may not preclude the restriction of subsequent SPC in which they have valid marketing authorisation.

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<sup>139</sup> This thesis does not examine the cases related to the link to patents and abuse of dominant position, as a competition law infringement. In that regard, see Steven Anderman and Areil Ezrachi. (eds), *Intellectual Property and Competition Law. New Frontiers* (Oxford University Press, 2011). See also Josef Drexl, 'AstraZeneca and the EU Sector Inquiry: When Do Patent Filings Violate Competition Law?' (2012) Max Planck Institute for Intellectual Property & Competition Law Research Papers, No. 12/02, 2012, at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2009276](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009276)>. Cases related to free movement of goods will be examined below in Section 4.

<sup>140</sup> Judgment of the Court of 12 June 1997, *Yamanouchi Pharmaceutical v Comptroller-General of Patents, Designs and Trademarks*, Case C-110/95, EU:C:1997:291.

<sup>141</sup> Judgment of the Court of 10 May 2001, *BASF*, Case C-258/99, EU:C:2001:261,

<sup>142</sup> Judgment of the Court of 23 January 1997, *Biogen v Smithkline Beecham Biologicals*, Case C-181/95, EU:C:1997:32.

<sup>143</sup> Judgment of the Court of 16 September 1999, *Farmitalia*, Case C-392/97, EU:C:1999:416.

<sup>144</sup> Judgment of the Court of 11 November 2010, *Hogan Lovells International*, C229/09, EU:C:2010:673.

The importance of the market authorisation in this regard cannot be overstated, with *Synthon*,<sup>145</sup> going as far as interpreting the failure to acquire market authorisation as a valid ground for refusing the SPC application. The CJEU continued its interpretation of the protections afforded under the SPC, defining the protection afforded to a ‘human embryo’ in *Brüstle*.<sup>146</sup> In doing so, the CJEU was also interpreting the limitations of the medical patents in relation to the SPC. In *Pharmacia Italia*,<sup>147</sup> the purpose of the medical product that has received an SPC and market authorisation in one Member State for use on humans will be prohibited from seeking market authorisation or the same product in another Member State for veterinary use.

The purpose of this section was to provide an overview of the development of patent protection within the EU. As such, the selection of the caselaw above reflects the broader scope of the issues rather than an in-depth focus on the minutiae. Overall, this succinct discussion has shown that the Patent protection within the EU, while facing difficulties has made significant progress in addressing new developments in relation to technical advancements. Further, the importance of SPC in relation to medical patents was continuously highlighted by the CJEU.

### ***3.5. Recent Developments and New Forms of Intellectual Property***

The concept of IP can be seen as dynamic, moving beyond the traditional elements discussed above.<sup>148</sup> To address the evolving nature of IP, the EU has taken action in various areas. There has been a significant expansion in areas such as geographical indications (GI) for food and agricultural products in the years

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<sup>145</sup> Judgment of the Court of 28 July 2011, *Synthon*, Case C-195/09, EU:C:2011:518. This was also seen in Judgment of the Court of 24 November 2011, *Medeva*, Case C-332/10, EU:C:2011:773; Judgment of the Court 17 October 2013, *Sumitomo Chemical*, Case C-210/12, EU:C:2013:665.

<sup>146</sup> Judgment of the Court of 18 October 2011, *Brüstle*, Case C-34/10, EU:C:2011:669. For an analysis of this from a medical law perspective, see generally Timo Minssen and Ana Nordberg, ‘The Evolution of the CJEU’s Case Law on Stem Cell Patents: Context, Outcome and Implications of Case C-364/13 International Stem Cell Corporation’ (2015) 5 Nordic Intellectual Property Review, 493; Myrthe G Nielen, Sybe A de Vries and Niels Geijsen, ‘European Stem Cell Research in Legal Shackles’ (2013) 32 The EMBO Journal 3107.

<sup>147</sup> Judgment of the Court of 19 October 2004, *Pharmacia Italia*, Case C-31/03, ECLI:EU:C:2004:641.

<sup>148</sup> The motives and development of this shift to recognise and foster these newer elements of intellectual property, are discussed in detail in the latter half of this thesis.

following TRIPS.<sup>149</sup> This is noteworthy because, as discussed in Chapter One, the EU was one of, if not the, most significant actor seeking higher levels of protection for GIs during the Doha Round of negotiations. The EU also sought to ensure GIs based protections are maintained and updated in line with other TRIPS-Plus protection. The CJEU case law in this area seems to exemplify a trend of expansion of the protection of GIs,<sup>150</sup> mirroring (at least partially) the international development spearheaded by the EU. With regards to GIs case law also shows the intention of the CJEU to protect consumers, preventing the use of the GIs to potentially mislead the source of the good.<sup>151</sup> This potential of misleading the consumer is determined at the European level, rather than consumers of the specific region.<sup>152</sup> However, to satisfy this condition the good in question must fall within the product specification for the origin of the good,<sup>153</sup> or requiring the packaging of the product as well as its production to occur within the specific region.<sup>154</sup> Further, once granted this protection may not be altered by domestic legislation.<sup>155</sup>

Alongside GIs, the EU has also established a system that grants IPRs to new plant varieties called Community Plant Variety Right (CPVR).<sup>156</sup> The CPVR is similar to a patent and once given, is valid throughout the EU. The CJEU case law has dealt with the CPVR and related aspects of trade,<sup>157</sup> mostly enhancing and expanding the

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<sup>149</sup> Council Regulation (EC) No 2006/510 of 20 March 2006 on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and Foodstuffs, [2006], OJ L 93/12. 71 Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, [1994], OJ L 227/1.

<sup>150</sup> Judgment of the Court 8 May 2014, *Assica and Krafts Foods Italia*, Case C-35/13, EU:C:2014:306.

<sup>151</sup> Judgment of the Court of 7 November 2000, *Haus Cramer*, Case C-312/98, EU:C:2000:599.

<sup>152</sup> Judgment of the Court of 21 January 2016, *Viiniverla*, Case C-75/16, EU:C:2016:35.

<sup>153</sup> Judgment of the Court of 25 June 2002, *Bigi*, Case C-66/00, EU:C:2002:397.

<sup>154</sup> Judgment of the Court of 20 May 2003, *Ravil*, Case C-469/00, EU:C:2003:295; Judgment of the Court of 20 December 2017, *Comité Interprofessionnel du Vin de Champagne*, Case C-393/16, EU:C:2017:991; Judgment of the Court of 20 May 2003, *Consorzio del Prosciutto di Parma and Salumificio S. Rita*, Case C-108/01, EU:C:2003:296.

<sup>155</sup> Judgment of the Court of 9 June 1998, *Chiciak and Fol*, Case C-129, EU:C:1998:274.

<sup>156</sup> Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights [1994] OJ L 227/1; Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office [2009] OJ L 2513; Commission Regulation (EC) No 1238/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards the fees payable to the Community Plant Variety Office [1995] OJ L 121/31; Commission Regulation (EC) No 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in Article 14 (3) of Council Regulation (EC) No 2100/94 on Community plant variety rights [1995] OJ L 173/14.

<sup>157</sup> Directive 2006/114/EC of the European Parliament and of the Council 12 December 2006 concerning misleading and comparative advertising (codified version), [2006], OJ L 376/21.

protection afforded to the IP rightholder. This expansion includes the operation of licensing costs for plant propagating materials.<sup>158</sup> Further, the CJEU examined the limitations and exemptions afforded to farmers in relation to the provision of information regarding their use of protected plant varieties,<sup>159</sup> but also in regard to the classification and identification of rights holders,<sup>160</sup> and the scope of this protection when calculating compensation.<sup>161</sup>

It must also be noted that, with regards to IP, the EU had also expanded enforcement measures available at the EU level. The Enforcement Directive,<sup>162</sup> regulating the manner in which the Member States introduce procedures to protect IPRs.<sup>163</sup> Further, this Directive broadly sets the sanctions for breaches of IPRs.<sup>164</sup> The Enforcement Directive, more so now than when first developed due to a shift in online activity and new realms of IP matters, operates in tandem with the E-Commerce Directive.<sup>165</sup> The Directive on Copyright in the Digital Single Market,<sup>166</sup> further expands the enforcement ability to address the digital landscape and its unique position in relation to enforcement. Under the E-Commerce Directive, the EU and the Member States have expanded the scope of protection afforded to IP for online activities. However, under Articles 12-15, the recognition of broader IP concerns, beyond that of the IP rightholder, can be seen to develop. The EU sought

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<sup>158</sup> Judgment of the Court of 8 June 2006, *Saatgut-Treuhandverwaltung*, Case C-7/05, EU:C:2006:376; Judgment of the Court 5 July 2012, *Geistbeck*, Case C-509/10, EU:C:2012:416; Judgment of the Court 15 November 2012, *Raiffeisen-Waren-Zentrale Rhein-Main*, Case C-56/11, EU:C:2012:713.

<sup>159</sup> Judgment of the Court of 10 April 2003, *Schulin*, Case C-305/00, EU:C:2003:218; Judgment of the Court of 11 March 2004, *Saatgut-Treuhandverwaltungsgesellschaft*, Case C-182/01, EU:C:2004:135; Judgment of the Court of 14 October 2004, *Brangewitz*, Case C-336/02, EU:C:2004:622.

<sup>160</sup> Judgment of the Court of 11 March 2004, *Saatgut-Treuhandverwaltungsgesellschaft*, Case C-182/01, EU:C:2004:135.

<sup>161</sup> Judgment of the Court of 20 October 2011, *Greenstar-Kanzi Europe*, Case C-140/10, EU:C:2011:677. See also Judgment of 9 Jun 2016, *Hasson*, Case C-481/14, EU:C:2016:419.

<sup>162</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, [2004], OJ L 157/45, corrected version in [2004], OJ L 195/16.

<sup>163</sup> The Enforcement Directive Article 1 ‘This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of IPRs. For the purposes of this Directive, the term ‘IPRs’ includes industrial property rights’.

<sup>164</sup> However, such sanctions are restricted to civil matters. Further, Article 3 goes as far to explicitly exclude harmonisation of criminal sanctions in relation to IP matters.

<sup>165</sup> Directive 2000/31/EC of the European Parliament and of the Council 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on Electronic Commerce’), [2000], OJ L 178/1.

<sup>166</sup> Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. Text with EEA relevance. OJ L 130/92.

to protect the internal market from the importation of infringing merchandise. This materialised in a series of Regulations, governing border control<sup>167</sup> and jurisdictional issues.<sup>168</sup>

On the whole, the EU has developed several instruments to address emerging forms of IP but also pressing concerns in terms of enforcement. As will be discussed in Part III, the same approach can be found in EU external relations.

#### **4. Intellectual Property, Free Movement Goods and Competition in the Internal Market**

The sections above have addressed the manner in which the elements of IP have been regulated by the EU, taking into account relevant CJEU case law. This section tallies with that which precedes it by focusing on the question of how IP protection can be limited to preserve the operation of the internal market.

##### ***4.1 Introductory Remarks***

The EU Treaties have consistently referred to the ‘Four Freedoms’, that is the free movement of goods, services, persons, and capital, as the cornerstones of the internal market while ensuring the free movement of goods, a staple feature of the European goals and objectives,<sup>169</sup> the Treaties have prohibited the restriction of movement between the Member States. However, in a limited number of cases, the Treaty has permitted an exemption to free movement. Article 36 TFEU provides the possibility of justifying restraints on the free movement of goods (i.e. prohibitions or restrictions on imports, exports or goods in transit)<sup>170</sup> *inter alia* for

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<sup>167</sup> Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, [2003], OJ L 196/7. Allowing the seizure and destruction of counterfeit goods and other goods infringing IP.

<sup>168</sup> Council Regulation 44/2001 of 22 December 2000 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (‘Brussels I’), [2001], OJ L 12/1.

<sup>169</sup> Article 30 TEEC, Article 28 TEC, and Article 34 TFEU.

<sup>170</sup> The CJEU interprets Arts. 34 and 35 TFEU in a broad manner. As the Court held *inter alia* in Judgment of the Court of 12 July 1984, *Prodest v Caisse primaire d’assurance maladie de Paris*, Case C-237/83, EU:C:1984:277, Article 34 TFEU concerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special advantage for national production or for the domestic market of the State in question.

the protection of industrial and commercial property, provided that such prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between the Member States.<sup>171</sup> Since *Keurkoop v. Nancy Kean Gifts*,<sup>172</sup> the CJEU, in interpreting Article 36 TFEU, has repeatedly stated that it is for national law to determine the procedures and conditions governing the grant of IPRs.<sup>173</sup> The CJEU has also constantly stipulated that, insofar as it provides for an exception to one of the fundamental principles of the EU, Article 36 allows derogations from the free movement of goods only where those derogations are justified to safeguard rights which constitute the specific subject-matter of IP.<sup>174</sup> More precisely, the CJEU has, since the early 1970s, resolved the conflict between free movement and the protection of national IPRs by referencing two interrelated norms of the specific subject-matter of the property right in question (sometimes referred to as its essential function) and of consent to first marketing. The CJEU, referring to the doctrine of the specific subject matter, has developed the principle of exhaustion,<sup>175</sup> according to which to the extent that a product has been legally placed on the market in a Member State, either by the

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<sup>171</sup> This ground covers all IPRs, including GIs, even if this inclusion has been considered questionable because GIs may not be attributed solely to an individual holder, but to all those entrepreneurs active in a specific territory. Franz Jurgen Säker, 'The Interrelationship between Competition Law and Intangible Property Law', in Gunter Hirsh, Frank Montag and Franz Jurgen Säker, *Competition Law: European Community Practice and Procedure* (Thompson, 2008) 39 *et seq.*

<sup>172</sup> Judgment of the Court of 14 September 1982, *Keurkoop BV v Nancy Kean Gifts BV*, Case C-144/81, EU:C:1982:289. For a comment see David T. Keeling, *Intellectual Property Rights in European Union law*, Vol. I (Oxford University Press, 2003), 30. See *infra* Section 3.

<sup>173</sup> See also Judgment of the Court of 30 June 1988, *Thetford, v. Fiamma*, Case C-35/87, EU:C:1988:353, paragraph 12 *et seq.* In addition, the CJEU has affirmed that Member States' sovereign power to lay down the conditions governing the grant of IPRs must be exercised in a way of not discriminating against nationals of other Member State See also, Judgment of the Court of 6 June 2002, *Ricordi*, Case C-360/00, EU:C:2002:346.

<sup>174</sup> *Ex pluribus*, Judgment of the Court of 31 October 1974, *Centrafarm BV and Others v Winthrop BV*, Case C-16/74, EU:C:1974:115, paragraph 7. 'Inasmuch as it provides an exception to one of the fundamental principles of the Common Market, Article 36 in fact only admits of derogations from the free movement of goods where such derogations are justified for the purpose of safeguarding rights which constitute the specific subject-matter of this property'.

<sup>175</sup> See generally, Irene Calboli, 'Trademark Exhaustion in the European Union: Community-Wide or International? The Saga Continues' (2002), 6 Marquette Intellectual Property Law Review 47, Irene Calboli, 'Reviewing the (Shrinking) Principle of Trademark Exhaustion in the European Union (Ten Years Later)' (2012), 16 Marquette Intellectual Property Law Review 257, Susy Frankel and Daniel J. Gervais, 'International Intellectual Property Rules and Parallel Imports' in Irene Calboli and Edward Lee (eds), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports Research Handbook* (Edward Elgar 2016), Vincent Chiappetta, 'Working Toward International Harmony on Intellectual Property Exhaustion (and Substantive Law)' in Irene Calboli and Edward Lee (eds), *Research Handbook on Intellectual Property Exhaustion and Parallel Imports Research Handbook* (Edward Elgar 2016).

owner or with his consent, parallel import may not be prevented by exclusive IPRs.<sup>176</sup> Otherwise, according to the CJEU, this might enable the owner of the right to exclude some national markets, and ultimately partition the EU internal market. In other words, the free movement of goods does intersect IP under the guise of the principle of territoriality, as the Member States can enforce various IP restrictions within their boundaries.

In parallel import cases,<sup>177</sup> attempts were made to import protected goods from one Member State, at a lower price with the intention of resale in a neighbouring Member State in which the IP holder marketed the good at an (often significantly) higher price. While the CJEU has addressed this question, it must be noted that a large portion stems from the early days of the EU and the manner in which territoriality was resolved. That said, the early decisions retain their importance and continue to shape IP development within the EU and globally.

In *Établissements Consten and Grundig v. Commission*,<sup>178</sup> the sale of products under the protected trademark of GINT by a third party who legally purchased the product in Germany and resold them in France was examined by the Commission following a domestic claim of infringement of the trademark. The Commission held that the agreement restricting trade between the French trademark holder and its Germany equivalent affected the freedom of trade between the Member States, thereby infringing former Article 8 TEEC. Both the French and German companies appealed, citing the Commission's decision was in violation of Article 345 TFEU as it had not given adequate weight to the rules of property ownership in the Member States. The CJEU held that, while EU law cannot hamper the existence of IPRs recognized by the law of a Member State, it can regulate its exercise in order to protect free competition in the internal market. The CJEU held that the Member

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<sup>176</sup> As clarified *inter alia* by Hays, 'parallel import occurs when an intellectual property owner or his licensee sells protected good in one market under such circumstances that these goods can be purchased for export and imported into another market for sale against the wishes of the intellectual property owner and in competition with similar goods enjoying equivalent protection in the second market'. See Thomas Hays, *Parallel Importation Under European Union Law* (Thompson, 2004), 1.

<sup>177</sup> Judgment of the Court of 31 October 1974, *Centrafarm v. Sterling*, Case C-15/74 EU:C:1974:114; Judgment of the Court of 31 October 1974, *Centrafarm BV and Others v Winthrop BV*, Case C-16/74, EU:C:1974:115; Judgment of the Court of 15 June 1976, *EMI Records Limited v CBS United Kingdom Limited*, Case C-51/75, EU:C:1976:85.

<sup>178</sup> Judgment of the Court of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Case C-56/64, EU:C:1966:41.

States must refrain from using rights under national trademark law in order to set an obstacle to parallel imports. This does not affect the grant of those rights, but only limits their exercise to the extent necessary to give effect to the prohibition of anti-competitive agreements under Article 101 TFEU.<sup>179</sup>

This decision led to several cases on the matter of parallel imports, which confirmed and expanded the reasoning the CJEU employed in *Grundig*. In both *Parke Davis v. Centrafarm*,<sup>180</sup> and *Sirena v. Eda*,<sup>181</sup> the rightsholders objected to the parallel importation of their goods, citing protection of existing IP laws; *Parke Davis* on the grounds of patent law and *Sirena* on trademark infringement. However, in both cases and unlike in *Grundig*, there was no agreement between the rightsholder and its equivalent company. As such, Article 101 TFEU would not apply. The CJEU examined measures affecting trade within the EU from the perspective of the measures constituting an abuse of a dominant market position. However, as the CJEU did not view the mere ownership of an IP as a dominant position, thereby nothing finding a justification to hold the obstruction of parallel imports as abusive.

The next stage of development, following inconclusive results in *Parker Davis* and *Sirena*, was in *Deutsche Grammophon v. Metro SB*.<sup>182</sup> The case was referred to the CJEU to address the question of whether opposing the re-sale of unauthorised imported records violated Articles 101 or 102 TFEU.<sup>183</sup> The CJEU clarified that ‘although the Treaty does not affect the existence of industrial property rights conferred by the national legislation of a Member State, the exercise of these rights may come within the prohibitions of the Treaty’.<sup>184</sup> In doing so, this decision led to the establishment of the principle of regional exhaustion as a key aspect of EU

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<sup>179</sup> Judgment of the Court of 13 July 1966, *Consten and Grundig v Commission of the EEC*, Case C-56/64, EU:C:1966:41.

<sup>180</sup> Judgment of the Court of 29 February 1968, *Parke, Davis and Co. v Probel, Reese, Beintema-Interpharm and Centrafarm*, Case C-24/67, EU:C:1968:11.

<sup>181</sup> Order of the Court of 18 October 1979, *Sirena v. Eda*, Case C-40/70, EU:C:1979:236.

<sup>182</sup> Judgment of the Court of 8 June 1971, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, Case C-78/80, EU:C:1971:59.

<sup>183</sup> Judgment of the Court of 8 June 1971, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, Case C-78/80, EU:C:1971:59, paragraph 12 states that if ‘a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market’.

<sup>184</sup> Judgment of the Court of 8 June 1971, *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG*, Case C-78/80, EU:C:1971:59, paragraph 11.

jurisprudence.<sup>185</sup> While the core of the legal basis of *Deutsche Grammophon* remains in operation, subsequent decisions have developed this principle to better suit different requirements of other elements of IP.<sup>186</sup>

#### ***4.2. Trademarks and the Free Movement of Goods and Competition in the Internal Market***

The first decision in the aftermath of *Deutsche Grammophon* related to a trademark dispute. In *HAG I*,<sup>187</sup> the case related to coffee produced in Germany under the trademark of HAG being imported into Belgium. The objections were raised by the importer who held an allowance on imports from the previous holders of the trademark. The CJEU held that the prohibition against importation was not justifiable, that the trademark cannot rely upon the exclusiveness of the trademark with the intention of preventing the marketing of goods legally produced in a Member State of the same origin under an identical trademark.<sup>188</sup>

In subsequent cases, the CJEU briefly considered the role of trademarks operating within the internal market.<sup>189</sup> The most relevant are *EMI Records Limited v CBS Grammofoon A*,<sup>190</sup> *EMI Records v. CBS*,<sup>191</sup> *Terrapin v. Terranova*.<sup>192</sup> In those cases, the CJEU clarified that *HAG I* would only apply in the instances where identical trademarks of the same origin were then held by different trademark rightsholder.<sup>193</sup>

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<sup>185</sup> This principle would form part of nearly all legal instruments seek to harmonizing IP within the European Union, in doing so serving as both a minimum and maximum rule. As such, the Member States are then prohibited from applying the principle of global exhaustion.

<sup>186</sup> Judgment of the Court of 6 April 1995, *P - RTE and ITP v Commission*, Case C-241/91, EU:C:1995:9826, paragraph 26. ‘The Court of First Instance found, in the light of the case law of the Court of Justice, that it followed from Article 36 of the Treaty that only those restrictions on freedom of competition, free movement of goods or freedom to provide services which were inherent in the protection of the actual substance of the intellectual property right were permitted in [the EU]’.

<sup>187</sup> Judgment of the Court of 3 July 1974, *Van Zuylen v Hag AG*, Case C-192/73, EU:C:1974:72.

<sup>188</sup> Judgment of the Court of 3 July 1974, *Van Zuylen v Hag AG*, Case C-192/73, EU:C:1974:72, paragraph 12.

<sup>189</sup> Judgment of the Court of 31 October 1974, *Centrafarm BV and Others v Winthrop BV*, Case C-16/74, EU:C:1974:115.

<sup>190</sup> Judgment of 15 June 1976, *EMI Records / CBS Grammofoon*, Case C-86/75, ECLI:EU:C:1976:86 as well as Judgment of 15 June 1976, *EMI Records / CBS Schallplatten*, Case C-96/75 ECLI:EU:C:1976:87, where identical issues were presented, showing the issues the EU faced prior to the Trademark Directive and preventing the fragmentation of Member State law on what would become such an important aspect.

<sup>191</sup> Judgment of the Court of 15 June 1976, *EMI Records Limited v CBS United Kingdom Limited*, Case 51-75, EU:C:1976:85.

<sup>192</sup> Judgment of 22 June 1976, *Terrapin / Terranova*, Case C-119/75, ECLI:EU:C:1976:94.

<sup>193</sup> Judgment of 22 June 1976, *Terrapin / Terranova*, Case C-119/75, ECLI:EU:C:1976:94,

One of the first hints of the complexity of what would become the interplay between IP protection, the free movement of goods, and competition law was seen in *Hoffmann-La Roche*,<sup>194</sup> which allowed the use of trademark protections to prevent the distribution and importation of a good in all jurisdictions in which the rightsholder held the trademark, without running contrary to Article 102 TFEU (i.e. which concerns the abuse of dominant position). However, the restriction on importation must only be for the purpose of protecting the trademarked and not used as an instrument of abuse in the market.

These developments led the CJEU to revisit *HAG I* in *Cnl-Sucal NV SA v. HAG GF AG* (*HAG II*),<sup>195</sup> again examining the importation of coffee into Belgium, by a successor holder of title from the company in *HAG I*. The CJEU held that trademarks were ‘an essential element in the system of undistorted competition that the Treaty seeks to establish’.<sup>196</sup> The CJEU also offered guidance on the matter, defining the essential function of a trademark within the EU. It held that

‘the specific subject matter of trademarks is in particular to guarantee to the proprietor of the trademark that he has the right to use that trademark for the purpose of putting a product into circulation for the first time and therefore to protect him against competitors wishing to take advantage of the status and reputation of the trademark by selling products illegally bearing that mark. In order to determine the exact scope of this right exclusively conferred on the owner of the trademark, regard must be had to the essential function of the trademark, which is to guarantee the identity of the origin of the marked product to the consumer or ultimate user by enabling him without any possibility of confusion to distinguish that product from products which have another origin’<sup>197</sup>

Mirroring developments at the international level, the mid-1990s saw concerns over the application of trademarks relating to pharmaceutical goods become a concern

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paragraph 7.

<sup>194</sup> Judgment of the Court of 23 May 1978, *Hoffman-La Roche v Centrafarm* C-102/77, EU:C:1978:108. This interplay also briefly resurfaced in Judgment of the Court of 6 November 1984, *Kohl v Ringelhan*, Case C-117/83, ECLI:EU:C:1984:334.

<sup>195</sup> Judgment of the Court of 17 October 1990, *CNL-SUCAL v HAG*, C10/89, EU:C:1990:359.

<sup>196</sup> Judgment of the Court of 17 October 1990, *CNL-SUCAL v HAG*, C10/89, EU:C:1990:359, paragraph 13.

<sup>197</sup> Judgment of the Court of 17 October 1990, *CNL-SUCAL v HAG*, C10/89, EU:C:1990:359, paragraph 14.

within the Member States. This then led to significant development in the area, particularly concerning the free movement of trademarked goods. Firstly, in *MPA Pharma GmbH v Rhône-Poulenc Pharma GmbH*,<sup>198</sup> the CJEU allowed the restriction or prevention of an imported pharmaceutical product by the holder of a trademark, where the importer has made alterations or repackaged the pharmaceutical product. However, the CJEU did not allow the prohibition on importing goods without limitation or restraint. Firstly, if the prohibition would facilitate or contribute to the creation of an artificial partition of the markets between MS, it will be not permitted.<sup>199</sup> Secondly, in the event of repackaging of the good by the importer, the prohibition turns on whether the repackaging has any effect on the contents.<sup>200</sup> Thirdly, prohibition is not allowed when a statement of repackaging is made clear by the importer and that it was done without approval or authorisation of the trademark holder.<sup>201</sup> Fourthly, prohibition is not allowed where the repackaged product's presentation is not going to create a liability or cause for damages to the reputation of the original, trademark-protected good or the reputation of the trademark holder.<sup>202</sup> Finally, the prohibition is not permitted where the importer, while still repackaging the product without authorisation to do so, gives notice of intention or notice of action to the trademark holder.<sup>203</sup> This matter was again seen in *Eurim-Pharm Arzneimittel GmbH v Beiersdorf AG*,<sup>204</sup> where the CJEU ruled identically, both recognising and restating the protections afforded to the trademark, while also upholding the limitations.

This line of cases continued until the late 1990s, with the CJEU often examining the question of restricting the importation, and whether doing so created an artificial partitioning of the internal market. In *Parfums Christian Dior SA and Parfums*

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<sup>198</sup> Judgment of the Court of 11 July 1996, *MPA Pharma v Rhône-Poulenc Pharma*, C232/94, EU:C:1996:289

<sup>199</sup> Judgment of the Court of 11 July 1996, *MPA Pharma v Rhône-Poulenc Pharma*, C232/94, EU:C:1996:289, paragraph 50. The CJEU also implied that the artificial partition must be a demonstrable act by the holder of the trademark in such case.

<sup>200</sup> Judgment of the Court of 11 July 1996, *MPA Pharma v Rhône-Poulenc Pharma*, C232/94, EU:C:1996:289, paragraph 50.

<sup>201</sup> Judgment of the Court of 11 July 1996, *MPA Pharma v Rhône-Poulenc Pharma*, C-232/94, EU:C:1996:289, paragraph.

<sup>202</sup> Judgment of the Court of 11 July 1996, *MPA Pharma v Rhône-Poulenc Pharma*, C-232/94, EU:C:1996:289, paragraph 50.

<sup>203</sup> Judgment of the Court of 11 July 1996, *MPA Pharma v Rhône-Poulenc Pharma*, C-232/94, EU:C:1996:289, paragraph 50.

<sup>204</sup> Judgment of the Court of 11 July 1996, *Eurim-Pharm Arzneimittel v Beiersdorf and Others*, Case C-71/94, EU:C:1996:286.

*Christian Dior BV v Evora BV*,<sup>205</sup> the CJEU once again held that a trademark holder could not prevent the importation of their good unless they would suffer serious damage to their reputation as a result of the imported good.<sup>206</sup>

On the whole, the balance struck by the Court shows that IP needs to be protected as they are essential to enhance competition in the internal market. However, the exercise of IPRs cannot endanger the internal market and the EU fundamental freedoms.

#### ***4.3. Copyright, Free Movement of Goods and Competition in the Internal Market***

Despite the fact that, as discussed in Section 3, the Court has adopted, in several cases a market-oriented view of IP and has sought to protect the internal market, in those cases related to free movement, there is some consideration of non-market interests. The question of regional exhaustion, in relation to copyright and related rights, presents interesting insights in that regard. In *Musik-Vertrieb Membran v. GEMA*,<sup>207</sup> the CJEU looked at how copyright differs from other elements of IP.<sup>208</sup> It held that copyright differed as it comprised the moral right of the author but also ‘comprises other rights, notably the right to exploit commercially the marketing of the protected work’<sup>209</sup> and that this right ‘constitutes a form of market control exercisable by the owner’.<sup>210</sup>

From *Coditel v. Ciné Vog Films*,<sup>211</sup> a new avenue of jurisprudence on the distribution of copies, which is also subject to exhaustion, has developed. This

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<sup>205</sup> Judgment of the Court of 4 November 1997, *Parfums Christian Dior v Evora*, Case C-337/95, EU:C:1997:517.

<sup>206</sup> This was quickly followed, although phrased from the perspective and allowances of the trademark holder rather than the exemptions they face, in Judgment of the Court of 11 November 1997, *Loendersloot v Ballantine & Son and Others*, Case C-349/95, EU:C:1997:530 and Judgment of the Court of 12 October 1999, *Upjohn*, Case C-379/97, EU:C:1999:494.

<sup>207</sup> Judgment of the Court of 20 January 1981, *Musik-Vertrieb Membran GmbH v GEMA*, Case C-55/80, EU:C:1981:10.

<sup>208</sup> That is not to say that copyright is entirely separate from other elements of IP, rather the CJEU must be aware of the additional elements that copyright and related rights bring to the table. See Judgment of the Court of 22 January 1981, *Dansk Supermarked*, Case C-58/80, EU:C:1981:17 for application of copyright treated akin to trademarks.

<sup>209</sup> Judgment of the Court of 20 January 1981, *Musik-Vertrieb Membran GmbH v GEMA*, Case C-55/80, EU:C:1981:10, paragraph 12.

<sup>210</sup> Judgment of the Court of 20 January 1981, *Musik-Vertrieb Membran GmbH v GEMA*, Case C-55/80, EU:C:1981:10, paragraph 13.

<sup>211</sup> Judgment of the Court of 18 March 1980, *Coditel v Ciné Vog Films*, Case C-62/79, EU:C:1980:84.

jurisprudence arose in reaction to both shifts in technology and innovation, but also in response to the need for the development of EU harmonised rules. This jurisprudence can be seen as an early indicator for the current trend of expanding and stretching existing principles to protect new forms of works. *Coditel* related to the unauthorised broadcast of a film, already shown on Germany televisions, on a Belgian cable network. However, the right to show the film in the Belgian television network has already been acquired by way of license from Ciné Vog, the rightsholder of the film. In this case, the CJEU recognised new or alternative form of exploitation of copyrighted work which is distinct from the other existing elements which are subject to the principle of exhaustion. The CJEU noted the particularly unique nature of film as opposed to other literary or artist pieces, as a form of work ‘available to the public by performances which may be infinitely repeated’.<sup>212</sup> Furthermore, the CJEU held that the copyright holder has a legitimate interest in the calculation of fees arising from the authorised exhibition of the piece, and is based on the number of performance.<sup>213</sup> The CJEU went as far as saying that this ability to collect fees for repeated publication is an ‘essential function of copyright’ for this form of artistic expression.<sup>214</sup> The case revolved around Article 56 TFEU (free movement of services), as no physical goods were transported over a border. Ultimately, the CJEU held that the restriction on the distribution of the film in Belgium was justified, and subsequently, the CJEU upheld the principles in *Coditel v. Ciné Vog Films (Coditel II)*.<sup>215</sup>

The third strand of copyright cases arose in response to the wide discrepancies in the legislation of the Member States.<sup>216</sup> In *Warner Brothers v. Christiansen*,<sup>217</sup> the CJEU held that the Treaty do not prohibit the application of national legislation

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<sup>212</sup> Judgment of the Court of 18 March 1980, *Coditel v Ciné Vog Films*, Case C-62/79, EU:C:1980:84, paragraph 12.

<sup>213</sup> Judgment of the Court of 18 March 1980, *Coditel v Ciné Vog Films*, Case C-62/79, EU:C:1980:84, paragraph 13.

<sup>214</sup> Judgment of the Court of 18 March 1980, *Coditel v Ciné Vog Films*, Case C-62/79, EU:C:1980:84, paragraph 14.

<sup>215</sup> Judgment of the Court of 6 October 1982, *Coditel v Ciné-Vog Films*, Case C-262/81, EU:C:1982:334

<sup>216</sup> As well as the growing global pressures for a new, standardised level of IP protection sought by IP dependant industries during this period. As discussed in Section II.

<sup>217</sup> Judgment of the Court of 17 May 1988, *Warner Brothers and Others v. Christiansen*, Case C-158/86, EU:C:1988:242, where the question centred on the difference in UK and Danish law, following the defendant brought retail copies of tapes to the UK for rental. The issue arose, as under Danish law, permission was required by the right holder, however the UK did not have any legislation at the time.

which gives an author the right to make the hiring-out of video-cassettes subject to his permission, when the video-cassettes in question have already been put into circulation with his consent in another Member State whose legislation enables the author to control the initial sale, without giving him the right to prohibit hiring-out. According to the CJEU, such legislation, insofar as it applies without distinction to video-cassettes produced in situ and video-cassettes imported from another Member State, does not operate any arbitrary discrimination in trade between Member States. For this reason, it is justified on the grounds of the protection of industrial and commercial property, in the context of Article 36 TFEU.<sup>218</sup> Another case within this strand is *EMI v. Patricia*,<sup>219</sup> concerning the difference within protection terms and durations afforded to the protection of artistic expressions. On examining the matter, the CJEU held that the prohibition on importing the goods as a means to protect IP was not an abusive exercise of rights and was not contrary to the Treaty.<sup>220</sup>

On the whole, these cases underline how copyright is significantly different to the other elements of IP in relation to not only cross-border elements but also in relation to new media infringements, such as digital and cable transmissions of copyright. As such, the CJEU sought to determine how differences in national legislation sought to address these differences, and if such national legislation derogated too far from the key Directives.

#### ***4.4. Patent, Free Movement of Goods and Competition in the Internal Market***

As with copyright and trademark law, patent law also developed from the principles established in *Deutsche Grammophon*, with the first test of this approach in *Centrafarm v. Sterling Drug*.<sup>221</sup> The CJEU upheld *Deutsche Grammophon*, and affirmed that the creator of the patent has the right to be rewarded for their

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<sup>218</sup> Judgment of the Court of 17 May 1988, *Warner Brothers and Others v. Christiansen*, Case C-158/86, EU:C:1988:242, paragraphs 15-16.

<sup>219</sup> Judgment of the Court of 24 January 1989, *EMI Electrola v Patricia Im- und Export and Others*, C341/87, EU:C:1989:30.

<sup>220</sup> Judgment of the Court of 24 January 1989, *EMI Electrola v Patricia Im- und Export and Others*, C341/87, EU:C:1989:30, paragraph 12.

<sup>221</sup> Judgment of the Court of 31 October 1974, *Centrafarm v. Sterling*, Case 15-74 EU:C:1974:114. Where a patent holder sought to prevent the parallel importation of pharmaceutical drugs from Germany and the UK into the Netherlands, where the patent holder had licensed the manufacturing on an exclusive basis.

innovation, and has the exclusive right to use the invention directly or by the granting a license for its use, as well as the means to protect this right from infringement.<sup>222</sup> Along this line, subsequent relevant cases are, among others: *Merck v. Stephar*,<sup>223</sup> *Pharmon v. Hoechst*,<sup>224</sup> and *Generics v. Smith Kline*.<sup>225</sup> In *Merck*, the CJEU examined whether the importation amounted to infringement under free movement provisions. The CJEU looking at the decision in *Centrafarm*, once again held it was the reward of the patent holder to exercise the patent for their innovation.<sup>226</sup> Additionally, the CJEU addressed the instance of discrepancy, where one Member State did not provide equivalent IP protections. In the period in which the case was brought to the CJEU, Italy did not provide patent law protection to pharmaceutical products. The CJEU held that the responsibility fell on the rightsholder if they choose to market their product to a Member State without the protection they would require. Further, the rightsholder would subsequently face the consequence of this choice in light of the free movement of goods within the EU.<sup>227</sup>

In *Pharmon v. Hoechst*, the CJEU found that the Treaties preclude the application of national provisions which enable a patent proprietor to prevent the importation and marketing of a product which has been lawfully marketed in another member state by the patent proprietor himself, with his consent, or by a person economically or legally dependent on him. However, it also found that a patent holder was entitled to activities which protect this right when operating in the realm of compulsory

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<sup>222</sup> Judgment of the Court of 31 October 1974, *Centrafarm v. Sterling*, Case 15-74 EU:C:1974:114, paragraph 9.

<sup>223</sup> Judgment of the Court of 14 July 1981, *Merck & Co. Inc. v Stephar BV and Petrus Stephanus Exler*, Case C-187/80, EU:C:1981:180. A dispute arose over the release of pharmaceutical products onto the Italian market, which at the time did not provide patent protections for such goods. Merck claimed that by exporting the pharmaceutical product from Italy to the Netherlands, the act infringed Dutch patent protection.

<sup>224</sup> Judgment of the Court of 9 July 1985, *Pharmon v. Hoechst*, Case C-19/84, EU:C:1985:304. A dispute arose following the sale on consignment with intention for resale one the manufacturing license, which prohibited the export, expired.

<sup>225</sup> Judgment of the Court of 9 July 1997, *Generics v Smith Kline & French Laboratories*, Case C-316/95, ECLI:EU:C:1997:347. A dispute arose whether domestic legalisation prohibiting the application process to a competent authority with the intention of marketing once the term of the patent protection expires, amounts to having a measure equivalent in effect under Article 30 TFEU. And in the event, what is the justification for such action under Article 36 TFEU.

<sup>226</sup> Judgment of the Court of 14 July 1981, *Merck & Co. Inc. v Stephar BV and Petrus Stephanus Exler*, Case C-187/80, EU:C:1981:180, paragraph 10.

<sup>227</sup> Judgment of the Court of 14 July 1981, *Merck & Co. Inc. v Stephar BV and Petrus Stephanus Exler*, Case C-187/80, EU:C:1981:180, paragraph 10.

licences.<sup>228</sup> According to the Court, the Treaties do not preclude the application of legal provisions of a member state which give a patent proprietor the right to prevent the marketing in that state of a product which has been manufactured in another member state by the holder of a compulsory licence granted in respect of a parallel patent held by the same proprietor.

In *Generics v. Smith Kline*, the CJEU held that, while the case did not relate to an instance of actual importation, the legislation in question had the purpose to potentially prevent the lawful importation of products once the patent protection has expired in another Member State. The CJEU held that to prohibit importation was however justified under Article 36 TFEU, as the prohibition fell within the specific subject matter of the patent.

The case law also turned on the question of licences of rights and how this interacted with the free movement of goods within the EU. In *Allen and Hanburys Ltd v Generics (UK) Ltd*,<sup>229</sup> the CJEU held provisions allowing the grant injunctions to prohibit the importation of the licensed good from another Member State restrict the free movement.<sup>230</sup> Further, the CJEU held such prohibition could not be justified on the grounds of consumer protection or fair trading in instances where the legislation does not apply to domestic and imported goods without discrimination.<sup>231</sup>

On the whole, the Court of Justice has sought to ensure that there remains a protection for the rightsholder of a patent to facilitate and encourage the innovation of such pharmaceutical goods. Further, the CJEU also ensured that such protection, while adequate, does not unduly restrict the free movement of goods within the internal market.

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<sup>228</sup> Judgment of the Court of 9 July 1985, *Pharmon v. Hoechst*, Case C-19/84, EU:C:1985:304, paragraph 26.

<sup>229</sup> Judgment of the Court of 3 March 1988, *Allen & Hanburys v. Generics*, Case C-434/85, EU:C:1988:109.

<sup>230</sup> Judgment of the Court of 3 March 1988, *Allen & Hanburys v. Generics*, Case C-434/85, EU:C:1988:109, paragraph 16.

<sup>231</sup> Judgment of the Court of 3 March 1988, *Allen & Hanburys v. Generics*, Case C-434/85, EU:C:1988:109, paragraph 22.

#### ***4.5. Geographical Indications and the Free Movement of Goods***

Geographical indications, often perceived as a novel and minor IP right,<sup>232</sup> have been recognised by the EU for long. Despite the attempt to strike a balance between the protection of GI, the prohibition of market restrictions and the protection of consumers, the CJEU adopts in most cases a very ‘market oriented’ view. For example, in *Prantl*,<sup>233</sup> the CJEU held that Member States provisions restricting certain design elements of a wine bottle such as shape or size, to a limited number of domestic producers while simultaneously prohibiting such design to imported products, have an equivalent effect to a quantitative restriction.<sup>234</sup> The CJEU held that the legislation of a Member State may, in order to protect a designation of geographical origin in the interests of consumers, prohibit the marketing of wines imported in a certain type of bottle. However, when the use of that shape or similar shape of bottle accords with fair and traditional practice in the State of origin, and any such legislation that prohibits the use of bottles for the imported wine constitutes a measure having an effect equivalent to a quantitative restriction. The CJEU continued with a rejection of the justification of such restriction of design elements on the grounds of public policy,<sup>235</sup> also rejecting the justification of protecting a design element which was traditionally associated with domestic producers on the grounds of fair and traditional practices.<sup>236</sup>

In the late 1990s and early 2000s, the concept of GIs were increasingly visible of EU FTAs of the era, and the CJEU adopted a more nuanced view arose in relation to ‘luxurious’ food and beverages, which enjoyed significant economic benefits from exportation to other Member State and foreign markets, often on the strength of the name and the perceived quality attached to it. For example, in *Gorgonzola*,<sup>237</sup> the CJEU held that the Member States are not precluded from introducing measures, including but not limited to the prohibition of importation of goods, with the

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<sup>232</sup> At the global level, see Part III for an its development as a negotiation objective of the EU with its trading partners.

<sup>233</sup> Judgment of the Court of 13 March 1984, *Prantl*, Case C-16/83, EU:C:1984:101.

<sup>234</sup> Judgment of the Court of 13 March 1984, *Prantl*, Case C-16/83, EU:C:1984:101, paragraph 30.

<sup>235</sup> Judgment of the Court of 13 March 1984, *Prantl*, Case C-16/83, EU:C:1984:101, paragraph 38.

<sup>236</sup> Judgment of the Court of 13 March 1984, *Prantl*, Case C-16/83, EU:C:1984:101, paragraph 38.

<sup>237</sup> Judgment of the Court of 4 March 1999, *Consortio per la tutela del formaggio Gorgonzola*, Case C-87/97, EU:C:1999:115.

intention of protecting GIs recognised under Council Regulation (EEC) No 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.<sup>238</sup> The protection of GIs and its ability to restrict or prohibit its free movement is further seen in *Prosciutto di Parma*.<sup>239</sup> The CJEU held that a requirement for certain elements of preparation to occur within the Member State it was marketed in, while normally would amount to having an equivalent effect to a quantitative restriction, was justifiable and thereby compatible with Article 30 TFEU.

The development of case law highlighted the balance between ensuring adequate protection for the GIs and protecting the free movement of the internal market. In doing so, the CJEU also examined the terms which can be protected, their requirements, and their limitations. This provided a strong foundation for the expansion of both the general protection afforded to GIs at the international level and what would fall within the classification as many of the EU's trade agreements have annexes relating to the mutual recognition of geographical indication.

#### ***4.6. Design and the Free Movement of Goods***

Design as a protected element of IP, while often overshadowed by the more traditional elements of IP or falling outside economic agenda for the expansion of novel forms of IP, was considered by the CJEU in a number of cases, in which, once again, the CJEU tried to strike a balance between IP protection and free movement. In *Keurkoop BV v Nancy Kean Gifts BV*,<sup>240</sup> the right of a design, protected under national law may allow the prohibition of importing products with an identical appearance to the protected design from the other Member States. However, this prohibition is subject to several limitations. Firstly, the products must not be already in circulation in other Member States by, or with the consent of, the holder of the design rights.<sup>241</sup> Secondly, there must be no agreed practices to restrain

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<sup>238</sup> However, trademarks registered prior to the recognition of the GIs will still benefit from their protected status as a trademark without conflicting with Article 13(1)(b) of the Regulation.

<sup>239</sup> Judgment of the Court of 20 May 2003, *Consorzio del Prosciutto di Parma and Salumificio S. Rita*, Case C-108/01, EU:C:2003:296.

<sup>240</sup> Judgment of the Court of 14 September 1982, *Keurkoop BV v Nancy Kean Gifts BV*, Case C-144/81, EU:C:1982:289.

<sup>241</sup> Judgment of the Court of 14 September 1982, *Keurkoop BV v Nancy Kean Gifts BV*, Case C-144/81, EU:C:1982:289, paragraph 10.

competition between the parties in question.<sup>242</sup> Thirdly, that the design elements of the products protected by the design rights were created independently of the other.<sup>243</sup> Subsequently, in *Conorzio Italiano Della Componentistica di Ricambio er Autoveicoli and Maxicar v Régie nationale des Usines Renault*,<sup>244</sup> the question of protecting the design rights for a decorative car ornament from a third-party manufacturer, through the restriction of the free movement of goods arose concerning the question of abuse of a dominant market position. The CJEU held that the prohibition of third-party manufacturing and distribution of the design itself is the adequate and justified protection of the design right, and in itself, it does not amount to an abuse of a dominant market position.<sup>245</sup>

On the whole, this short section aims to demonstrate the extent to which the CJEU has continually sought to balance the protection and enforcement measures of IP on the one hand, and the free movement of goods within the internal market on the other. This is done in a manner consistent with the other elements of IP, illustrating a coherent application by the CJEU.

## **5. Intellectual Property and European Union International Obligations**

The development of both EU secondary legislation discussed in the previous sections and case law has also been heavily influenced by international IP law. The EU has, in fact, acceded to the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and the Madrid Protocol on the international registration of trademarks. Moreover, the EU is a party to the WTO. After having discussed in Chapter One the development of such international agreements and the role of the EU in this development, this section only addresses in a general fashion the effects that these agreements display in the EU legal order.

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<sup>242</sup> Judgment of the Court of 14 September 1982, *Keurkoop BV v Nancy Kean Gifts BV*, Case C-144/81, EU:C:1982:289, paragraph 26.

<sup>243</sup> Judgment of the Court of 14 September 1982, *Keurkoop BV v Nancy Kean Gifts BV*, Case C-144/81, EU:C:1982:289, paragraph 29.

<sup>244</sup> Judgment of the Court of 5 October 1988, *CICRA and Others v Renault*, C53/87, EU:C:1988:472.

<sup>245</sup> However, the CJEU later stated that certain behaviour, whether economically justifiable or not, such as the refusal to supply the protected design part to certain sellers or garages, or the termination of supply of that part while a significant number of the related car model are still on the market, would amount to abuse of a dominant market position.

### ***5.1. Effects and Relevance of International Obligations in European Union Law***

Before discussing the role of the relevant international treaties in the EU, it is essential to succinctly examine the status of international agreements and the effects they display in the EU legal order. First, it is important to reiterate that the EU can only conclude agreements that fall within the scope of its competences (as it will be further discussed in Chapter Four) and that are compatible with its constitutional principles. The CJEU can examine the compatibility of an international agreement before its conclusion under Article 218(11) TFEU. Secondly, international agreements concluded by the EU are binding on the institutions and Member States of the Union (Article 216(2) TFEU). The CJEU has also established that international agreements binding on the EU are an integral part of the EU legal order.<sup>246</sup> It follows that Member States are bound to ensure compliance with an international agreement concluded by the EU, irrespective of whether they are themselves a party to it. Since, in those cases, Member States are not bound by reason of being a party to the relevant agreement, they are bound by it because the agreement has become part of EU law.

With regard to the status of international agreements within the hierarchy of sources of law, the CJEU has argued that international treaties are formally situated below the provisions of the Treaties, and above secondary law.<sup>247</sup> The Court has also stated that this status is that of both purely EU agreements and mixed agreements (i.e. agreements concluded by the EU and its Member States).<sup>248</sup> The CJEU has hence established that international agreements enjoy a sub-constitutional status within the overall EU legal order. This means that provisions of EU secondary law must, as far as practicable, be interpreted in a manner that is consistent with international agreements (principle of consistent interpretation). The CJEU enjoys the power to interpret those agreements. However, the invalidity of an EU act conflicting with an international agreement may only be invoked if the relevant provision of the agreement has direct effect. As the Court said in *International Fruit*,<sup>249</sup> with regard

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<sup>246</sup> Judgment of the Court of 30 April 1974, *Haegeman v. Belgian State*, Case 181/73, EU:C:1974:41.

<sup>247</sup> Judgment of the Court of 10 September 1996, *Commission v Germany*, Case C-61/94, EU:C:1996:313.

<sup>248</sup> Judgment of the Court of 7 October 2004, *Commission v France*, Case C-239/03, EU:C:2004:598.

<sup>249</sup> Judgment of the Court of 12 December 1972, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, Joined Cases 21 to 24/ 72, EU:C:1972:115.

to the GATT:

‘[b]efore the incompatibility of a [EU] measure with a provision of international law can affect the validity of that measure, the Community must first of all be bound by that provision. Before invalidity can be relied upon before a national court, that provision of international law must also be capable of conferring rights on citizens of the Community which they can invoke before the courts’.<sup>250</sup>

Moreover, *International Fruit* defined the basis for the reception of international law within the EU legal order. In *Kupferberg*,<sup>251</sup> the CJEU provides a clear examination of the direct effect of an international treaty provision binding the EU. First, the Court examined whether the parties themselves to the (free trade) agreement intended to give the provision of that agreement direct effect:

‘In conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. Only if that question has not been settled by the agreement does it fall for decision by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the Treaty’.<sup>252</sup>

When the Court concluded that the parties to the international treaty did not have an express or implied intention as to the direct effect of the treaty, it continued by examining whether the invoked provision of the agreement was unconditional and sufficiently precise to have direct effect. The CJEU, therefore, analysed the provision’s words in the light of the context, object and purpose of the agreement. In so doing, in *Kupferberg*, the CJEU concluded that this provision had direct effect. Later, while the Court has found that some provisions of association agreements of free trade agreements have direct effect, the opposite conclusion has been reached for example in relation to the GATT 1947 or the CRPD.

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<sup>250</sup> Judgment of the Court of 12 December 1972, *International Fruit Company and Others v Produktschap voor Groenten en Fruit*, Joined Cases 21 to 24/ 72, EU:C:1972:115, paragraphs 7-8.

<sup>251</sup> Judgment of the Court of 26 October 1982, *Hauptzollamt Mainz v Kupferberg & Cie, Case C-104/81*, EU:C:1982:362.

<sup>252</sup> Judgment of the Court of 26 October 1982, *Hauptzollamt Mainz v Kupferberg & Cie, Case C-104/81*, EU:C:1982:362, paragraph 17.

The CJEU has the competence to interpret international agreements, including mixed agreements. An example can be found in *Schieving-Nijstad*.<sup>253</sup> In this case, the Dutch judge *a quo* referred a number of questions concerning the application and interpretation of Article 50 paragraph 6 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement) in the context of proceedings involving the grant of provisional measures to restrain the alleged infringement of a trade mark. The Court relied on a previous judgment (*Hermès*),<sup>254</sup> in which the CJEU ruled that it had jurisdiction to interpret Article 50 of the TRIPs Agreement not only in situations where the national courts were called upon to order provisional measures for the protection of rights arising under a Community trademark but also where the case concerned the rights arising under a trademark protected under national - and in that case Uniform Benelux - trademark law. In *Hermes*, the Court had clearly stated that:

‘where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of [EU] law, it is clearly in the [EU] interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply’.<sup>255</sup>

On the whole, international agreements display significant effects in EU law (even indirectly through the principle of consistent interpretation), and the Court is empowered to interpret them, to establish whether they are directly effective, to trace the boundaries of EU and national competence and define the EU’s obligations under any such agreements.

## ***5.2. Case Law on International Intellectual Property Provisions***

In the context of IP, the Court has, at various points in time, examined the effects of TRIPs provisions and other IP international norms upon the broader EU legal order. As mentioned above, since *Hermes*, the Court has affirmed its own

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<sup>253</sup> Judgment of the Court of 13 September 2001, *Schieving-Nijstad and Others*, Case C-89/99, EU:C:2001:438.

<sup>254</sup> Judgment of the Court of 16 June 1998, *Hermès International v FHT Marketing Choice*, Case C-53/96, EU:C:1998:292.

<sup>255</sup> Judgment of the Court of 16 June 1998, *Hermès International v FHT Marketing Choice*, Case C-53/96, EU:C:1998:292, paragraph 23.

competence to interpret provisions of the TRIPs. This not only entails establishing the scope and meaning of these provisions but also whether these can have a direct effect. In *Merck Genericos*,<sup>256</sup> the CJEU held that, since the TRIPs Agreement has been concluded by the EU and its Member States, it has jurisdiction to define the obligations which the EU has thereby assumed and, for that purpose, to interpret the provisions of the TRIPs Agreement. In that case, the CJEU affirmed that there is, therefore, an EU interest in considering the CJEU as having jurisdiction to interpret Article 33 of the TRIPs Agreement concerning the minimum duration of patent protection.

When it comes to the direct effect of TRIPs provisions, one of the most relevant decision is the *Parfums Dior* judgment.<sup>257</sup> The national case arose because of an action by Dior SA, proprietor of different trademarks for perfumery products, against Tuk BV. Dior alleged that Tuk had infringed its trademark, by selling perfumes bearing those marks when they had not been put on the market in the EU. The national court decided to stay the proceeding and raised the question to the CJEU of the direct effect of Article 50(6) of TRIPs. In particular, the national court asked whether Article 50(6) of the TRIPs Agreement was to be interpreted as having direct effect in the sense that the legal consequences set out therein take effect even in the absence of any corresponding provision of national law.

In this case, the CJEU held that ‘the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of [EU] law’.<sup>258</sup> However, the CJEU also held that:

‘[i]n a field in which the [EU] has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of [EU] law. Accordingly, [EU] law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down

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<sup>256</sup> Judgment of the Court of 11 September 2007, *Merck Genéricos Produtos Farmacêuticos*, Case C-431/05, EU:C:2007:496.

<sup>257</sup> Judgment of the Court of 14 December 2000, *Dior and Others*, Case C-300/98, EU:C:2000:688.

<sup>258</sup> Judgment of the Court of 14 December 2000, *Dior and Others*, Case C-300/98, EU:C:2000:688, paragraph 44.

by Article 50(6) of the TRIPs Agreement or that it should oblige the courts to apply that rule of their own motion'.<sup>259</sup>

The CJEU recalled *Hermès* and the requirement for the judicial authorities of the Member States, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights falling in a field to which TRIPs applies and in respect of which the EU has already legislated, to do so as far as possible in the light of the wording and purpose of Article 50 of TRIPs.

In *Merck Genericos*,<sup>260</sup> the Court once again held that the TRIPs agreement does not display direct effect. However, being the matter not regulated by EU law, the Court held that Article 33 of the TRIPs Agreement could be directly applied by a national court subject to the conditions provided for by national law.

In a similar fashion, in *P Develey v. OHIM*,<sup>261</sup> the CJEU held that the Paris Convention<sup>262</sup> could not be applied directly as the EU was not a member. While TRIPs implied obligations from the Paris Convention, it would not be directly applicable for the reasons stated in *Dior*.<sup>263</sup>

Bontinck has suggested that, from *Parfums Dior*, the CJEU has taken the view that the individual is sufficiently protected under EU law by the existing legislation and case law, but Member States remain free to grant a higher level of protection when the matter falls outside the scope of EU law.<sup>264</sup> It transpires, however, that this space is increasingly more restricted due to the ever-developing scope of EU law.

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<sup>259</sup> Judgment of the Court of 14 December 2000, *Dior and Others*, Case C-300/98, EU:C:2000:688, paragraph 48.

<sup>260</sup> Judgment of the Court of 11 September 2007, *Merck Genéricos Produtos Farmacêuticos*, Case C-431/05, EU:C:2007:496.

<sup>261</sup> Judgment of the Court of 25 October 2007, *P - Develey v OHIM*, Case C-238/06, EU:C:2007:635.

<sup>262</sup> The dispute related to an appeal filed against a judgment by the General Court confirming the decision of OHIM to reject the application for registration of the trademark on the shape of the bottle.

<sup>263</sup> Judgment of the Court of 25 October 2007, *P - Develey v OHIM*, Case C-238/06, EU:C:2007:635, paragraphs 39–44. See also Judgment of the Court of 6 July 2010, *Monsanto Technology*, Case C-428/08, EU:C:2010:402, paragraphs 70–77, concerning the compatibility of the Biotech Directive with Article 27 and 30 of TRIPs: while direct applicability of TRIPs is denied in accordance with the pre-cited decisions, it is also emphasised that when applying the relevant provisions, Member State must try, as far as may be possible, to 'supply an interpretation in keeping with TRIPs'.

<sup>264</sup> Gaëlle Bontinck, 'The TRIPs Agreement and the ECJ: A New Dawn? Some Comments About Joined Cases C-300/98 and C-392/98, *Parfums Dior and Assco Gerüste*' (Jean Monnet Programme 1 May 2001) <<https://jeanmonnetprogram.org/archive/papers/01/013901.html>>.

## **6. Concluding remarks**

As the chapter has attempted to show, the development of IP within the EU has been a long and often an uneven process, and one which is far from over. As will be seen in Chapter Four and further discussed in Part III, this development –at least partially - mirrors the development of the EU external competence on IP matters.

This chapter has examined the conflict between IP and the free movement of goods within the EU, with the view of highlighting the market dimension of IPRs and how this market dimension has been balanced with EU fundamental freedoms. The chapter has also shown that the CJEU has carefully crafted with its own case law a balance between the two competing interests.

The analysis conducted and the exploration of the manner in which IPRs have historically unfolded in EU law offer the foundation for the understanding of how IP clauses work in EU agreements. This analysis also provides a basis for how the market dimension of IP protection in the EU internal sphere is reflected in the external one, which will be discussed in Part III. Essentially, what the EU views as important in the internal sphere, i.e. an internal market without barriers and enhanced by free competition, is then reflected in the EU global agenda and in its external policies, of which IP is increasing an area of concern.

# -Chapter Three-

## The European Union, Human Rights and Intellectual Property

### 1. Introduction

As discussed in the introduction to this thesis, the overall aims of this research are to evaluate the role of TRIPS-Plus provisions in EU international agreements, assess the extent to which they protect IPRs, and discuss whether they clash (actually or potentially) with the human rights that the EU is concurrently embedding within its external action policy. This chapter builds upon the discussion of IP as human rights conducted in Chapter One. As also noted in Chapter One,<sup>1</sup> this thesis embraces the view that the right of authors and creators to protect their intangible works is a human right and firmly situates IP within this realm. This chapter discusses IP as a human right in the EU context (and in this way, contrasting the market dimension of IP discussed in Chapter Two). Moreover, this thesis acknowledges the conflict that may arise between IP and other human rights. In that connection, this chapter elucidates how the concept of human rights has developed within the EU Treaties. Due to the ever-broadening scope of human rights within the EU, this will not be an exhaustive examination.

After this introduction, this chapter firstly examines the gradual expansion of human rights protection in the EU,<sup>2</sup> as well as the rationales for and causes of such

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<sup>1</sup> See *supra* Chapter One, Section 4.3.

<sup>2</sup> There is a wide scholarship on the development of human rights protection the EU, upon which this chapter builds on. Among many others see: Maurice H. Mendelson, 'The European Court of Justice and Human Rights (1982) Yearbook of European Law 135; Rick Lawson, 'Confusion and Conflict? Diverging Interpretations of the European Convention of Human Rights in Strasbourg and Luxembourg' in Rick Lawson and Matthijs De Blois (ed), *The Dynamics of the Protection and Fundamental Rights in Europe: Essays in Honour of Henry G Schermers Vol III* (Dordrecht/ London, Nihhoff, 1994); Manfred A. Daus, 'The Protection of Fundamental Rights in the Community of Legal Order' (1985) 10 European Law Review 389; Henry G Schermers, 'The European Communities Bound by Fundamental Human Rights' (1990) 27 Common Market Law Review 249; Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 Common Market Law Review 669; JHH Weiler and Nicholas J.S Lockhart, "'Taking Rights Seriously' Seriously: The European Court and its

expansions across the Treaties. As already discussed in the Introduction to this thesis, this chapter always refers to ‘human rights’ as a deliberate choice and for consistency, but it acknowledges that the terminology used with regards to the EU internal sphere is that of ‘fundamental rights’. Following on from this discussion, the chapter succinctly discusses the Charter of Fundamental Rights (the Charter). In doing so, it analyses the development of the Charter and its place within the overall EU legal order. A further section examines the European Convention on Human Rights (ECHR) and its own position within the EU legal order compared to that of the Charter. Finally, this chapter will examine the position of IP as a human right within the EU legal order. This analysis builds on the discussion conducted in the preceding chapter and examines IP as a human right through the perspective of the European Court of Human Rights (ECtHR). A final section offers some brief comments on human rights within the EU, and in doing so, it reframes the development of these rights to provide the necessary context for the discussion of the EU’s external action in Chapter Four.

## **2. The Development of Human Rights Protection within the European Union Treaties**

The protection of human rights has emerged slowly but consistently in the EU Treaties, and human rights have even been incorporated into the general principles of EU law which have constitutional status. Reid notes that human rights and other non-economic interests were a reactionary development which:

‘arose as a consequence of the need to secure the (then) EC legal order. It was (and largely remains) premised upon the integration of existing legal obligations. In this respect it can be said to have emerged through the roots of the EU legal order, informing it, and shaping it’.<sup>3</sup>

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Fundamental Rights Jurisprudence – Part I’ (1995) 32 Common Market Law Review 51, and Part II (1995) 32 Common Market Law Review 579; Francis G. Jacobs, ‘Human Rights in the European Union’ in Nicholas Emiliou and David O’Keefe (eds), *Legal Aspects of Integration in the European Union* (Kluwer Law International, 1997); Bruno de Witte, ‘the Past and Future Role of the European Court of Justice in the Protection of Human Rights’ In Philip Alston (ed), *The EU and Human Rights* (Oxford, Oxford University Press, 1997); Dean Spielmann, ‘Human Rights Case Law in the Strasbourg and Luxembourg Courts; Conflicts, Inconsistencies and Complementarities’ in Philip Alston (ed), *The EU and Human Rights*, (Oxford, Oxford University Press, 1997).

<sup>3</sup> Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade:*

In a similar vein, Geiger goes further, arguing that ‘[i]n the last decade, the rule of human rights in European and international legal order has very significantly increased, leading to what has sometimes been called the ‘constitutionalization’ of the entire legal system’.<sup>4</sup>

This section highlights in a chronological fashion the most important steps in the evolution of human rights protection, discussing the changes brought about by the various reforms of the founding Treaties, as well as the impact such changes have had on the functioning of the institutions, and the jurisprudence of the CJEU.<sup>5</sup>

### ***2.1. The Beginning: The Treaty of Rome***

There was no explicit reference to human rights within the Treaty of Rome.<sup>6</sup> Hence, the former European Economic Community (EEC) did not have a clearly delineated ‘policy on human rights’.<sup>7</sup> However, human rights and the obligation to protect these same rights were gradually integrated into the EU legal order through the case law of the CJEU.<sup>8</sup> During this initial stage, the CJEU developed what could be considered an unwritten bill of rights within the EU legal order. Some scholars have argued that the Court did not engage in any explicit human rights protections at first and that it had ‘employ[ed] [human] rights instrumentally’ by ‘clearly subordinat[ing] human rights to the end of closer economic integration’.<sup>9</sup> The ‘constitutional traditions common to the Member States’ serves to jump start this

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*Lessons from the EU Experience* (Hart Publishing, 2015) 22.

<sup>4</sup> Christophe Geiger, Introduction, in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 1. Also see Christophe Geiger, ‘“Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in Europe’ (2006) 37(4) *International Review of Intellectual Property and Competition Law* 371.

<sup>5</sup> Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* (Hart Publishing, 2015) 21. Reid notes the case law as ‘key to understanding the evolution of the economic Community into the contemporary Union’.

<sup>6</sup> Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.

<sup>7</sup> Philip Aston and JHH Weiler, ‘An ‘Ever Closer Union’ in Need of a Human Rights Policy’ (1998) 9 *European Journal of International Law* 658, 661. Aston and Weiler note that the lack of ‘a comprehensive or coherent policy at either level and fundamental doubts persist as to whether the institutions of the Union possess adequate legal competence in relation to a wide range of human rights issues arising within the framework of Community policies’.

<sup>8</sup> Robert Schütze, *European Constitutional Law* (Cambridge 2<sup>nd</sup> Ed 2016) 432.

<sup>9</sup> Jason Coppel and Aidan O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 12 *Legal Studies* 227, 228 and 245. Nicholas J.S Lockhart, ‘“Taking Rights Seriously” Seriously: The European Court and its Fundamental Rights Jurisprudence – Part I’ (1995) 32 *Common Market Law Review* 51, and Part II (1995) 32 *Common Market Law Review* 579.

process.<sup>10</sup>

During the early days, the CJEU had explored the limits of the EU powers and the intersection between human rights and the fundamental freedoms. In its early cases, such as *Stork*,<sup>11</sup> the Court did not engage in the protection of human rights *per se*. Rather, the CJEU recognised the need for an effective method of enforcement for rights. In *Humblet*,<sup>12</sup> the Court emphasised the responsibility of the Member States in protecting and enforcing human rights. Some scholars note that ‘this position of the European Union towards national fundamental rights never changed. However, the CJEU’s view evolved with regard to the exercise of implied European [human] rights’.<sup>13</sup> In *Sgarlata*,<sup>14</sup> as in *Stork*, the CJEU invoked the supremacy of the then EC law, refusing the annulment sought and declaring the action inadmissible.

A substantial change in the jurisprudence of the CJEU came with *Stauder*,<sup>15</sup> where the Court held that human rights were general principles of EU law. This was confirmed in *Internationale Handesellschaft*,<sup>16</sup> where the CJEU confirmed that the ‘respect for [human] rights informs an integral part of the general principles of law protected by the Court of Justice’.<sup>17</sup> In this and other decisions, the CJEU expanded on which sources the former EC can draw upon in interpreting human rights.<sup>18</sup> These sources included constitutional traditions common to the Member States and international treaties of which the Member States are signatories. In *Nold*,<sup>19</sup> the Court clarified that ‘[human]rights form an integral part of the general principles of law, the observance of which it ensures’.<sup>20</sup> The CJEU drew human rights protection

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<sup>10</sup> Judgment of the Court 2 December 1970, *Internationale Handelsgesellschaft*, Case 11/70 EU:C:1970:114 paragraph 4.

<sup>11</sup> Judgment of the Court of 4 February 1959, *Friedrich Stork & Cie v High Authority of the European Coal and Steel Community*, Case 1/58, EU:C:1959:4 paragraph 26.

<sup>12</sup> Judgment of the Court of 16 December 1960, *Humblet v Belgian State*, Case C-6/60, EU:C:1960:48.

<sup>13</sup> Robert Schütze, *European Constitutional Law* (Cambridge 2<sup>nd</sup> Ed 2016) 433.

<sup>14</sup> Judgment of the Court of 1 April 1965, *Marcello Sgarlata and others v Commission of the EEC*, Case 40/65, EU:C:1965:36.

<sup>15</sup> Judgment of the Court of 12 November 1969, *Stauder v Stadt Ulm*, Case 29/69, EU:C:1969:57.

<sup>16</sup> Judgment of the Court 2 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70 EU:C:1970:114 paragraph 4.

<sup>17</sup> Judgment of the Court 2 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70 EU:C:1970:114 paragraph 4.

<sup>18</sup> Judgment of the Court of 23 October 1974, *Transocean Marine Paint Association v Commission of the European Communities*, Case 17/74, EU:C:1974:106 and Judgment of the Court of 4 December 1974, *Yvonne van Duyn v Home Office*, Case 41/74, EU:C:1974:133.

<sup>19</sup> Judgment of the Court of 14 May 1974, *Nold KG v Commission* Case 4/73 EU:C:1974:51.

<sup>20</sup> Judgment of the Court of 14 May 1974, *Nold KG v Commission* Case 4/73 EU:C:1974:51

from the constitutions of the Member States.<sup>21</sup> In early case law, the CJEU remained ambiguous regarding the status of international treaties.<sup>22</sup> but the 1980s saw the beginning of a shift away from this ambiguous position.<sup>23</sup> The CJEU clearly stated that the European Convention on Human Rights (ECHR) constitutes a particular source of inspiration. In *National Panasonic*,<sup>24</sup> the Court referred extensively to Article 8 ECHR with regard to the right to respect for private and family life.

The CJEU was also quite clear in establishing that human rights within EU law may be limited in accordance with the broader questions and issues relating to the public interest,<sup>25</sup> provided that such limitation is proportionate.<sup>26</sup>

## ***2.2. From the Single European Act (SEA) to the Treaty of Amsterdam Passing by Maastricht***

The next stage of development took place following the entry into force of the Single European Act (SEA). The Preamble to the SEA was the first to specifically acknowledge and cement the existence of human rights in the EC Treaties:

‘[d]etermined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom,

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paragraph 13.

<sup>21</sup> Judgment of the Court of 14 May 1974, *Nold KG v Commission* Case 4/73 EU:C:1974:51 paragraph 13.

<sup>22</sup> The CJEU would go as far as to referring to them as a ‘guideline’ in the early mid to late 1970’s. Judgment of the Court of 14 May 1974, *Nold KG v Commission*, Case 4/73, EU:C:1974:51, paragraph 13 and Judgment of the Court of 13 December 1979, *Hauer v Land Rheinland-Pfalz*, Case 44/79, EU:C:1979:290, paragraph 25.

<sup>23</sup> This development is consistent with wider developments such as all Member States having been signatories of the ECHR a few years prior.

<sup>24</sup> Judgment of the Court of 26 June 1980, *National Panasonic v Commission*, Case 136/79, EU:C:1980:169.

<sup>25</sup> Judgment of the Court of 14 May 1974, *Nold KG v Commission*, Case C-4/73 EU:C:1974:51 paragraph 14.

<sup>26</sup> *Inter alia* Judgment of the Court of 13 December 1979, *Hauer v Land Rheinland-Pfalz*, Case 44/79, EU:C:1979:290 paragraph 23. Robert Schütze, *European Constitutional Law* (Cambridge 2<sup>nd</sup> Ed 2016) 437. Schütze notes the importance of this question and how the ‘principle of proportionality is almost omnipresent in the jurisprudence of the Court’. See also Jonas Christoffersen, *Human Rights and Balancing: The Principle of Proportionality* in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 19. Christoffersen warns that ‘proportionality cannot be viewed as a simple formula that can be readily applied to solve complex political and legal questions’.

equality, and social justice’.

During this period, the CJEU further elaborated on the role played by human rights protection in the EU legal order and its limits, as well as on the role of the Court itself in this respect. In *Cinethèque*,<sup>27</sup> the Court underlined that it has an obligation to ensure observation of human rights in the field of EU law. However, it also clarified that the Court has no power to examine the compatibility of national law with the ECHR, as such an examination remains in the hands of the relevant national authorities.

However, in *ERT*,<sup>28</sup> the CJEU made another significant step. In what could be considered a further step in its ‘silent revolution’<sup>29</sup> in this area, the CJEU held that it would not only be bound to respect the principles stemming from the ECHR but also that it would be able to review national legislation which implements EU law to ensure compliance with the ECHR.

With the Maastricht Treaty of 1992, the Preamble of the TEU confirmed the Member States’ ‘attachment to the principles of liberty, democracy, and respect for human rights and fundamental freedoms and the rule of law’. Article 6 TEU also introduced another express reference to human rights:

‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’.

During this period, efforts were made by the CJEU to clarify the scope of human rights protection within EU Law.<sup>30</sup> In *Kremzow*,<sup>31</sup> it reiterated that:

‘[t]he [ECHR] has special significance in that respect. As the Court has also held, it follows that measures are not acceptable in the [EU] which are

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<sup>27</sup> Judgment of the Court of 11 July 1985, *Cinéthèque SA and others v Fédération Nationale des Cinémas Français*, Joined cases 60 and 61-84, EU:C:1985:329.

<sup>28</sup> Judgment of the Court of 18 June 1991, *ERT v. DEP*, Case C-260/89, EU:C:1991:254.

<sup>29</sup> Robert Schütze, *European Union Law*, (Cambridge University Press, 2015) 458.

<sup>30</sup> Judgment of the Court of 30 March 1993, *Konstantinidis v Stadt Altensteig and Landratsamt Calw*, Case C-168/91, EU:C:1993:115.

<sup>31</sup> Judgment of the Court of 29 May 1997, *Kremzow v Republik Österreich*, Case C-299/95, EU:C:1997:254.

incompatible with observance of the human rights thus recognized and guaranteed'.<sup>32</sup>

The Court also held that, where national legislation falls within the field of application of EU law, it must give the national court all necessary guidance with regards to interpretation to enable such a court is capable of assessing the compatibility of that legislation with the human rights protected by the ECHR, whose observance the Court ensures. However, the Court reaffirmed that it 'has no such jurisdiction with regard to national legislation lying outside the scope of [EU] law'.<sup>33</sup>

### ***2.3. From the Treaty of Amsterdam to the Treaty of Lisbon***

#### ***2.3.1. The Constitutional Developments***

The Treaty of Amsterdam brought significant developments in relation to the protection of human rights.<sup>34</sup> Explicit references to human rights were included in the Treaties, starting with a modification to the Preamble which included an explicit reference to the 'fundamental social rights as defined in the European Social Charter'. Article 6 TEU was also amended to read as follows:

'[t]he Union is founded on the principles of liberty, democracy, respect for

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<sup>32</sup> Judgment of the Court of 29 May 1997, *Kremzow v Republik Österreich*, Case C-299/95, EU:C:1997:254, paragraph 14.

<sup>33</sup> Judgment of the Court of 29 May 1997, *Kremzow v Republik Österreich*, Case C-299/95, EU:C:1997:254 paragraph 15. 'However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law'.

<sup>34</sup> Philip Aston and JHH Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy' (1998) 9 *European Journal of International Law* 658, 663. Aston and Weiler note that '[t]o date, in relation to its internal human rights situation, the institutions of the Community have succeeded in cobbling together a makeshift policy which has been barely adequate, but by no means sufficient. In the future, this approach will be unsustainable, increasingly ineffective and ultimately self-defeating. In relation to its external policies, the irony is that the Union has, by virtue of its emphasis upon human rights in its relations with other states and its ringing endorsements of the universality and indivisibility of human rights, highlighted the incongruity and indefensibility of combining an active external policy stance with what in some areas comes close to an abdication of internal responsibility. At the end of the day, the Union can only achieve the leadership role to which it aspires through the example it sets to its partners and other states. Leading by example should become the leitmotif of a new European Union human rights policy'. It is noteworthy, that it did not bring alterations or amendments regarding the accession of the ECHR. Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* (Hart Publishing, 2015) 31. Reid argues that it did however serve to enhance 'both the Court's role in respect of human rights, but also, significantly, clarifying the obligations upon the institutions to respect these standards and remaining what had been a lacuna'.

human rights and fundamental freedoms and the rule of law, principles which are common to the Member States’.

The importance attached to human rights can also be seen in the modification of Article 7 TEU, which afforded the Council the ability to determine if a matter was a ‘serious and persistent breach of [human] rights by a Member State’. If the Council found such a breach, it could suspend the voting rights of said Member State. This importance of human rights was further exemplified in the amended Article K.7, which conferred jurisdiction upon the CJEU in respect of actions of institutions where they were believed to have infringed Article 6 TEU. In doing so, the Treaty enhanced the Court’s role in protecting and promoting human rights, as well as clarifying the duty of institutions to respect and uphold these same rights.

This was further developed under the Treaty of Nice, by extending the powers of the EU to address a breach of human rights by the Member States. This development was again first seen in the Preamble of the Treaty of Nice, requiring the Member States to confirm ‘their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’ and the ‘fundamental social rights as defined in the European Social Charter’. Article 6 TEU read:

‘1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law’.

Article 7 expressly permitted the Council to act in instances where there is a ‘clear risk of serious breach by Member States of principles mentioned in Article 6(1)’. Critically, this is a lower threshold to meet than that of Article 7 of the Treaty of Amsterdam.<sup>35</sup> While in relation to the Common Foreign and Security Policy

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<sup>35</sup> While the threshold for action may be lower, the activation of this provision still requires significant political will for this to be carried out.

(CFSP),<sup>36</sup> Article 11(1) explicitly specifies that one of the core purposes of the CFSP is to ‘develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms’.

The development of human right provisions continued under the Treaty of Nice, with the modifications it brought into effect in respect of the development and cooperation policy within the EU. Article 177(2) EC required that ‘Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms’. Similarly, under the title of ‘Economic, financial, and technical cooperation with third countries’ Article 181(a)(1) included explicit human right considerations and stated that:

‘Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms’.

In 2000 the European Convention drafted the Charter of Fundamental Rights of the European Union (the Charter).<sup>37</sup> As mentioned in Chapter Two, the Charter was initially a declaration of rights which already existed and were protected by the EU. It did expand upon some substantive rights created, but not yet acted upon, in the Treaty of Amsterdam. The Proclamation of the Charter also raised a number of issues. These issues primarily centred on the effect and legal status of the Proclamation within the EU legal order.<sup>38</sup> At first, the Charter was non-binding in nature but displayed a significant effect since the beginning as a benchmark for human rights that the Member States and the Union institutions had mutually agreed upon as being fundamental in nature. In particular, the CJEU built upon the Charter, considering it an influential source for this reason.<sup>39</sup>

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<sup>36</sup> While an examination of the CFSP is outside the scope of this thesis, its inclusion is warranted in this section as a contextual inclusion of the development of human right provisions within the Treaties.

<sup>37</sup> On 7 December 2000 at the Nice IGC, the European Parliament, the Council, and the European Commission proclaimed the Charter of Fundamental Rights of the European Union (2000 OJ C 364/8). For an analysis of this drafting process, see Gráinne de Búrca, ‘The Drafting of the European Union Charter of Fundamental Rights’ (2001) 26 *European Law Review* 126.

<sup>38</sup> Bruno deWitte, ‘The Legal Status of the Charter: Vital Question or Non-Issue?’ (2001) 8(1) *Maastricht Journal of European and Comparative Law* 81; Peik Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *Common Mark Law Review* 945.

<sup>39</sup> While the Charter did not ‘produce binding legal effects comparable to [EU] law, it does, as a material legal source, shed light on the fundamental rights which are protected by the

### 2.3.2. *The Role of the CJEU*

Throughout the modification of the Treaties, the role of the CJEU continued to be of seminal importance. The Court ruled directly on the relationship between human rights and economic freedoms in *Schmidberger*,<sup>40</sup> where it held that human rights could be restricted so long as the restriction does not, ‘taking account of the aim of the restriction, constitute disproportionate interface, impairing the very substance of the rights guaranteed’.<sup>41</sup> This ruling also appears to be consistent with the Court’s earlier jurisprudence, for example, that the requirement to allow or approve the restriction on the free movement of goods must be proportionate. It is worth noting the difference within the application of how the CJEU upholds the free movement of goods compared to the free movement of people.<sup>42</sup> Later in *Omega Spielhallem*,<sup>43</sup> the Court returned to flesh out further the proportionality test highlighted in

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Community legal order’. Opinion of Advocate General Kokott of 8 September 2005, Parliament v Council, Case C-540/03, EU:C:2005:517, paragraph 108. A similar rationale was seen in Opinion of Advocate General Alber of 1 February 2001, *TNT Trace*, Case C-340/99, EU:C:2001:74; Opinion of Advocate General Tizzano of 8 February 2001, *BECTU*, Case C-173/99, EU:C:2001:81; Opinion of Advocate General Jacobs of 22 March 2001, *P- Z v Parliament*, Case C-270/99, EU:C:2001:180; Opinion of Advocate General Stix-Hackl of 31 May 2001, *Commission v Italy*, Case C-49/00, EU:C:2001:310; Opinion of Advocate General Jacobs of 14 June 2001, *Netherlands v Parliament and Council*, Case C-377/98, EU:C:2001:329; Opinion of Advocate General Geelhoed of 5 July 2001, *Baumbas and R*, Case C-413/99, EU:C:2001:385; Opinion of Advocate General Léger of 10 July 2001, *Wouters and Others*, Case C-309/99, EU:C:2001:390. Further, Groussot and Pech noted that the fact ‘that the text of the Charter is available as a stand-alone document in the EU’s Official Journal (OJEU C 83/391, 30 March 2010), rather than reproduced in the substantive text of Treaties, whose consolidated version was published in the same issue of the Official Journal (OJEU C 83/01, 30 March 2010), is irrelevant in that respect’. Xavier Groussot and Laurent Pech, ‘Fundamental Rights Protection in the EU Post-Lisbon Treaty’ (Fondation Robert Schuman: The Research and Studies Centre on Europe, 2010) <<https://www.robert-schuman.eu/en/european-issues/0173-fundamental-rights-protection-in-the-eu-post-lisbon-treaty>>.

<sup>40</sup> Judgment of the Court of 12 June 2003, *Schmidberger*, Case C-112/00, EU:C:2003:333.

<sup>41</sup> Judgment of the Court of 12 June 2003, *Schmidberger*, Case C-112/00, EU:C:2003:333, paragraph 80.

<sup>42</sup> The CJEU has historically given more weight to instances of discrimination in relation to the free movement of goods, as seen in the interpretation of MEQRs as ‘[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions’ Judgment of the Court of 11 July 1974, *Dassonville*, Case 8/74, EU:C:1974:82 paragraph 5. This focus on market access is described as problematic when compared to the goals of non-economic goals. Emily Reid ‘Balancing Human Rights, Environmental Protection and International Trade Lessons from the EU Experience’ (Hart Publishing, 2015) 77. Further, the CJEU held that ‘the increasing tendency of traders to invoke Article [34] as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States’. Judgment of the Court of 24 November 1993, *Keck and Mithouard*, Joined cases C-267/91 and C-268/91, EU:C:1993:905, paragraph 14.

<sup>43</sup> Judgment of the Court of 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, EU:C:2004:614.

*Schmidberger* and discussed ‘how the requirement of the protection of human rights in the Community can be reconciled with those arising from a fundamental freedom enshrined in the Treaty’.<sup>44</sup>

The seminal role played by the CJEU in striking an appropriate balance between the fundamental freedoms and human rights in respect of IP measures can be clearly seen across a number of key cases. In *Biopatents*,<sup>45</sup> the CJEU held that the Biotech Directive did not infringe upon any human rights protected within EU law.<sup>46</sup> The CJEU, echoing the Opinion of Advocate General Jacobs,<sup>47</sup> upheld the importance of bodily integrity within the context of human rights, while also underlining that the provision did not require the informed consent of the donor of human biological matter to be part of inventions developed from or using the biological matter.<sup>48</sup> It further held that Article 5(1) of the Directive sufficiently mitigated the risk to bodily integrity, and as such, the reliance by the Netherlands upon human rights in their claim was misplaced.<sup>49</sup> In *Metronome Music*,<sup>50</sup> the CJEU looked at the conformity of the Directive on Rental and lending rights, and its operation between the freedom to pursue trade and the right to property. In this case, the Court focused on the risk to the author’s ability to make an income and the exclusive right granted for music production:

‘certainly constitutes the most effective form of protection, having regard in particular to the development of new technologies and the increasing threat of piracy, which is favoured by the extreme ease with which recordings can be copied’.<sup>51</sup>

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<sup>44</sup> Judgment of the Court of 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Case C-36/02, EU:C:2004:614, paragraph 72.

<sup>45</sup> Judgment of the Court of 9 October 2001, *Netherlands v. Parliament and Council*, Case C-377/98, EU:C:2001:523.

<sup>46</sup> Directive 98/44/EC Of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, OJ No. L 213 of July 1998, 13.

<sup>47</sup> Opinion of Advocate General Jacobs of 14 June 2001, *Netherlands v Parliament and Council*, Case C-377/98, EU:C:2001:329 paragraph 215.

<sup>48</sup> Judgment of the Court of 9 October 2001, *Netherlands v. Parliament and Council*, Case C-377/98, EU:C:2001:523, paragraphs 69-81.

<sup>49</sup> Judgment of the Court of 9 October 2001, *Netherlands v. Parliament and Council*, Case C-377/98, EU:C:2001:523, paragraph 79.

<sup>50</sup> Judgment of the Court of 28 April 1998, *Metronome Musik v Music Point Hokamp*, Case C-200/96, EU:C:1998:172.

<sup>51</sup> Judgment of the Court of 28 April 1998, *Metronome Musik v Music Point Hokamp*, Case C-200/96, EU:C:1998:172, paragraph 24.

The further justified the inclusion of producers of the home records under the broad category of creation and that within such inclusion sought to mitigate the economic liability.<sup>52</sup> The CJEU found the introduction of such exclusive rights to be proportionate and reasonable to the matter at hand. This line of development continued in *Deckmyn*,<sup>53</sup> concerning parody under Article 5(3)(k) of the InfoSoc Directive,<sup>54</sup> the CJEU agreed with Advocate General Cruz Villalón<sup>55</sup> that parody ‘evokes an existing or existing work while being notably different from it, and secondly, constitutes an expression of humour or mockery’.<sup>56</sup> However, it remained with the Member States to determine whether this was a proportionate or fair use in each instance of parody.<sup>57</sup>

In the first *Kadi* case,<sup>58</sup> the CJEU had the opportunity to not only discuss the role of human rights within the EU legal order but also how the protection of those right might affect EU international obligations. The facts of the case concern the UN Security Council’s sanctions imposed upon Kadi, who was identified as a possible supporter of Al-Qaida. The EU transposed the UN sanction through the use of a regulation, which Kadi then challenged in front of the General Court. That Court refused to review the EU regulation on the basis that this would amount to a review of the measure adopted by the Security Council.<sup>59</sup> However, upon appeal, the CJEU reviewed the lawfulness of the EU regulation transposing the UN resolution. Its core argument was that the protection of human rights forms part of the very foundations of the Union legal order. For this reason, all Union measures (even

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<sup>52</sup> Judgment of the Court of 28 April 1998, *Metronome Musik v Music Point Hokamp*, Case C-200/96, EU:C:1998:172, paragraph 24 ‘the remuneration of those who invest in the creation of those profits would cease to be properly guaranteed, with inevitable repercussions for the creation of new works’.

<sup>53</sup> Judgment of the Court 3 September 2014, *Deckmyn and Vrijheidsfonds*, Case C-201/13, EU:C:2014:2132.

<sup>54</sup> Article 5(3)(k) permits that ‘Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases; use for the purpose of caricature, parody or pastiche’.

<sup>55</sup> Opinion of Advocate General Cruz Villalón of 22 May 2014, *Deckmyn and Vrijheidsfonds*, Case C-201/13, EU:C:2014:458.

<sup>56</sup> Judgment of the Court 3 September 2014, *Deckmyn and Vrijheidsfonds*, Case C-201/13, EU:C:2014:2132, paragraph 33.

<sup>57</sup> Judgment of the Court 3 September 2014, *Deckmyn and Vrijheidsfonds*, Case C-201/13, EU:C:2014:2132, paragraph 35.

<sup>58</sup> Judgment of the Court of 3 September 2008, *Kadi*, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461.

<sup>59</sup> In its decision, the General Court also examined whether the Security Council had respected *ius cogens*, in particular certain fundamental rights. But the General Court did not find an infringement of this standard.

those transposing UN measures) must be compatible with those rights. Ultimately, the Court held that the claimant had not been informed of the grounds for his inclusion in the list of individuals subject to the sanctions. Thus, he had not been able to seek judicial review and consequently, his right to be heard as well as his right to effective an effective judicial remedy and the right to property had been infringed.

#### **2.4. The Treaty of Lisbon**

Building on the (failed) ‘Constitutional Treaty’,<sup>60</sup> the Treaty of Lisbon, enacted in 2009,<sup>61</sup> brought a ‘quantitative and qualitative jump’ to the position of human rights within the Treaties.<sup>62</sup> The Treaty of Lisbon retained and built upon the explicit references to human rights found within those Treaties which preceded it while retaining some of the innovations contained within the ‘Constitutional Treaty’. The Preamble of the TEU required the Member States to confirm ‘their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’ as well as ‘their attachment to fundamental social rights as defined in the European Social Charter’. This aspirational goal is then reflected in the foundational values of the Union under Article 2 TEU, which reads

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<sup>60</sup> The failure of the Constitutional Treaty is a result of a myriad of political, economic, and legal issues outside the scope of this thesis. For a comprehensive analysis of these factors see Finn Laursen (ed), *The Rise and Fall of the EU's Constitutional Treaty* (Leiden Niihoff, 2008); NW Barber, Maria Cahill, and Richard Ekins (eds), *The Rise and Fall of the European Constitution* (Hart 2019).

<sup>61</sup> Further to the negative outcome of two referenda on the Constitutional Treaty in May and June 2005, the European Council decided to have a two-year ‘period of reflection’. On the basis of the Berlin declaration of March 2007, the European Council of 21 to 23 June 2007 adopted a detailed mandate for a subsequent Intergovernmental Conference (IGC), under the Portuguese presidency. The IGC concluded its work in October 2007. The Treaty of Lisbon was signed at the European Council of Lisbon on 13 December 2007 and has been ratified by all Member States. For the development of the Treaty of Lisbon from the rejection of the, see generally Jacques Ziller, ‘The Treaty of Lisbon: Constitutional Treaty, Episode II’ in Finn Laursen (ed), *Design the European Union: From Paris to Lisbon* (Palgrave, 2012); Nicole Scicluna, ‘When Failure Isn’t Failure: European Union Constitutionalism After the Lisbon Treaty’ (2012) 50(3) *Journal of Common Market Studies* 441; Thomas Christiansen, ‘The EU Reform Process: From the European Constitution to the Lisbon Treaty’ in Maurizio Carbone (ed), *National Politics and European Integration: From the Constitution to the Lisbon Treaty* (Edward Elgar 2010); Phil Sypris, ‘The Treaty of Lisbon: Much Ado...But About What?’ (2008) 37(3) *Industrial Law Journal* 219.

<sup>62</sup> Xavier Groussot and Laurent Pech, ‘Fundamental Rights Protection in the EU Post-Lisbon Treaty’ (Foundation Robert Schuman: The Research and Studies Centre on Europe, 2010) <<https://www.robert-schuman.eu/en/european-issues/0173-fundamental-rights-protection-in-the-eu-post-lisbon-treaty>>.

as follows:

‘[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

Article 2 TEU mirrors the language of the previous Treaties. It is, however, complemented by a broader provision on the objectives of the Union. Article 3(1) TEU states that the Union's aim is to promote peace, its *values* and the well-being of its peoples’ (emphasis added). Moreover, Article 3(3) TEU mentions among the objectives those of:

- combating ‘social exclusion and discrimination’.
- promoting ‘social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child’.

This provision also stipulates that the EU ‘shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced’. Article 3(3) TEU then implicitly places value upon cultural rights within EU constitutional law.

Article 3(5) TEU is of particular importance in this regard. Article 3(5) TEU requires the EU to promote human rights and the values of the Union in the wider world,<sup>63</sup> although always within the boundaries proscribed by the principle of conferral. The latter provision tallies with Article 21 TEU, which further states that the EU’s international action must be ‘guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world’. In this regard, Article 3(5) TEU explicitly mentions as core EU values:

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<sup>63</sup> Article 3(5) TEU states that ‘[i]n its relations with the wider world, the Union shall uphold and promote its values and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter’.

‘democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law’.

The Treaty of Lisbon brought significant change in Article 6 TEU. Firstly, Article 6(1) TEU states that:

‘[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties’.

In recognising the Charter as having the same legal status as the Treaties in the European legal order, the Treaty of Lisbon put an end to the debate regarding the status and effects of the Charter within the EU legal order. However, the Member States’ reluctance to hand over power was also expressly taken into account, insofar as Article 6(1) TEU makes clear that ‘provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties’. Secondly, Article 6(2) TEU required that the ‘Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms’. The Union’s accession to the Convention has not yet occurred and, as it will be discussed further later in this chapter, following *Opinion 2/13*,<sup>64</sup> it is somewhat uncertain if there is a means of acceding to the ECHR that is equally amenable to the Council of Europe, the Union institutions and the CJEU itself. As with the previous provision, Article 6(2) TEU does not create any new competence for the EU. Thirdly, Article 6(3) TEU requires that;

‘[human] rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’.

The Treaty of Lisbon firmly embedded human right considerations within the overall objectives of the EU. Alongside these general provisions, under Title V on

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<sup>64</sup> Opinion of the Court of 19 December 2014, Opinion pursuant to Article 218(11) TFEU, *Opinion 2/13*, EU:C:2014:2454.

Freedom, Security and Justice, Article 67 TFEU requires the EU to uphold and apply this area of law with ‘respect for fundamental rights and the different legal systems and traditions of the Member States’. Similarly, under Title X on Social Policy, Article 151 TFEU re-affirms the recognition of the ‘fundamental social rights such as those set out in the European Social Charter’.

The Treaty of Lisbon underlines the successes achieved within the development of human rights by the EU institutions over the years. Unfortunately, as it will be discussed later, gaps remain within the human rights framework that currently exists at the Union level and requires a further step in order to ensure that these rights are effective. Following the entry into force of the Treaty of Lisbon, the binding status of the Charter as well the embedding of human rights provisions throughout the two Treaties:

‘arguably confirms a shift of the fundamental rights from being a secondary consideration, subordinate to the primary economic focus of the EU, to being an equal consideration and objective of the EU legal order’.<sup>65</sup>

It can, therefore, be said that;

‘[t]he express provisions of the Charter are not seen as confining the Court of Justice. Instead, the Luxembourg Court maintains its ‘dynamic’ approach, with the express rights the Charter being seen as the starting point of any consideration of EU law, rather than app point of discussions as to the nature, extent and effect of the law’.<sup>66</sup>

### **3. The Charter of Fundamental Rights: An Overview**

#### ***3.1. The Development of the Charter of Fundamental Rights***

Reid notes that with ‘the emergence of EU human rights, a shift in the *tempo* and nature of commitment to human rights can be observed post-2000’, and that the Charter carries a ‘substantial symbolic significance’.<sup>67</sup> The position and purpose of

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<sup>65</sup> Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* (Hart Publishing, 2015) 84.

<sup>66</sup> Aiden O’Neill, ‘How the CJEU uses the Charter of Fundamental Rights (Eutopia Law, 2012) <[eutopialaw.com/2012/04/03/how-the-cjeu-uses-the-charter-of-fundamental-rights/](http://eutopialaw.com/2012/04/03/how-the-cjeu-uses-the-charter-of-fundamental-rights/)>.

<sup>67</sup> Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* (Hart Publishing, 2015) 33, Catherine Barnard ‘The EU

the Charter can only be understood in light of the development of human rights protection within the EU discussed above.<sup>68</sup>

As previously discussed, the first explicit reference to human rights within the Treaties was within in the Preamble of the SEA. This development continued and was further expanded upon with each Treaty revision. Following the Treaty of Amsterdam, conditions within the EU shifted favourably towards the creation of a 'specific charter of fundamental rights of the Union to be drawn up'.<sup>69</sup> Furthermore, 'the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident'.<sup>70</sup>

The Charter itself, following a lengthy and heavily contested drafting progress,<sup>71</sup> was approved following recommendations made by the European Parliament. Much to the express dissatisfaction of the European Parliament, the Charter did not possess full constitutional status and display direct legal effect upon its proclamation. Its mere existence, the rights and obligations that it sought to establish, and its potential effects ensured that it remained highly contentious nonetheless.<sup>72</sup> The European Parliament maintained constant vigilance on the topic and made repeated attempts to secure a legally binding status for the Charter, and the first step began mere months after the proclamation of the Charter. Under the

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Charter of fundamental rights: happy 10<sup>th</sup> Birthday' (2011) European Union Studies Association Review 5, noting the importance of correct implementation, that even a narrow implementation would be mitigated by the general principles, which includes human rights, and would be still binding on the Member States.

<sup>68</sup> For a history of the drafting of the Charter and the influence of the politics of the Member States, the institutions of the EU, and the EU as a whole, see Gráinne de Búrca and Jo Beatrix Aschenbrenner, 'The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights' (2003) 9 Columbia Journal of European Law 355, 356-360; Richard Bellamy and Justus Schönlaue, 'The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights' (2004) 11(3) Constellations 412.

<sup>69</sup> Point 12 of the Resolution on the Amsterdam Treaty, (CONF 4007/97 - C4-0538/97) A4-0347/97.

<sup>70</sup> Cologne European Council Conclusions of 3-4 June 1999 and particularly the Annex IV on the Drawing up of a Charter of Fundamental Rights of the European Union. Paragraph 44. <[http://www.europarl.europa.eu/summits/koll\\_en.htm](http://www.europarl.europa.eu/summits/koll_en.htm)>.

<sup>71</sup> Richard Bellamy and Justus Schönlaue, 'The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights' (2004) 11(3) Constellations: An International Journal of Critical and Democratic Theory 412; Gráinne de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26(2) European Law Review 126.

<sup>72</sup> Jonas Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38(5) Common Market Law Review 1171, Gráinne de Búrca, 'The Drafting on the EU Charter of Fundamental Rights' (2001) 26 European Law Review 126; Richard Bellamy and Justus Schönlaue, 'The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights' (2004) 3(11) Constellations: An International Journal of Critical and Democratic Theory 412.

Treaty of Nice, following broader institutional reformation for planned enlargement of the EU,<sup>73</sup> there then existed, under Declaration 23, the ability to review and revisit ‘the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice’. This was followed later in the year by the Laeken Declaration on the future of the EU, which referred to the status of the Charter, and affirmed that:

‘[t]hought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Right’.<sup>74</sup>

Within the failed Constitutional Treaty, the Charter was firmly embedded within the final draft, much like a bill of rights or section on fundamental rights within a national constitutional text. Following the rejection of the Treaty by French and Dutch voters in May and June 2005, this unequivocal constitutional framing of the Charter failed to come to pass. It did, however, cement the idea of a binding Charter, and ultimately led to the indirect incorporation of the Charter within EU constitutional law through Article 6(1) TEU, and following the ratification and entry to force of the Treaty of Lisbon, granted the Charter full legal effect. The limitations contained within Article 51(1) TFEU regarding the Charter’s scope of application, sought to mitigate the fear held by Member States it may become too broad in terms of its effect, where they previously held the ‘passive obligation not to infringe such rights in its activities rather than an obligation to promote them’.<sup>75</sup>

### ***3.2. The Charter of Fundamental Rights***

The Charter, in re-affirming the protection of human rights, can be seen as a ‘gifted crystallisation of existing fundamental rights contained in the sources’.<sup>76</sup> The

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<sup>73</sup> In anticipation of the eastern expansion of the EU, and in part stemming from a rise in right-wing political activity within the EU, many stressed the importance of ensuring the position and importance human rights and the respect for the rule of law should hold, Michael Merlingen, Cas Mudde, and Ulrich Sedelmeier, ‘The Right and the Righteous? European Norms, Domestic Politics and the Sanctions against Austria’ (2001) 39 *Journal of Common Market Studies* 56, 63-64.

<sup>74</sup> Laeken Declaration of 15 December 2001 on the Future of the European Union, 5

<sup>75</sup> Emily Reid, *Balancing Human Rights, Environmental Protection and International Trade: Lessons from the EU Experience* (Hart Publishing, 2015) 35.

<sup>76</sup> Xavier Groussot and Laurent Pech, ‘Fundamental Rights Protection in the EU Post-Lisbon

Charter covers all the rights found in the case law of the CJEU, the rights and freedoms enshrined in the ECHR, as well as other rights and principles resulting from the common constitutional traditions of EU countries and other international instruments. Almost half of the rights guaranteed by the Charter have equivalents within the ECHR. Where such rights are concerned, according to Article 52(3) of the Charter, the rights in the Charter should be given the same meaning and content as they have in the Convention. Nonetheless, the Charter displays an innovative value. For example, any comparable rights found in the Convention must merely serve as a benchmark and minimum standard for protection. As noted by Rosas, several provisions of the Charter find no precedent in the CJEU case law, while others significantly expand ECHR rights.<sup>77</sup>

The Charter includes civil, political, social and economic rights, which are listed under different headings:

- Dignity
- Freedoms
- Equality
- Solidarity
- Citizens' Rights
- Justice.

As mentioned in Chapter Two, Article 17 of the Charter is the sole provisions to discuss IP,<sup>78</sup> under the broad heading of property. The CJEU has, however, consistently held that the right to an effective remedy guaranteed in Article 47 of the Charter 'ensures the effective exercise of the fundamental right to property, which includes the intellectual property right protected in Article 17(2) of the Charter'. The Charter also protects *inter alia* freedom of expression and freedom of the arts. On foot of Article 10 ECHR, Article 11(1) of the Charter states that:

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Treaty' (Fondation Robert Schuman: The Research and Studies Centre on Europe, 2010) <<https://www.robert-schuman.eu/en/european-issues/0173-fundamental-rights-protection-in-the-eu-post-lisbon-treaty>>.

<sup>77</sup> Allan Rosas, 'When Is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19 *Jurisprudence* 1269, 1272.

<sup>78</sup> See *supra* Chapter Two, Section 2.2.

‘[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers’.

Moreover, Article 22 of the Charter requires the EU to respect cultural, religious and linguistic diversity. The preamble to the Charter also speaks of ‘respecting the diversity of the cultures and traditions of the peoples of Europe’. Further, Article 25 of the Charter articulates an explicit right to participate in cultural life for the elderly. These provisions are at the same time complementary and intersecting IP, but IP also needs to be balanced with these concerns.

The Charter sets out two different kinds of provisions: rights and principles. The difference between rights and principles lays in the fact that principles are not considered to be enforceable. This was clarified, for example in relation to Article 26 of the Charter.<sup>79</sup> In determining whether a provision is a right or a principle, it is necessary to refer to the Explanations Relating to the Charter of Fundamental Rights and to the case law of the CJEU. It is clear, for this analysis, that Article 17 establishes a clear right as the language utilised is unequivocal in this respect. The CJEU has also repeatedly stated that Article 17 of the Charter ‘is a rule of law intended to confer rights on individuals’.<sup>80</sup> This right is therefore fully enforceable within the scope of application of the Charter. Regarding the latter, a thorough discussion of it falls outside the scope of this analysis. It suffices to point out that that, as noted by Fontanelli, ‘the Charter is just the human rights shadow of Union law, not a self-standing repository of new powers for the Union’.<sup>81</sup> Article 51 of the Charter specifies that:

‘1. The provisions of this Charter are addressed to the institutions and bodies

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<sup>79</sup> Judgment of the Court of 22 May 2014, *Glatzel*, C-356/12, EU:C:2014:350 paragraph 78. The CJEU held that ‘although Article 26 of the Charter requires the European Union to respect and recognise the right of persons with disabilities to benefit from integration measures, the principle enshrined by that article does not require the EU legislature to adopt any specific measure. In order for that article to be fully effective, it must be given more specific expression in European Union or national law. Accordingly, that article cannot by itself confer on individuals a subjective right which they may invoke as such (see, to that effect, as regards Article 27 of the Charter, Case C176/12 *Association de médiation sociale* EU:C:2014:2, paras 45 and 47)’.

<sup>80</sup> Judgment of the Court of 20 September 2016, *Ledra Advertising and Others v Commission and ECB*, C-8/15 P to C-10/15 P, EU:C:2016:701, paragraph 66.

<sup>81</sup> Filippo Fontanelli, ‘The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights’ (2014) 20(2) *Columbia Journal of European Law* 194, 200.

of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’.

It is worth noting that Article 51(1) of the Charter builds on well-established CJEU case law. This is evident from the explanations attached to the Charter, whose authority is expressly mentioned by Article 6(1) TEU. When one considers the extent to which IP is governed by EU law, Torremans argues that ‘it is clear that the impact of Article 51 of the Charter as a restriction on the scope of Article 17(2) is minor, or should one say (almost) minute’.<sup>82</sup>

Finally, Article 52 of the Charter sets out the conditions for the allowance of limitation against the rights recognised by the Charter. While recognising the existence of limitations, they are subject to the principle of proportionality, and as such, will only be upheld if they are deemed ‘necessary’ and ‘genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’.<sup>83</sup> Moreover, the Court has consistently held that:

‘any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of those rights and freedoms and that it is apparent from the case-law of the Court that a measure which results in serious infringement of a right protected by the Charter is to be regarded as not respecting the requirement that such a fair balance be struck between the fundamental rights which must be reconciled’.<sup>84</sup>

Additionally, while protecting the rights found within the Charter, the EU (and its Member States) are permitted to introduce provisions which would grant rightsholders additional or more extensive protection.<sup>85</sup> However, this is at the

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<sup>82</sup> Paul Torremans, ‘Article 17(2)’ in Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014) 491.

<sup>83</sup> Article 52(1) of the Charter

<sup>84</sup> Judgment of the Court of 18 October 2018, *Bastei Lübbe*, Case C-149/17, EU:C:2018:841 paragraph 46. See also Judgment of the Court of 16 July 2015, *Coty Germany*, C580/13, EU:C:2015:485, paragraph 35.

<sup>85</sup> Article 52(3) of the Charter.

discretion of the legislators.<sup>86</sup>

#### **4. The European Convention of Human Rights and the European Union Legal Order: An Overview**

As mentioned above in Section 2, the ECHR has held a special significance within the EU legal order, and the CJEU has drawn inspiration from it to elaborate on the standard of EU level human rights protection. However, while the EU marched towards the creation of a written bill of rights under the Charter, and while the CJEU developed a wide range of case law,<sup>87</sup> it did not go in the direction of ensuring that those rights are upheld by an external Court, and namely the European Court on Human Rights.<sup>88</sup> The accession of the ECHR, which is still ongoing, has, since the beginning, been a troubled process.<sup>89</sup> In *Opinion 2/13*,<sup>90</sup> the CJEU set out four main reasons why the draft agreement for accession to the ECHR was incompatible with EU law. Firstly, it had failed to account for the specific characteristics of the EU legal order on a number of fronts.<sup>91</sup> Secondly, in violation of Article 344 TFEU, the draft agreement did not preclude the use of the ECtHR to settle matters of law within the jurisdiction of the CJEU.<sup>92</sup> Third, the draft agreement created a system where both a Member State and the EU could end up before the ECtHR.<sup>93</sup> Finally, the

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<sup>86</sup> Alexander Peukert, 'The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 142 ff.; Paul Torremans, 'Art 17(2) – Right to Property' in Jeff Kenner, Angela Ward, Steve Peers and Tamara K. Hervey (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford University Press 2014) 503.

<sup>87</sup> Robert Schütze, *European Constitutional Law* (Cambridge 2<sup>nd</sup> Ed 2016) 450.

<sup>88</sup> Ide Jesus Butler and O. De Shutter, 'Binding the EU to International Human Rights Law' (2008) 27 *Yearbook of European Law* 277, 278. With criticism levelled at the CJEU for its manner of preferring internal human rights over a more balanced international standard. Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard International Law Journal* 1, 23 'The [*Kadi*] judgment is striking for its treatment of the UN Charter, as least insofar as its relationship to EC law was concerned, as no more than any other international treaty'.

<sup>89</sup> Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes A Nightmare' (2015) 16(1) *German Law Journal* 213; Tobias Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights After Opinion 2/13: Is It Still Possible and Is It Still Desirable?' (2015) 11(2) *European Constitutional Law Review* 239.

<sup>90</sup> Opinion of the Court of 12 December 2014, *Opinion pursuant to Article 218(11) TFEU*, C-2/13, EU:C:2014:2454.

<sup>91</sup> Opinion of the Court of 12 December 2014, *Opinion pursuant to Article 218(11) TFEU*, C-2/13, EU:C:2014:2454., paragraphs 179-200.

<sup>92</sup> Opinion of the Court of 12 December 2014, *Opinion pursuant to Article 218(11) TFEU*, C-2/13, EU:C:2014:2454., paragraphs 201-214.

<sup>93</sup> Opinion of the Court of 12 December 2014, *Opinion pursuant to Article 218(11) TFEU*, C-2/13, EU:C:2014:2454., paragraphs 215-235.

draft agreement did not preclude the ECtHR ruling on matters the CJEU had previously addressed.<sup>94</sup>

Therefore, the ECHR does not yet form part of the EU legal framework but remains a source of inspiration for human rights protection in the EU in general.<sup>95</sup> This is made explicit by Article 52(3) of the Charter, which establishes that:

‘[i]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [the ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection’.

The CJEU further held in *J.McB. v. L.E.*<sup>96</sup> that the meaning of Charter rights should be established not only based on provisions of the ECHR but also on the jurisprudence of the ECtHR.

## **5. Intellectual Property and Human Rights in the European Union Legal Order: The European Court of Human Rights as a Point of Reference**

As previously discussed,<sup>97</sup> the question of whether IP is a human right is significant. This thesis builds on the view that IP protects the right of the creator and is an essential part of the right to culture.<sup>98</sup> Moreover, when it comes to the EU, the Charter has undoubtedly placed IP in the human rights framework (albeit connecting it to the right to property, rather than to the right to culture) through the Charter, as discussed in Chapter Two. Although the regulation of IP remains firmly embedded within the Internal Market, the EU legal order has recognised the human rights nature of IP, also building on the jurisprudence of the ECtHR. The approach adopted by the EU internally (also through the reliance on the ECHR) is significant for the purpose of this analysis in that it is reflected in the external sphere (as this thesis argues).

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<sup>94</sup> Opinion of the Court of 12 December 2014, *Opinion pursuant to Article 218(11) TFEU*, C-2/13, EU:C:2014:2454., paragraphs 236-238.

<sup>95</sup> Przemyslaw Tacik, 'After the Dust Has Settled: How to Construct the New Accession Agreement After Opinion 2/13 of the CJEU (2017) 18(4) German Law Journal 919.

<sup>96</sup> Judgment of the Court of 5 October 2010, *PPU- MCB*, C-400/10, EU:C:2010:582.

<sup>97</sup> See *supra* Chapter Two, Sections 4.2 and 4.3.

<sup>98</sup> See *supra* Chapter One, Section 4.1

### ***5.1. Intellectual Property as a Human Right***

As mentioned above, Article 17 of the Charter protects IP, firmly including it within the realm of human rights. Most of the cases regarding IP decided by the CJEU, reviewed in Chapter Two, concern the interpretation of certain provisions of secondary legislation (many of which are related to the copyright directives) or the interaction between IP and free movement and competition law. However, in many cases, the CJEU cites and refers to the Charter (albeit in a cursory manner). As mentioned above,<sup>99</sup> the CJEU has utilised the ECHR and the interpretation of the rights contained within it by the European Court of Human Rights (ECtHR) as an important source of inspiration for the protection of human rights, and has consistently highlighted the case law of the ECtHR relating to Article 1 of Protocol No 1 to the ECHR, which must be taken into account pursuant to Article 52(3) of the Charter, in interpreting Article 17, as the minimum threshold of protection.<sup>100</sup> For this reason, it is useful to discuss the case law of the ECtHR on IP as a human right.

#### *5.1.1. The Protection of Intellectual Property under the ECtHR as a ‘Model of Protection’*

The ECtHR has seen its role increase in recent years in resolving IP-centred disputes. From the 1990s onwards, a significant body of case law began to develop in respect of IP matters. It must also be noted that, while the case law was primarily centred on the traditional three IP elements of copyright, patents, and trademark, there was a wide protection afforded to each under Article 1 of Protocol No. 1 of the ECHR, going as far to include the registration itself or the system for the application of the registration.<sup>101</sup> Geiger and Izyumenko note that, in addition to the right to property protection, ‘the ECtHR has safeguarded a series of other rights of relevance or embedded within IP, which have equal (if not higher) value and against which IP needs to be balanced’.<sup>102</sup>

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<sup>99</sup> See *supra* Chapter Three, Section 4.

<sup>100</sup> Judgment of the Court of 15 March 2017, *Al Chodor*, C528/15, EU:C:2017:213, paragraph 37; Judgment of the Court of 13 June 2017, *Florescu and Others*, C258/14, EU:C:2017:448, paragraph 49; Judgment of the Court of 12 February 2019, *TC*, C492/18 PPU, EU:C:2019:108, paragraph 57.

<sup>101</sup> ECtHR, *Anheuser-Busch v. Portugal*, Application No. 73049/01, (2007) paragraph 72.

<sup>102</sup> Christophe Geiger and Elena Izyumenko, ‘Intellectual Property Before the European Court

The ECtHR examined the protection afforded to copyright and the right of the author versus the State. This was first seen in *Dima v Romania*.<sup>103</sup> *Dima v Romania* centred on the refusal of the Romanian Supreme Court to grant the copyright of the State Seal to the Dima on the grounds it was commissioned work from the State. As such, the State held the copyright on the work in question. The ECtHR held this was not a violation Dima's right to property and 'refused to overrule the courts' (questionable) interpretation of domestic copyright'.<sup>104</sup> In the subsequent case of *Balan v Moldova*,<sup>105</sup> the ECtHR held the opposite. This case related to the use of a photograph by the State in national identity cards, with Moldova claiming Balan could not claim copyright over the identity cards due to their inherent nature. However, the Moldovan Supreme Court had previously upheld the copyright of the photo. This distinction between the photograph and its use in the national identity card allowed the ECtHR to utilise a wider discretion in interpreting the matter. The ECtHR held the copyright to be 'a right recognised by law and by a previous final judgment, and not merely a legitimate expectation of obtaining a property right'.<sup>106</sup> Thus the actions of the State violated the author's right under Article 1 of Protocol No. 1 of the ECHR.

Further, in *University of Illinois Foundation v The Netherlands*,<sup>107</sup> the ECtHR also addressed the question of a State refusing to restore the status and protection of the IP of the individual, which affected the economic function of the IP. The facts of this case related to the termination of a title due to a delayed payment for renewing the IP title. The claim was rejected by the ECtHR on the grounds that the newly restored patent would have no legal basis.<sup>108</sup> Geiger and Izyumenko considered the result to be somewhat outdated in its reasoning, and that 'the position of the Court

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of Human Rights' Centre for International Intellectual Property Studies Research Paper 1/2018 <ssrn.com/sol3/Papers.cfm?abstract\_id=3116752>, 29. [footnote omitted].

<sup>103</sup> ECtHR, *Dima v. Romania*, Application No. 58472/00 (2006).

<sup>104</sup> Henning Grosee Ruse Khan, 'Overlaps and Conflicts Norms in Human Rights Law: Approaches of European Courts to Address Intersections with Intellectual Property Rights' in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 80. Ruse Khan further notes that this decision confirms the 'essential role of the national law in determining the protectable subject matter under Article 1'.

<sup>105</sup> ECtHR, *Balan v Moldova*, Application No. 19247/03 (2008).

<sup>106</sup> ECtHR, *Balan v Moldova*, Application No. 19247/03 (2008) paragraph 34.

<sup>107</sup> ECommHR, *University of Illinois Foundation v. the Netherlands*, Application No. 12048/86 (1988).

<sup>108</sup> ECommHR, *University of Illinois Foundation v. the Netherlands*, Application No. 12048/86 (1988) paragraph 1.

might be different today if a similar case were brought before it'.<sup>109</sup>

The matter of infringing the right to property under Article 1 has also arisen with respect to compulsory licensing of patents. This was seen in *Smith Klein v. the Netherlands*.<sup>110</sup> However, this question was primarily centred on the State's grant of a compulsory license. The ECtHR found that, while the compulsory licensing did restrict and control the full use of the patent, the compulsory licensing was found to be justified and proportionate in the case at hand. This approach was recently tested and was again found to constitute no violation concerning the granting of the compulsory license.<sup>111</sup>

Similarly, in *Anheuser-Busch v. Portugal*,<sup>112</sup> the ECtHR first held that the protection afforded by trademarks, while considered under Article 1 of the ECHR to be property, only applied to matured trademark and not the application process. However, on appeal, it held that while the mere application does not grant any such protections to trademarks, it does give rise to the expectation of protection once the process is completed - barring no foreseeable obstacles. To allow, through retroactive legislation to raise such an obstacle, the applicant may be deprived of the lawful protection under the property rights aspect of the ECHR.

The ECtHR also addressed the concern over claims brought against international organisations, such as the cases brought against the former European Patent Office (EPO).<sup>113</sup> The matter related to the lack of human rights protection (in particular procedural rights) within the EPO. This centred on the grounds that:

‘the national patent laws of European’s various nations must all operate in accordance with principles of human rights while no such check is placed

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<sup>109</sup> Christophe Geiger and Elena Izyumenko, 'Intellectual Property Before the European Court of Human Rights' Centre for International Intellectual Property Studies Research Paper 1/2018 <[ssrn.com/sol3/Papers.cfm?abstract\\_id=3116752](https://ssrn.com/sol3/Papers.cfm?abstract_id=3116752)>, 14.

<sup>110</sup> ECommHR, *Smith Klein v. the Netherlands*, Application No. 12633/87 (1990).

<sup>111</sup> ECtHR, *Sia Akka / Laa v. Latvia*, Application No.562/05, (2016).

<sup>112</sup> ECtHR, *Anheuser-Busch v. Portugal*, Application No. 73049/01, (2007) 45 EHRR 36 [830]. A dispute arose regarding the trademark application for 'Budweiser' in Portugal. Following the registration, Portugal concluded a bilateral treaty with the Czech Republic which recognised the reservation of the trademark of 'Budweiser' based on the geographical origin of the beer by a Czech brewery, thereby preventing the recognition of the trademark.

<sup>113</sup> ECommHR, *Heinz v. the Contracting States party to the European Patent Convention insofar as they are High Contracting Parties to the European Convention on Human Rights* Application No. 21090/92 (1994); ECommHR, *Reber, Reber Systematik GmbH and Kinkel v. Germany* Application No. 27410/95 (1996); ECommHR, *Lenzing AG v. Germany* Application No. 39025/97 (1998); ECommHR, *Lenzing AG v. the United Kingdom* Application No. 38817/97 (1998) ECtHR, *Rambus Inc. v. Germany* Application No 40382/04 (2006).

upon the operations of the European Patent Office itself'.<sup>114</sup>

While the latter case law does not concern the substance of IP as a human right, it addresses the procedural dimension, which is linked to the actual enforceability of that right and its substantive protection.

The increased role of the ECtHR in protecting IP can be seen through the interpretation of the Right to Privacy under Article 8 ECHR.<sup>115</sup> In doing so, the ECtHR has examined how the right to privacy operates as both a defence against the enforcement of allegedly overzealous IP enforcement measures,<sup>116</sup> as well as a basis for the protection of the creator on the grounds of the moral rights of their work. While the ECtHR has yet to address this question in relation to IP, lessons can be learned from the previous case law surrounding the right to privacy.<sup>117</sup> Chiefly, this case law can permit the restriction of certain rights to uphold other rights.<sup>118</sup> However, in doing so, the 'aim pursued must be balanced against the seriousness of the interference, and that the social need must be sufficiently pressing to outweigh the human right in question'.<sup>119</sup>

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<sup>114</sup> Jeremy Phillips, 'EPO not Bound by Human Rights Convention' (IPKat, 23 November 2004), <<http://ipkitten.blogspot.fr/2004/11/epo-not-bound-by-human-rights.html>>.

<sup>115</sup> Article 8 ECHR '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

<sup>116</sup> Its use as a defence against the (potentially) overzealous enforcement of IP is discussed below.

<sup>117</sup> ECommHR, *Sunday Times v the United Kingdom* Application No. 6538/74 (1979); ECommHR *Leander v Sweden* Application No. 9248/81 (1987).

<sup>118</sup> ECommHR, *Sunday Times v the United Kingdom* Application No. 6538/74 (1979) paragraph 67. The Commission held that: 'the Court concludes that the interference complained of did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention. The Court therefore finds the reasons for the restraint imposed on the applicants not to be sufficient under Article 10 (2) (art. 10-2). That restraint proves not to be proportionate to the legitimate aim pursued; it was not necessary in a democratic society for maintaining the authority of the judiciary'; ECommHR *Leander v Sweden* Application No. 9248/81 (1987) paragraph 59. The Commission held 'the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life'.

<sup>119</sup> Patrick Breyer, 'Telecommunications Data Retention and Human Rights: The Compatibility of Blanket Traffic Data Retention with the ECHR' (2005) 11 *European Journal of Law* 365, 368. Breyer further notes that the 'proportionality test finally requires the harm to civil rights to be proportionate to the aims of the legislation in question. Thus, the positive and the negative effects of the measure on individuals and society as a whole must be balanced against each other. This cannot be achieved by means of general considerations on the interests and rights in question, since it is impossible to establish an absolute order or ranking of interests and rights. Instead, it is necessary to determine how useful the measure will actually be, and what harmful effects it will actually have'.

From this body of case law, it can be seen that the ECtHR allows the CoE Member States a wide scope of discretion in their interpretation and regulation of IP within the framework of the right to property protected under the Article 1 of Protocol No. 1 of the ECHR. It must be noted that, while this approach offers some forms of domestic protection, the ECtHR tends to be unwilling to act strongly, thus placing a claim firmly within the scope of the ECHR in only a limited number of instances.<sup>120</sup> Nonetheless, the ECtHR does acknowledge the protection of IP as a human right, and this approach has been creeping into EU law.

### 5.1.2. *The Role of the CJEU in Protecting the Right of the Author*

Another important aspect of IP as a human right is the protection of the right of the author and the protection of their work.<sup>121</sup> The CJEU has developed a wide body of case law on its interaction with other human rights. This can be seen in the jurisprudence of the CJEU on the importance and the validity of IP as a right and has been seen across the various elements. In *Metronome Music*, justified the protective aspect of IP on the grounds that the ‘protection of the extremely high and risky investments which are required for the production of phonograms and are essential if authors are to go on creating new works’.<sup>122</sup> Similarly, the author and performer’s rights can be upheld and justified as part of ‘the protection of the moral and economic rights’.<sup>123</sup> This moral and economic was expanded by Advocate General Szpunar that copyright:

‘has two main objectives. The first is to protect the personal relationship between the author and his work as his intellectual creation and therefore, in a sense, an emanation of his personality. This primarily involves the area of moral rights. The second objective is to enable authors to exploit their works economically and thus earn an income from their creative

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<sup>120</sup> Christophe Geiger and Elena Izyumenko, 'Intellectual Property Before the European Court of Human Rights' Centre for International Intellectual Property Studies Research Paper 1/2018 <ssrn.com/sol3/Papers.cfm?abstract\_id=3116752>,17. Geiger and Izyumenko note that '[t]his would include encouraging technological and economic development or wider access to musical works'.

<sup>121</sup> See *Supra* Chapter One.

<sup>122</sup> Judgment of the Court of 28 April 1998, *Metronome Musik v Music Point Hokamp*, Case C-200/96, EU:C:1998:172 paragraph 24.

<sup>123</sup> Judgment of the Court of 20 October 1993, *Collins and Patricia Im- und Export v Imtrat and EMI Electrola*, Joined cases C-92/92 and C-326/92, EU:C:1993:847.

endeavours’<sup>124</sup>

The CJEU later held that ‘the fact that national legislation denies [the author] the exploitation rights at issue would be tantamount to depriving him of his lawfully acquired intellectual property right’.<sup>125</sup> The balance found by the CJEU evokes that found by the ECtHR. In *SIA AKKA/LAA v Latvia*,<sup>126</sup> the ECtHR upheld that the denial of injunctive relief to protect copyrighted work would also infringe the rights of the author. This included the compulsory licensing of the work,<sup>127</sup> which would amount to a ‘control of the use of the property’. However, based upon on the facts of the case, the ECtHR found the measures and the remuneration process to be proportionate balancing between the right of the author to commercially exploit their work and the public interest to access the work.

## ***5.2. Balancing Intellectual Property and Other Human Rights***

As already noted by Geiger and Izyumenko, the ECtHR:

‘is increasingly concerned about the conformity of IP laws with Europe’s catalogue of human rights and fundamental freedoms’.<sup>128</sup>

The question of what happens when protecting IP as a human right comes into (potential) conflict with other established human rights has trickled down into the EU. This balance is not always easy to reach, as discussed, among others, by Sganga.<sup>129</sup> The most recent example is the *Brüstle* case.<sup>130</sup> Similar to the previous *Biopatents*,<sup>131</sup> the cases centred on the patentability of the human embryo under the Biotech Directive and whether such restriction infringed the human rights of the potential patent. In examining this matter, the CJEU looked to Article 5(1) of the

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<sup>124</sup> Opinion of Advocate General Szpunar of 25 October 2018, *Funke Medien NRW*, Case C-496/17, EU:C:2018:870, paragraph 58.

<sup>125</sup> Judgment of the Court of 9 February 2012, *Luksan*, C-277/10, ECLI:EU:C:2012:65, paragraph 69-70.

<sup>126</sup> ECtHR, *SIA AKKA/LAA v. Latvia* Application No. 562/05 (2016).

<sup>127</sup> ECtHR, *SIA AKKA/LAA v. Latvia* Application No. 562/05 (2016) paragraph 49.

<sup>128</sup> Christophe Geiger and Elena Izyumenko, ‘Intellectual Property Before the European Court of Human Rights’ Centre for International Intellectual Property Studies Research Paper 1/2018 <ssrn.com/sol3/Papers.cfm?abstract\_id=3116752>, 6.

<sup>129</sup> Caterina Sganga, *Propertizing European Copyright. History, Challenges and Opportunities* (Edward Elgar, 2018).

<sup>130</sup> Judgment of the Court of 18 October 2011, *Brüstle*, Case C-34/10, EU:C:2011:669.

<sup>131</sup> Judgment of the Court of 9 October 2001, *Netherlands v. Parliament and Council*, C-377/98, EU:C:2001:523.

Biotech Directive and its explicit prohibition of the human body as ‘patentable inventions’. Further, Article 6(1) states:

‘[i]nventions shall be considered unpatentable where their commercial exploitation would be contrary to *ordre public* or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation’.

The CJEU examined the matter, taking into account the potential for this prohibition to prevent the use of the embryo in scientific research as part of the patent application process. The CJEU found that the use of the embryos for scientific research was within the meaning of Article 6(2)(c) of the Biotech Directive. This case exemplifies that IP is not an absolute right and can be limited.

In the sections below, the balance between IP and the rights that are under consideration in this thesis are discussed in more detail, having regard to the CJEU case law. In this vein, once again, the jurisprudence of the ECtHR is particularly relevant as it gives an important indication of the balance that must be struck between the rights of IP-holders on the one hand, and of other important stakeholders on the other. Consequently, the jurisprudence of the Strasbourg Court is mentioned throughout the section.

### *5.2.1. Intellectual Property and the Right to Health*

While the right to health has been recognised within the European legal order,<sup>132</sup> it has not been without issue. A large body of CJEU case law has addressed, to varying degrees, health standards, public policy, cross-border recognition and treatment. While the majority of this case law falls outside the scope of this thesis and is not

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<sup>132</sup> Article 35 of the Charter states that ‘[e]veryone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities’. The EU competence on health is limited. On the one hand, the EU has a shared competence on common safety concerns in public health matters (Article 4 TFEU). On the other hand, it has a supporting competence on protection and improvement of human health. However, the EU has legislated on several issues related (broadly to the right to health through the use of the Internal market legal basis. However, Article 168(7) TFEU explicitly provides that Member States are responsible for the delivery of healthcare. For an overview of the different issues linked to the EU action in the field of health see Hervey TK, Young CA, Bishop LE. *Research handbook on EU health law and policy*. Chetenham, UK: Edward Elgar Publishing; 2017.

directly relevant to the objectives that this research pursues, there remains a significant body of decisions that touch upon the question of how the EU can restrict the use of IP under the guise of promoting health-based policies and in upholding the right to health. The matter had already been addressed by the European Commission on Human Rights which preceded the ECtHR, and by the ECtHR, in particular with regards to the right to health and IP in patents on pharmaceutical goods (i.e. the compulsorily licensing on vital medicines). In *Smith Kline v Netherlands*, the former European Commission on Human Rights examined measures by the Dutch Government and if they could be considered to constitute an interference with the patent-protected goods and control of the use of the property. The Commission held that the measure in question balanced the control over the use of the property against the legitimate aim of seeking to encourage and facilitate economic development as well as technological innovation in the field. In assessing these aims, the Commission views them as proportionate, arguing that:

‘the provision only comes into effect where such licence is necessary for the working of a patent of the same or later date and the licence should be limited to what is required for the working of the patent. ... The Commission accordingly finds that the control of use in the circumstances of this case did not fail to strike a fair balance between the interests of the applicant company and the general interest and is in accordance with the requirements of Article 1 of Protocol No. 1’.<sup>133</sup>

The CJEU, in its own case law, adopted a balancing test that is similar to that adopted in the ECHR framework. Several of these decisions concerned the Tobacco Products Directive and focus on whether and to what extent the use of IP is in conflict with the right to health.<sup>134</sup> The Directive requires that all future tobacco products be displayed in plain and ‘non-descript’ packaging. Effectively, it requires all tobacco products to be marketed identically, save for the brand name. This was prompted following a heavily contested debate indicating a drop in the levels of consumption if plain packages were to be adopted. However, many of the tobacco

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<sup>133</sup> ECommHR, *Smith Kline & French Lab. Ltd. v. the Netherlands* Application No. 12633/87 (1990).

<sup>134</sup> Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC Text with EEA relevance OJ No. L 127, of April 2014, 29.

companies claimed that this infringed the rights associated with the use of their respective trademarks. In this way, they argued that the Tobacco Products Directive actively undermined their trademarks and their associated value. While there was some merit to their claims as the CJEU had previously upheld the importance and value associated with a trademark,<sup>135</sup> this was a somewhat weak argument for a number of reasons. Even if IP falls within the realm of human rights, it does not exist in a vacuum and must be balanced with other (competing) rights. IP, as the CJEU has upheld, is not an absolute right,<sup>136</sup> meaning it can always be subject to limitations. However, IP is a human right and any restriction or limitation should not be considered a ‘disproportionate and intolerable interference, impairing the very substance of the fundamental right to property of the economic operators concerned’.<sup>137</sup> In order to determine what restriction is proportionate in the field of packaging of tobacco products, it is important to understand to what extent this plain packaging could encroach upon the rights of the trademark holder.<sup>138</sup> The CJEU

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<sup>135</sup> Judgment of the Court of 23 May 1978, *Hoffman-La Roche v Centrafarm*, Case 102/77, EU:C:1978:108, paragraph 1. The CJEU held that the purpose of the trademark is ‘to guarantee the identity of the origin of the trade-marked product to the consumer or ultimate user, by enabling him without any possibility of confusion to distinguish that product from products which have another origin’. See also Judgment of the Court of 11 November 1997, *Loendersloot v Ballantine & Son and Others*, Case C-349/95, EU:C:1997:530 paragraph 23. The CJEU held that in the use of trademarks in repacking of a product ‘account must be taken of the essential function of the trade mark, which is to guarantee to the consumer or end user the identity of the trade-marked product’s origin by enabling him to distinguish it without any risk of confusion from products of different origin’. Relevant is also Judgment of the Court of 12 November 2002, *Arsenal Football Club*, Case C-206/01, EU:C:2002:651, paragraph 47. The CJEU held that ‘[trademark] rights constitute an essential element in the system of undistorted competition which the Treaty is intended to establish and maintain. In such a system, undertakings must be able to attract and retain customers by the quality of their goods or services, which is made possible only by distinctive signs allowing them to be identified’. Similarly, in Judgment of the Court of 29 April 2004, *Björnekulla Fruktindustrier*, Case C-371/02, EU:C:2004:275 paragraph 23. The CJEU upheld expanded the commercial value of the trademark. ‘If the function of the trade mark as an indication of origin is of primary importance to the consumer or end user, it is also relevant to intermediaries who deal with the product commercially. As with consumers or end users, it will tend to influence their conduct in the market.’

<sup>136</sup> Judgment of the Court of 14 December 2004, *Swedish Match*, Case C-210/03, EU:C:2004:802, paragraph 72;

Judgment of the Court of 11 July 1989, *Schröder v Hauptzollamt Gronau*, Case 265/87, EU:C:1989:303, paragraph 15; Judgment of the Court of 5 October 1994, *Germany v Council*, Case C-280/93, EU:C:1994:367 paragraph 78; Judgment of the Court of 29 April 1999, *the Queen v Minister of Agriculture, Fisheries and Food, ex parte Standley and Others*, Case C-293/97, EU:C:1999:215 Judgment of the Court of 29 April 1999, *the Queen v Minister of Agriculture, Fisheries and Food, ex parte Standley and Others*, Case C-293/97, EU:C:1999:215, paragraph 54.

<sup>137</sup> Judgment of the Court of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA*, Case C-347/03, EU:C:2005:285, paragraph 121.

<sup>138</sup> Enrico Bonadio, ‘Plain Packaging of Tobacco Products Under EU Intellectual Property Law’ (2012) *European Intellectual Property Review* 599.

decisions in the tobacco cases built upon previous case law in which the Court had recognised the importance of health vis a vis free movement and other rights, in particular, the freedom to conduct a business and the right to property.<sup>139</sup> For example, in *Afton Chemical*, Advocate General Kokott stated that health and environmental concern:

‘are not protected on the basis of a principle of protection from damage which is bound to occur. Rather, preventive measures may be taken against risks whose extent is disputed. In this way, the legislature can give priority to the objective of protection of health or the environment over restriction of other interests’.<sup>140</sup>

Further, the CJEU in *Zoofachhandel Zülpke and Others v Commission*,<sup>141</sup> held that

‘[i]t has consistently been held that the freedom to choose an occupation, the freedom to conduct a business and the right to property are fundamental rights enshrined in Articles 15 to 17 of the Charter of Fundamental Rights. Nonetheless, those rights do not constitute absolute prerogatives, but must be viewed in relation to their social function. Consequently, the exercise of those rights may be restricted, provided that those restrictions in fact correspond to objectives of public interest pursued by the European Union and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights thus guaranteed’.<sup>142</sup>

When the Tobacco Product Directive was subsequently challenged by the tobacco industry in the U.K.<sup>143</sup> and Poland,<sup>144</sup> the CJEU assessed the provision which restricted the trademark of the parties adopting a similar approach. In *Philip Morris Brands and Others*, the CJEU noted that the known risks to health by the products

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<sup>139</sup> Judgment of the Court of 8 July 2010, *Afton Chemical*, Case 343/09, EU:C:2010:419

<sup>140</sup> Opinion of Advocate General Kokott of 6 May 2010, *Afton Chemical*, Case C-343/09, EU:C:2010:258, paragraph 94.

<sup>141</sup> Judgment of the General Court of 17 March 2016, *Zoofachhandel Zülpke and Others v Commission*, Case T-814/14, EU:T:2016:157.

<sup>142</sup> Judgment of the General Court of 17 March 2016, *Zoofachhandel Zülpke and Others v Commission*, Case T-814/14, EU:T:2016:157 paragraph 126.

<sup>143</sup> Judgment of the Court of 4 May 2016, *Pillbox 38*, Case C-477/14, EU:C:2016:324; Judgment of the Court of 4 May 2016, *Philip Morris Brands and Others*, Case C-547/14, EU:C:2016:325

<sup>144</sup> Judgment of the Court of 4 May 2016, *Poland v Parliament and Council*, Case C-358/14, EU:C:2016:323.

and the efforts made by the EU legislature to address the economic consequences of the restriction of the use of trademark ‘does not appear manifestly disproportionate’.<sup>145</sup> Similarly, In *Pillbox 38*,<sup>146</sup> the CJEU held that:

‘any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others’.<sup>147</sup>

### 5.2.2. *Intellectual Property and the Right to Education*

The right to education is protected by Article 14 of the Charter, which is based on the common constitutional traditions of Member States and on Article 2 of Protocol No. 1 to the ECHR.

However, it should be noted that the EU has only supporting competence with regard to education, and the extent to which it can engage with positive measures to support this right is heavily circumscribed. Harmonisation is not possible within supporting competences, and the Member States have resisted all attempts to alter this balance.<sup>148</sup>

Within the European legal order, a balance between the right to education (and culture) and IP is struck within the Infosoc Directive. Article 5(2)(c) of the Infosoc Directive permits the Member States to allow for limitations or exceptions for the reproduction of protected work by ‘publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage’.<sup>149</sup> This is expanded and developed under Article 5(3) to include reproduction and distribution under a broad and justifiable

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<sup>145</sup> Judgment of the Court of 4 May 2016, *Philip Morris Brands and Others*, Case C-547/14, EU:C:2016:325, paragraph 190.

<sup>146</sup> Judgment of the Court of 4 May 2016, *Pillbox 38*, Case C-477/14, EU:C:2016:32.

<sup>147</sup> Judgment of the Court of 4 May 2016, *Pillbox 38*, Case C-477/14, EU:C:2016:324, paragraph 160.

<sup>148</sup> Kari Käsper, 'Free Movement of Students in the EU' in Tanel Kerikmäe (ed), *Protecting Human Rights in the EU* (Springer 2014) 145.

<sup>149</sup> Article 5(2)(c) of the Infosoc Directive.

classification of educational and proportionate use. These exceptions are subject to the same standard of proportionality and justification to restrict the author's right under the guise of promoting the general interest in the work or following the public policy of the Member state.

### 5.2.3. Intellectual Property and the Freedom of Expression

Freedom of expression is clearly protected within the EU legal order.<sup>150</sup> The CJEU has held that expression must be given a broad meaning and applies, *inter alia* to the circulation by an entrepreneur of commercial information in particular in the form of an advertising slogan.<sup>151</sup> In that connection, the CJEU has referred to the ECtHR.<sup>152</sup> In this respect, the ECtHR has noted the freedom of expression and information, as guaranteed and protected under Article 10 ECHR, acts as a primary objective of the broader society. In recent years, there have been a growing number of instances where freedom of expression has been used by right-holders to protect their economic interests or the right-holder has made use of an expression to protect and exploit the trademark they hold, which are of seminal importance in the EU context. Two ECtHR cases related to the expression of material in relation to television networks by a third-party in a weekly guide are relevant in this respect as they influenced the jurisprudence of the CJEU. While the first case, *N.V Television v. the Netherlands*,<sup>153</sup> was ultimately settled out of court, the subsequent and near-identical case *De Geïllustreerde Pers N.V. v. the Netherland*, held that there was no violation of rights under Article 10 ECHR on the ground that the tv-guide printer had not actually received the information at this point.<sup>154</sup> As such, there was no expression to restrict. While the protection under Article 10 ECHR has only been

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<sup>150</sup> For example, see the recent caselaw on the intersection between the freedom of expression, limitations to copyright protection and fundamental rights: Judgment of the Court of 29 July 2019, *Pelham and Others*, Case C-476/17, EU:C:2019:624; Judgment of the Court of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, Case C-516/17, EU:C:2019:625; Judgment of the Court of 29 July 2019, *Funke Medien NRW*, Case C-497/17, EU:C:2019:623. See *supra*, Chapter Two Section 3.3 for a more detailed discussion from the perspective of the CJEU.

<sup>151</sup> Judgment of the Court of 17 December 2015, *Neptune Distribution*, Case C-157/14, EU:C:2015:823

<sup>152</sup> ECtHR, *Casado Coca v Spain* Application No. 15450/89 (1994) paragraphs 35-36; ECtHR, *Krone Verlag GmbH & Co. KG v. Austria (no. 3)* Application No. 39069/97 (2003) paragraphs 19-20.

<sup>153</sup> ECommHR, *N.V. Televizier v. the Netherlands* Application No. 2690/65 (1968).

<sup>154</sup> ECommHR, *De Geïllustreerde Pers N.V. v. the Netherland*, Application No.5178/71 (1976).

weakly applied in the context of copyright, for matters of expression using copyrighted material such as satire or irony, the ECtHR has consistently upheld a level of protection towards the freedom of expression when in conflict with other rights.<sup>155</sup>

The question of the freedom of expression and information was subsequently seen in relation to the infringement of online activities,<sup>156</sup> First seen in *Ashby Donald and Others v. France*.<sup>157</sup> This case related images taken in public which captured trademarked images in the background and was later uploaded to a hosting service. This was followed in *The Pirate Bay* in relation to the system facilitating the transfer of information and its protection under Article 10 ECHR.<sup>158</sup> In both cases, the ECtHR judgments:

‘denoted a prominent and important shift. The ECtHR made it clear that even illegal and profit-making sharing of copyright-protected material was not devoid of the freedom of expression guarantees and that, in certain circumstances, it was simply impossible to ignore the freedom of expression checks to assess what impact the copyright legal framework had on the enjoyment of human rights in Europe’.<sup>159</sup>

The ECtHR examined Article 10 in relation to online activities in two similar cases for ISP and platforms. In *Delfi As v Estonia*,<sup>160</sup> the ECtHR held that defamatory comments made anonymous users on Delfi’s news portal, would place the liability on Delfi, Due to the nature of the comments and the presentation of the material on the website, the ECtHR found the national requirements to monitor and prevent such commentary as just and reasonable. However, the ECtHR would shortly return to the matter in *MTE v Hungry*.<sup>161</sup> This case related to an opinion piece posted

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<sup>155</sup> ECtHR *Vereinigung Bildender Kunstler v. Austria*, Application no. 68354/01 (2007).

<sup>156</sup> ECtHR *Times Newspapers Ltd (Nos 1 and 2) v The United Kingdom*. Application Nos 3002/03 and 23676/03; (2009) 27. The ECtHR held that ‘in light of its accessibility and its capacity to store and communicate vast amounts of information, the internet plays an important in enhancing the public’s access to news and facilitate the sharing and dissemination of information generally’.

<sup>157</sup> ECtHR *Ashby Donald And Others v France*, Application No. 36769/08 (2013).

<sup>158</sup> ECtHR *Neij and Sunde Kolmisoppi v. Sweden*, Application No. 40397/12 (2013).

<sup>159</sup> Christophe Geiger and Elena Izyumenko, 'Intellectual Property Before the European Court of Human Rights' Centre for International Intellectual Property Studies Research Paper 1/2018 <[ssrn.com/sol3/Papers.cfm?abstract\\_id=3116752](http://ssrn.com/sol3/Papers.cfm?abstract_id=3116752)>, 40.

<sup>160</sup> ECtHR, *Delfi As v Estonia* Application No. 40397/12 (2103).

<sup>161</sup> ECtHR, *Magyar Tartalomsgalgalatok Egyesulete and Index.hu Zrt v Hungary* Application No. 22947/13, (2016).

online about the alleged unethical practices of a company. MTE argued that the Hungarian Supreme Court did not apply the protections afforded to ISPs under the E-Commerce Directive. The national court had previously interpreted these protections as applying solely to commercial activities. While the ECtHR permitted the national court to determine the application in this regard, it nonetheless held that such actions imposed an ‘excessive and impractical forethought’ by the ISP to raise the protection under Hungarian law.<sup>162</sup> As such, it was not a fair or justified restriction of Article 10 ECHR.

Article 10 ECHR can also be called by the rightsholder, as a means of restricting access. This line of questioning was raised in *AEPI S.A.*,<sup>163</sup> but was rejected by the ECtHR on the grounds put forward of the applicant. As such, the scope remains contested. However, as Geiger and Izyumenko note, the position of these ‘[new] realities might require paying greater attention to the freedom of expression interests’, and the flexibility of ECtHR appears to be suited to addressing these concerns and aiding in the global development of IP.<sup>164</sup>

## 6. Concluding Remarks

The chapter critically analysed the core tenets of the protection of fundamental rights in the EU, paying particular attention at how such protection projects upon IP. The findings of this chapter will shape Chapter Four on the EU’s external action policy, as well as the content of Part III of this thesis. The chapter highlighted that the current Treaties include several obligations to respect human rights, both internally and externally. Secondly, the development of human rights within the European legal order is now firmly rooted within the EU’s internal actions and, as it will be further discussed, this is reflected in its external action policy. As noted above, the EU has not yet acceded the ECHR, although the Member States have. Despite this setback, the ECHR is ‘of special significance’ for the EU, and this is visible in relation to IP matters.

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<sup>162</sup> ECtHR, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* Application No. 22947/13, (2016) paragraph 82.

<sup>163</sup> ECtHR, *AEPI S.A. v. Greece*, Application No. 48679/ 99, (2002).

<sup>164</sup> Christophe Geiger and Elena Izyumenko, ‘Intellectual Property Before the European Court of Human Rights’ Centre for International Intellectual Property Studies Research Paper 1/2018 <[ssrn.com/sol3/Papers.cfm?abstract\\_id=3116752](http://ssrn.com/sol3/Papers.cfm?abstract_id=3116752)>, 46.

This chapter, building on the previous analysis, has also illustrated how the EU has adopted a view that IP falls within the realm of human rights. However, since IPRs are not absolute, they need to be balanced with other human rights. The specific engagement with IP in general and IP as a human right has been greatly developed and expanded over the last few decades. The approach to IP matters shown within the internal sphere has a significant influence in the external sphere of the EU, as it will be discussed in Part III.

# **-Chapter Four-**

## **Defining the External Competence on Intellectual Property and Embedding Human rights in the External Action of the European Union**

### **1. Introduction**

Building on the discussion of the development of IP law and human rights protection within the EU from the preceding chapters, this chapter will move on to analyse the evolution of the corresponding competences of IP and human rights in EU external action. The shape and scope of these competences are extremely significant for a number of reasons. The extent of the IP external competence has a far-reaching effect on the ability of the EU to initiate, negotiate, and conclude the various trade-based agreements discussed in Part III. This chapter will set the stage and round out the conceptual context for the subsequent analysis in Part III. Particular attention will be paid to the extension of the Common Commercial Policy (CCP) of the EU to cover IP matters.

This chapter is divided into five sections following this brief introduction. Section 2 first provides a contextual overview of the EU's external competence across the Treaties, before moving to charter the current position of the external competence on IP matters. This section includes how the change brought by the Treaty of Lisbon affected the external sphere and discusses the effects of those changes. Building on this background analysis, the third section discusses the CCP, examining its scope and limitations, before moving to examine the CCP in action. Section 4 addresses the specific place of IP within the EU's external action policy and to what degree IP falls within the CCP. To address this matter, Section 4 will look to the recent case law of the CJEU on IP. Section 5 briefly looks at human rights in the external action in order to frame the discussion that will be conducted in Part III. Finally,

the chapter offers some concluding comments on the position of IP within EU external competence and what this means for the EU's external action policy going forward, and how this will lay the groundwork for future agreements, and it highlights how human rights are framing the EU external action.

## **2. The European Union External Competences: An Overview**

As the EU went through various changes across the Treaties, so too did its competence in relation to areas of trade and, more broadly, external engagements. While the EU now has the ability to conclude international agreements and acts consistently on the international scene on a variety of matters, in the early days of the EU, this was not the case. Even now, significant questions remain regarding the precise nature and extent of the EU external competences. Those questions often centre on whether the EU holds an exclusive competence and the EU can consequently conclude the agreement by itself, or, if the competence is shared with the Member States, on whether the Member States need to conclude the international agreement alongside the EU (these types of agreements may also be referred to as mixed agreements). This section traces in a chronological fashion the development of EU external competences in relation to trade.

### ***2.1. European Union External Competences: From Their Origin to the Treaty of Lisbon***

The Treaty of Rome recognised the CCP under Article 3(b) and affirmed that 'the establishment of a common customs tariff and a common commercial policy towards third countries' was to be considered an activity task of the former Community. The purpose of the CCP was then expanded and developed under former Article 113 of the EC Treaty, which established:

'1. After the transitional period has ended, the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies.

2. The Commission shall submit proposals to the Council for implementing the common commercial policy’.

Moreover, Article 238 of the EC treaty permitted the former EC to:

‘conclude with a third State, a union of States or an international organisation agreements establishing an association involving reciprocal rights and obligations, common action and special procedures’.

However, this initially gave rise to uncertainty regarding the limits of this competence and ability of the EU to conclude Association Agreements.<sup>1</sup> Verellen describes the early situation of the EU’s foreign affairs as being ‘wrapped in mystery’.<sup>2</sup>

The former Community had the capacity to conclude agreements,<sup>3</sup> but only where explicitly prescribed by the Treaties. The CJEU, through to the *ERTA* doctrine, established that the EC could conclude agreements in all areas in which it has internal competences.<sup>4</sup> In this seminal case, the question related to the ability of the Member States to conclude the European Road Transport Agreement (ERTA). The Commission argued against the scope of ERTA, that certain provisions within it were in direct conflict with EU regulations on the matter.<sup>5</sup> As such, the Commission referred the issue to the CJEU, seeking to annul the decision of the Council.<sup>6</sup> The Commission based the argument that the EU held the correct power to conclude the ERTA negotiations rather than the Council,<sup>7</sup> while the Council sought the

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<sup>1</sup> Judgment of the Court of 15 December 1976, *Donckerwolke and Others v Procureur de la République and Others*, Case 41/76, EU:C:1976:182, paragraph 32. ‘As full responsibility in the matter of commercial policy was transferred to the Community by means of Article 113 (1) measures of commercial policy of a national character are only permissible after the end of the transitional period by virtue of specific authorization by the Community’.

<sup>2</sup> Thomas Verellen, 'The ERTA Doctrine in the Post-Lisbon Era: Note under Judgment in *Commission v Council* (C-114/12) and Opinion 1/13' (2015) 21(2) *Columbia Journal of European Law* 383, 387.

<sup>3</sup> Then Article 210 TEEC.

<sup>4</sup> Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, Case 22/70 EU:C:1971:32.

<sup>5</sup> Due to the wider scope afforded under the Regulation which encompassed drivers from third countries while within the EU and while ERTA did not, the Commission argued it was not possible for both to operate at the same time.

<sup>6</sup> Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, Case 22/70 EU:C:1971:32, paragraph 1.

<sup>7</sup> Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, Case 22/70 EU:C:1971:32 paragraphs 6-8.

application to be declared inadmissible.<sup>8</sup> The CJEU disagreed with the Council and held that:

‘[t]o determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions’.<sup>9</sup>

The CJEU further held that this ‘authority arises not only from an express conferment by the Treaty’, but it may also arise from ‘other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions’.<sup>10</sup>

The CJEU then went to prescribe a number of instances where the former EC, now EU, could draw new external powers from. The Luxembourg judges held that there was no need for an express provision in the Treaties granting the EU the competence to conclude international agreements, but that this competence could derive from a Treaty provision or from secondary law measures. The Court held that when common rules are adopted through secondary legislation, the Member States cannot undertake international obligations that would affect those rules. If there is a risk that the international agreement could affect the scope or operation of the above common rules, the EU is competent to conclude that agreement.<sup>11</sup> Verellen also notes that the CJEU did not state how these requirements needed to be interpreted; neither did it discuss the nature of EU competences.<sup>12</sup> Rather, the CJEU simply stated that:

‘to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the

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<sup>8</sup> Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, Case 22/70 EU:C:1971:32 paragraph 2.

<sup>9</sup> Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, Case 22/70 EU:C:1971:32 paragraph 15.

<sup>10</sup> Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, Case 22/70 EU:C:1971:32 paragraph 16.

<sup>11</sup> Thomas Verellen, 'The ERTA Doctrine in the Post-Lisbon Era: Note under Judgment in *Commission v Council (C-114/12)* and Opinion 1/13' (2015) 21(2) *Columbia Journal of European Law* 383, 390-391. See also Geert De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press, 2008) 21; Piet Eeckhout, *EU External Relations Law* (Oxford University Press, 2011).

<sup>12</sup> Thomas Verellen, 'The ERTA Doctrine in the Post-Lisbon Era: Note under Judgment in *Commission v Council (C-114/12)* and Opinion 1/13' (2015) 21(2) *Columbia Journal of European Law* 383, 391.

framework of the Community institutions, assume obligations which might affect those rules or alter their scope'.<sup>13</sup>

Until the *ERTA* case, the assumption was in the absence of an explicit reference; the EU had no competence to contract and conclude agreements. However, in *ERTA* the CJEU held that the EU does hold the competence to act in such a manner, in particular, to establish contractual links as over the field of objectives defined in the Treaty. Additionally, with the view of engaging and implementing the common policies, the EU may adopt provisions, and where they do so introduce these common rules, prohibited the Member States from engaging in activities which may affect or alter the scope of such rules.<sup>14</sup> The CJEU supported this line of logic in *Kramer*.<sup>15</sup> The CJEU held that the internal competence was sufficient to presume a corresponding external competence. This logic was then followed in *Opinion 1/76*,<sup>16</sup> that from the existence of internal competency, it was possible to infer external competence. However, this was conditional on the Treaty having conferred internal competence for a specific objective, and that the participation in the agreement was necessary for the attainment of the said objective. The CJEU has focused on the 'necessity' elements as seen in *Kramer*, stressing this implied competence would only come into effect if it would be impossible to pursue the EU policy objective in question solely through domestic measures, a feature seen in the *Open Skies* judgments.<sup>17</sup> The 'ERTA doctrine' effectively settled the matter for the 'next twenty years'.<sup>18</sup> Over this period, many international actors operated on the assumption of the EU competence to complete international agreements, despite it still lacking explicit reference in the Treaty.<sup>19</sup>

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<sup>13</sup> Opinion of Advocate General Dutheillet de Lamothe *Commission of the European Communities v Council of the European Communities*, Case 22/70, EU:C: 1971:32, paragraph 22.

<sup>14</sup> Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, Case 22/70 EU:C:1971:32, paragraph 14.

<sup>15</sup> Judgment of the Court of 14 July 1976, *Cornelis Kramer and Others*, Joined Cases 3, 4 and 6-76, EU:C:1976:114.

<sup>16</sup> Opinion of the Court of 26 April 1977, *Opinion given pursuant to Article 228 (1) of the EEC Treaty*, Opinion 1/76, EU:C:1977:63,

<sup>17</sup> Judgment of the Court of 5 November 2002, *Open Skies*, Joined Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, EU:C:2002:628.

<sup>18</sup> Henri de Waele, *Layered Global Player Legal Dynamics of EU External Relations* (Springer 2011) 4.

<sup>19</sup> While the EU may not have had (explicit) competence to conclude past international agreements, their standing in the legal order is not in doubt. This turns allowance of faux-competency, from the perspective of completing the agreement with the 3<sup>rd</sup> party nations, stems from Article 27 of the Vienne Convention states that '[a] party may not invoke the provision of

In this regard, the CJEU would go as far as suggesting the competence ‘is in fact made up by the combination and interaction of internal and external measures without priority being taken by one over the other’.<sup>20</sup> Similarly, in *Demirel*,<sup>21</sup> the CJEU held that an Association Agreement could cover the whole field of application of the Treaty even when the internal competence had not been exercised.<sup>22</sup> In *ERTA* and in the subsequent cases, the CJEU referred to the need to safeguard ‘the unity of the Common Market and the uniform application of Community law’ as a basis for its own doctrine. In *Opinion 1/03*,<sup>23</sup> the Court affirmed that the ERTA doctrine is meant ‘to preserve the effectiveness of Community law and the proper functioning of the systems established by its rules’.<sup>24</sup>

But is the division of competence between the EU and the Member States, and how they act internally mirrored in the division of competence to act externally? Some scholars, such as Weiler,<sup>25</sup> distinguish between the internal legislative competence and external treaty-making powers and adds to those the question of international capacity and argue that the scope of its internal and external powers doesn’t have to maintain a similar division of boundaries. However, this approach is not without pushback, and the Court seems to have tended to extend the exclusive external competence of the EU (with some exceptions, sometimes in the interest of a pragmatic solution).<sup>26</sup> This approach was clearly seen in the *Open Skies* case,<sup>27</sup> in which the Court held, in line with the ERTA doctrine, that where the EU lays down common rules, the Member States are no longer competent to enter into international obligations with Third Countries if those obligations affect the common rules.

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its international laws as justification for its failure to perform a treaty’.

<sup>20</sup> Opinion of the Court of 11 November 1975, *Opinion given pursuant to Article 228 (1) of the EEC Treaty*, Opinion 1/75, EU:C:1975, paragraph 1363.

<sup>21</sup> Judgment of the Court of 30 September 1987, *Demirel v Stadt Schwäbisch Gmünd*, Case 12/86, EU:C:1987:400.

<sup>22</sup> Additionally, the Member States may implement elements of the Association Agreement while retaining the competence to act in the internal dimension.

<sup>23</sup> Opinion of the Court of 7 February 2006, *Nouvelle convention de Lugano*, Opinion 1/03, EU:C:2006:81.

<sup>24</sup> Opinion of the Court of 7 February 2006, *Nouvelle convention de Lugano*, Opinion 1/03, EU:C:2006:81, paragraph 131.

<sup>25</sup> J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999).

<sup>26</sup> See *infra* Chapter Four Section 4.

<sup>27</sup> Judgment of the Court of 5 November 2002, *Open Skies*, Joined Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, EU:C:2002:628.

At the same time, despite the growth in the scope of the external powers of the EU, mixed agreements are still used. However, their use appears to be somewhat limited in practice, often enacted to satisfy political needs and obligations of the Member States rather than a strictly legal requirement to do so. Mixed agreements are also used in instances where a significant aspect of their governance relates to sensitive global issues. The conclusion of Association Agreements serves as a clear example of this process due to their complex political aspects. It must also be noted that the precise division of competencies themselves is not essential to determine the mixity of the agreement.<sup>28</sup>

The Court also refers to ‘the principle of unity in the international representation of the Union and its Member States’.<sup>29</sup> In instances of shared or mixed competence, there exists a duty of cooperation between the EU and the Member States,<sup>30</sup> as consistently held by the CJEU, in among many others, *Commission v. Sweden*.<sup>31</sup>

The relationship between the EU and the Member States competences is said to have a dynamic nature. This dynamic nature is often claimed by the EU to gain an exclusive competence in a growing number of fields. In theory, by the same dynamic nature, the EU could also relinquish exclusive competence. However, this is a less common feature, and a lapse in the use of the exclusive competence in a particular field is not enough for the Member States to re-claim competence in the field, as seen in *Commission v. UK*.<sup>32</sup> This approach was further developed in the *Open Skies*<sup>33</sup> and *Lugano Convention*,<sup>34</sup> where the CJEU laid down criteria to determine whether external competence was exclusive or shared. In both cases, the

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<sup>28</sup> Andrés Delgado Casteleiro, 'EU Declarations of Competence to Multilateral Agreements: A Useful Reference Base?' (2012) 17(4) European Foreign Affairs Review, 491.

<sup>29</sup> Judgment of the Court of 20 April 2010, *Commission v Sweden*, Case C-246/07, EU:C:2010:203, paragraph 104.

<sup>30</sup> Article 4(3) TEU states that ‘[p]ursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives’. See also Marcus Klammert, *The Principle of Loyalty in EU Law* (Oxford University Press) 2014, 13-19.

<sup>31</sup> Judgment of the Court of 20 April 2010, *Commission v Sweden*, Case C-246/07, EU:C:2010:203.

<sup>32</sup> Judgment of the Court of 5 May 1981, *Commission v. UK*, Case 804/79, EU:C:1981:93.

<sup>33</sup> Judgment of the Court of 5 November 2002, *Open Skies*, Joined Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98, EU:C:2002:628

<sup>34</sup> Opinion of the Court of 7 February 2006, *Lugano Convention*, Opinion 1/03, EU:C:2006:81.

CJEU held the:

‘international commitments undertaken by the Member States fall within the scope of the common (internal) EU rules or lie within an area that is already likely covered by such rules, even if there is no contradiction between the rules and the exclusive power, since common rules may still be affected’.<sup>35</sup>

Once the EU has decided on a course of action, the Member States are subsequently unable to depart from this course of action. Such departure is a breach of Article 4(3) TFEU:

‘is likely to compromise the principle of unity in the international of the Union and its Member States and weaken their negotiation power with regard to the other parties to the Convention’.<sup>36</sup>

ACTA was a prime example of this process in practice. Specific elements of ACTA, such as the criminal enforcement of IP infringement, were considered to fall within the competence of the Member States. For this reason, the EU opted for mixity and this approach can be seen to respect and acknowledge political concerns and criticism ACTA was facing from both the Member States and the public at large, rather than as a strict legal requirement.<sup>37</sup>

To conclude, from the early days, the EU held two key areas of external competence in relation to trade. Firstly in relation to the creation of the CCP, and secondly in areas related to the EU’s ability to establish Associated Agreements with Third Countries. Following *ERTA* decision, the scope of the EU external competence was broadened by the CJEU, who held it was necessary to take the whole Treaty into

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<sup>35</sup> Henri de Waele, *Layered Global Player Legal Dynamics of EU External Relations* (Springer 2011) 11.

<sup>36</sup> Judgment of the Court of 20 April 2010, *Commission v Sweden*, Case C-246/07, EU:C:2010:203, paragraph 104.

<sup>37</sup> Opinion of Advocate General Sharpston of 10 July 2010, *Lesoochránárske zoskupenie*, Case C-240/09, EU:C:2010:436, paragraph 56. ‘the mixed agreement is itself a creature of pragmatic forces – a means of resolving the problems posed by the need for international agreements in a multi-layered system’.

See also Marc Maresceau, ‘A Typology of Mixed Bilateral Agreements’ in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements in EU Law Revisited: The EU and its Member States in the World* (Hart Publishing 2010) 11-29. Maresceau even argues that ‘if there is political consensus among the Member States that an agreement ought to be mixed, they will almost certainly manage to impose the mixed procedure, particularly by adding provisions which stand on their own and need member State involvement’.

account when determining the scope of EU competence. The CJEU stated that EU external competence could equally arise from other provisions of the Treaty and measures adopted by the institutions within the framework of these provisions.

## ***2.2. The Current European Union External Competences***

At present, the EU enjoys sound explicit external competences in a wide array of matters. This subsection briefly presents the most relevant provisions for the purpose of the subsequent analysis, with a focus on ‘trade-related’ competences without engaging with the Common Foreign and Security Policy, which as discussed in the Introduction is outside the scope of the thesis.

Article 3(1) TFEU grants the EU an exclusive competence in a number of fields:

- ‘(a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy’.

Thus, Article 3(1) TFEU includes the customs union and the CCP as exclusive (external) competences. Moreover, the *ERTA* doctrine,<sup>38</sup> i.e. the existence of implied powers for fields in which the EU does not have express external competence has been expressly codified under Article 3(2) TFEU:

‘[t]he Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal

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<sup>38</sup> Judgment of the Court of 14 July 1976, *Cornelis Kramer and others*, Case C-3, Case C-4 and C-6-76, EU:C:1976:114; Opinion of the Court of 19 March 1993, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty*, Opinion 2/91, EU:C:1993:106; Opinion of the Court of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, EU:C:1994:384; Judgment of the Court of 5 November 2002, *Commission v Germany*, Case C-476/98, EU:C:2002:631.

competence, or in so far as its conclusion may affect common rules or alter their scope’.

Cremona notes that this approach;

‘dealt creatively and constructively with the dilemma of revoking the principles of conferred powers with the need to provide a dynamic organisation with the necessary tools to match its internal development with a growing international presence’.<sup>39</sup>

Article 3(2) TFEU is then complemented and expanded upon under Article 216(1) TFEU that:

‘[t]he Union may conclude an agreement with one or more third countries or international organisations where the treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the union's policies, one of the objectives referred to in the treaties, or is provided for in a legally binding union act or is likely to affect common rules or alter their scope’.

While Article 216(1) TFEU does not specify if this competence is a shared competence or an exclusive competence, it does indicate that exclusive competence will arise when the agreement has the potential to impact the common rules of the EU or risks of alterations of their scope.

Scholars have noted that while this list of competences has not fully clarified the division of competence between the EU and the Member States,<sup>40</sup> the current position is still a significantly clear process.<sup>41</sup> With scholars further suggesting that together with Article 3(2) TFEU, ‘Art 216(1) TFEU renders explicit the doctrine of implied powers’.<sup>42</sup> While it has been put forward that Article 216(1) TFEU could

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<sup>39</sup> Marise Cremona, ‘Allocation of Competences in the Field of External Relations’ in Loïc Azoulay (ed), *The Question of Competence in the European Union* (Oxford University Press, 2014) 68. Also see Alan Dashwood and Joni Heliskoski, ‘The Classic Authorities Revisited’ in Alan Dashwood and Christophe Hillion (eds), *The General Law of EC External Relations* (Sweet and Maxwell, 2000) 6.

<sup>40</sup> Allan Rosas, ‘Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?’ in Inge Govaere, Erwan Lannon, Peter Van Elsuwege, and Stanislas Adam (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Leiden: Martinus Nijhoff Publishers 2013).

<sup>41</sup> Friedrich Erlbacher, ‘Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty’ CLEER Working Paper 2017/2, 9.

<sup>42</sup> *Inter alia* Marise Cremona, ‘Allocation of Competences in the Field of External Relations’ in Loïc Azoulay (ed), *The Question of Competence in the European Union* (Oxford University

eventually be interpreted to show the close link which is required for the powers to achieve a key objective of the EU to be exercised in an exclusive competence, the current case law suggests this is not a requirement by the text itself.<sup>43</sup>

Additionally, as it will be further discussed in section 5, Article 21 TEU sets out the principles and objectives that guide the external action and explicitly requires the observation of these principles and objectives in the external action in areas such as the CCP.

‘The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law’.<sup>44</sup>

Article 21 provides both a set of principles and a list of objectives.<sup>45</sup> While the EU has the competence to act on these objectives,<sup>46</sup> there are lingering questions over the strict obligation to do so. Asteriti notes that:

‘there was ambiguity regarding the substantive value of the “objectives”, the lack of legal basis for any specific action and the extent of the duty, as opposed to the capacity, to undertake any action’.<sup>47</sup>

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Press. 2014) 73.

<sup>43</sup> Judgment of the Court of 5 November 2002, *Commission v Germany*, Case C-476/98, EU:C:2002:631.

<sup>44</sup> Article 21(1) TEU.

<sup>45</sup> Article 21(2) TEU explicitly states ‘[t]he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order’. However, the majority of such areas are outside the scope of this thesis.

<sup>46</sup> The degree of this competence and its expansion is discussed below.

<sup>47</sup> Alessandra Asteriti ‘Article 21 TEU and the EU’s Common Commercial Policy: A Test of Coherence’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 124.

However, Asteriti also notes how these objectives are given a “bite” by the insertion of the essential elements clause[s]<sup>48</sup> during the negotiation of various trade agreements.<sup>49</sup>

### **3. The Common Commercial Policy**

The evolution of trade-related external competences, as already mentioned above, centres on the CCP as a core legal basis for undertaking trade commitments externally. This section focuses on the CCP and the CJEU relevant jurisprudence, with a particular view of highlighting its scope and limits.

#### ***3.1. Introductory Remark.***

In line with Article 3(1) TFEU, the EU is granted the exclusive competence over the CCP under Articles 206 and 207 TFEU. Article 206 TFEU briefly sets the objectives for the CCP, that:

‘[b]y establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers’.

This is the given explicit effect and scope of operation under Article 207 TFEU.

‘1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

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<sup>48</sup> Alessandra Asteriti ‘Article 21 TEU and the EU’s common commercial policy: a test of coherence’, in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 127.

<sup>49</sup> This ‘bite’ is discussed below in Part III.

2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy’.

The importance of the CCP as a ‘prime specimen of an exclusive external competence’ cannot be overstated.<sup>50</sup> Some describe the CCP as ‘the most supranational, and the most successful of the EU’s external policies, through which it demonstrates real weight and influence in the world’.<sup>51</sup> Despite its prominence,<sup>52</sup> the CPP and more precisely, the scope of the CCP, has not been unquestioned. By contrast, the extent to which the EU could act under the CCP has been subject to a high level of debate over the course of its evolution<sup>53</sup> within the broader discussion on the scope of EU’s powers, and on the application of the principle of conferral in the EU external action.

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<sup>50</sup> Henri de Waele, *Layered Global Player Legal Dynamics of EU External Relations* (Springer 2011) 10.

<sup>51</sup> Marise Cremona, ‘The Changing Nature of the EU’s Common Commercial Policy’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 4. See also Joris Larik, ‘Sincere Cooperation in the Common Commercial Policy: Lisbon, A ‘Joined-Up’ Union, and ‘Brexit’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 84. Larik describes the CCP as the ‘most unequivocal manifestation of the Union as a power in international affairs and global governance’.

<sup>52</sup> Allan Rosas, ‘EU External Relations: Exclusive Competence Revisited’ 38 *Fordham International Law Journal* 1073, 1074.

<sup>53</sup> See generally, Jacques H.J. Bourgeois, ‘External Relations Powers of the European Community’ (1999) 22(6) *Fordham International Law Journal* 149; Rafael Leal-Arcas, ‘Is EC Trade Policy Up to Par?: A Legal Analysis Over Time –Rome Marrakesh, Amsterdam, Nice, and the Constitutional Treaty’ (2007) 13 *Colombia Journal of European Law* 305; Ramses A. Wessel and Tamara Takács, ‘Constitutional Aspects of the EU’s Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament’ (2017) 28(2) *European Business Law Review* 103. Frederic van den Berghe, ‘The EC’s Common Commercial Policy Revisited: What Does Lisbon Add?’ (2009) 4(9) *Global Trade and Customs Journal* 275; Marise Cremona, ‘EC External Commercial Policy after Amsterdam: Authority and Interpretation within Interconnected Legal Orders’ in J.H.H. Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford University Press, 2000); Youri Devuyst, ‘The European Union’s Competence in International Trade after the Treaty of Lisbon’ (2011) 39 *Georgia Journal of International and Comparative Law* 645; Angelos Dimopoulos, ‘The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy’ (2010) 15 *European Foreign Affairs Review* 153, 153; Sophie Meunier and Kalypso Nicolaïdis, ‘Who Speaks for Europe? The Delegation of Trade Authority in the EU’ (1999) 37 *Journal of Common Market Studies* 477; Christoph Herrmann, ‘Common Commercial Policy After Nice: Sisyphus Would Have Done A Better Job’ (2002) 39 *Common Market Law Review* 7; Panos Koutrakos, ‘I Need to Hear You Say It’: Revisiting the Scope of the Common Commercial Policy’ (2003) 22 *Yearbook of European Law* 409.

However, the debate of the existence and extent of an external competence has also direct consequences for the decision-making process of the EU.<sup>54</sup> In particular, whether the matter at hand would fall within the scope of the CCP is thus essential to determine whether or not the Commission would act as the sole negotiator on behalf of the EU in the respective international agreement.<sup>55</sup> While the Treaty of Lisbon explicitly states the Commission's competence in the area of external representation,<sup>56</sup> in cases of mixed agreements the Commission acts alongside the Member States.

In case of agreements falling under the CCP, hence, the EU acts alone, with the Commission negotiating the agreement further having been empowered by the Council by means of a decision. Once an agreement has reached the final stage, the Council further having obtained the consent from the Parliament,<sup>57</sup> vote on the agreement under the CCP.<sup>58</sup> This procedure (which gives prominence to the Commission in the negotiation) has prompted the Commission itself to favour the broader interpretation of the CCP.<sup>59</sup>

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<sup>54</sup> Marise Cremona, 'The Changing Nature of the EU's Common Commercial Policy' in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 9. Cremona notes that '[i]n a sense the very existence of the CCP reflects the needs of the common market or internal market; without uniform rules on import and exports, internal frontier-free movement of goods and services cannot be fully achieved'.

<sup>55</sup> TFEU Article 207(3); Frank Hoffmeister, 'The Contribution Of EU Practice To International Law' in Marise Cremona (ed), *Developments in EU external relations law*, (Oxford University Press, 2008); Sophie Meunier and Kalypso Nicolaidis, 'The European Union As A Trade Power' in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (Oxford University Press, 2005) 254-257; Stephen Woolcock, 'Trade Policy: A further shift towards Brussels' Helen Wallace, Mark A. Pollack, and Alasdair R. Young (eds), *Policy-Making in the European Union* (Oxford University Press, 6<sup>th</sup> edition, 2010) 388-89.

<sup>56</sup> With an exception or the CFSP.

<sup>57</sup> Articles 207(3)–(4) TFEU and Article 218(6) TFEU.

<sup>58</sup> To do so, the Council must have a qualified majority on the vote. This requirement, in agreements deemed shared competence, require 'common accord of the MS', preventing the majority decision, allowing a single Member States a veto that mixed trade agreements require the agreement of the Member State, was written into the EC This is no longer present in the TFEU.

<sup>59</sup> See generally Jacques H.J. Bourgeois, 'External Relations Powers of the European Community' (1999) 22(6) *Fordham International Law Journal* 149; Rafael Leal-Arcas, 'Is EC trade Policy Up to Par?: A Legal Analysis Over Time –Rome Marrakesh, Amsterdam, Nice, and the Constitutional Treaty, (2007)] 13 *Colombia Journal of European Law* 305; Ramses A. Wessel and Tamara Takács, 'Constitutional Aspects of the EU's Global Actorness: Increased Exclusivity in Trade and Investment and the Role of the European Parliament' (2017) 28(2) *European Business Law Review* 103; Sophie Meunier and Kalypso Nicolaidis, 'The European Union As A Trade Power' in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (Oxford University Press, 2005) 254-257.

To date, the boundaries of the CCP remain vague, for three reasons.<sup>60</sup> Firstly, due to the somewhat ambiguous origin of the CCP under the original Treaty of Rome.<sup>61</sup> Secondly, due to the long history of the Member States' resistance to the EU acting as a single actor at the international level.<sup>62</sup> Finally, due to the CJEU's failure to provide a comprehensive definition of the CCP.<sup>63</sup> This has led to a high level of discussion (and often conflict) between the Commission and the Council. On the one hand, the Commission argues in favour of the broad interpretation of the CCP, with the intention of avoiding the issue of shared competence. On the other hand, the Council insists on the direct involvement of the Member States.<sup>64</sup>

### ***3.2. The Developing Scope of the Common Commercial Policy from Rome to Lisbon***

The exclusive nature of the CCP competence has never been questioned by the CJEU,<sup>65</sup> which has consistently held that this is in line with the 'defence of the common interests of the Community'.<sup>66</sup> To do otherwise would permit, and likely encourage, the Member States to exercise concurrent and contradictory powers. Furthermore, the CJEU suggested such action would go against the very principle

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<sup>60</sup> Youri Devuyt, 'The European Union's Competence in International Trade After the Treaty of Lisbon' (2011) 39 Georgia Journal of International and Comparative Law 639.

<sup>61</sup> Stephen Woolcock, 'Trade Policy: A Further Shift Towards Brussels' Helen Wallace, Mark A. Pollack, and Alasdair R. Young (eds), *Policy-Making in the European Union* (Oxford University Press, 6<sup>th</sup> edition, 2010) 384.

<sup>62</sup> See generally Sophie Meunier and Kalypso Nicolaïdis, 'The European Union As a Conflicted Trade Power' (2006) 13(6) Journal of European Public Policy 906; Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Trade Power' in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (Oxford University Press, 2005) 247.

<sup>63</sup> Panos Koutrakos, *EU International Relations*, (Hart 2006); David L. Scannell, 'Trespassing on Sacred Ground: The Implied External Competence of The European Community' (2001) 4 Cambridge Yearbook of International Law 343.

<sup>64</sup> Sophie Meunier and Kalypso Nicolaïdis, 'The European Union As a Conflicted Trade Power' (2006) 13(6) Journal of European Public Policy 906; Sophie Meunier and Kalypso Nicolaïdis, 'The European Union as a Trade Power' in Christopher Hill and Michael Smith (eds), *International Relations and the European Union* (Oxford University Press, 2005) 247.

<sup>65</sup> Opinion of the Court of 4 October 1979, *Accord international sur le caoutchouc naturel*, Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - *International Agreement on Natural Rubber*, EU:C:1979:224, paragraph 9 '[the council recalled] that the exclusive nature of community powers in the matter of commercial policy is not in question'.

<sup>66</sup> Youri Devuyt, 'The European Union's Competence in International Trade After the Treaty of Lisbon' (2011) 39 Georgia Journal of International and Comparative Law 646.

of the EU.<sup>67</sup> However, the CJEU has been called upon to decide what matters fall within the CCP.

The Treaty of Rome did not provide a precise definition of the CCP. Rather it laid down that the CCP should lay down a series of uniform principles:

‘particularly in regards to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in case of dumping or subsidies’.<sup>68</sup>

This non-exhaustive list of examples was later given as one of the grounds for criticising the poor drafting of legal instruments levied at the early days of the EU.<sup>69</sup> Some scholars claimed that ‘[m]ore than any other type of power, an exclusive power requires a comprehensive definition of its *ratio materiae*’.<sup>70</sup> Others would later praise the decision of the CJEU for its ‘broad, coherent and comprehensive view of the CCP’.<sup>71</sup> The CJEU, in *Opinion 1/78*,<sup>72</sup> held that the EU was empowered to develop a commercial policy, based on the provisions of the uniform principles,<sup>73</sup> thus highlighting that the question of external trade must be addressed from a wide perspective. The CJEU also alluded to the fact that a restrictive interpretation of the CCP would have created a strong risk for the distortion of intra-EU trade by way of disparities and would continue to exist in relation to economic developments with Third Countries.<sup>74</sup>

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<sup>67</sup> Opinion of the Court of 11 November 1975, *Opinion given pursuant to Article 228 (1) of the EEC Treaty*, Opinion 1/75, EU:C:1975:145, paragraph 1364.

<sup>68</sup> Article 113(1) TEC.

<sup>69</sup> Stephen Woolcock, ‘Trade Policy: A Further Shift Towards Brussels’ Helen Wallace, Mark A. Pollack, and Alasdair R. Young (eds), *Policy-Making in the European Union* (Oxford University Press, 6<sup>th</sup> edition, 2010) 388-89.

<sup>70</sup> *Inter alia* Youri Devuyt, ‘The European Union’s Competence in International Trade after the Treaty of Lisbon’ (2011) 39 *Georgia Journal of International and Comparative Law* 641 citing Claus-Dieter Ehlermann, ‘The Scope of Article 113 of the EEC Treaty, in *Etudes de droit des Communautés Européennes, Mélanges offerts à Pierre-Henri Teitgen*, (Paris: Paten, 1984).

<sup>71</sup> Youri Devuyt, ‘The European Union’s Competence in International Trade After the Treaty of Lisbon’ (2011) 39 *Georgia Journal of International and Comparative Law* 647; Piet Eeckhout, ‘*External relations of the European Union: Legal and Constitutional Foundations*’ (Oxford University Press 2004)16–18.

<sup>72</sup> Opinion of the Court of 4 October 1979, *Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty*, Opinion 1/78, EU:C:1979:224.

<sup>73</sup> Opinion of the Court of 4 October 1979, *Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty*, Opinion 1/78, EU:C:1979:224, paragraph 45.

<sup>74</sup> Opinion of the Court of 4 October 1979, *Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty*, Opinion 1/78, EU:C:1979:224, paragraph 45.

Towards the end of the Uruguay Round of the GATT negotiations, the EU faced the issue of a contested competence as to whether it had exclusive competence in the fields of trade in services and the TRIPS Agreement.<sup>75</sup> The Commission claimed exclusive competence over the Uruguay Round and the conclusion of TRIPS under the *ERTA* doctrine. The Member States rejected the exclusive competence, suggesting that they needed some agency in the negotiation to protect interests in these fields.<sup>76</sup> This led to *Opinion 1/94*,<sup>77</sup> where the CJEU assessed the competence under the CCP and the ability of the EU to conclude the WTO Agreement.<sup>78</sup> In *Opinion 1/94*, the CJEU departed from its previous view of the CCP in *Opinion 1/78* and took a narrow stance on the implied external competence doctrine to limit the scope of the CCP to certain aspects of the Uruguay Round. This narrow interpretation included trade in goods, cross-frontier trade in commercial presence through a subsidiary or a branch, presence of natural persons abroad, and measures taken at the external frontiers of the Community regarding the prohibition of the release into free circulation of counterfeit goods (however the TRIPS progress made during the Uruguay Round was excluded). In doing so, the CJEU also rejected the Commission's argument that 'the harmonisation achieved within the Community in certain areas covered by TRIPS is only partial and that, in other areas, no harmonisation has been envisaged'.<sup>79</sup> This finding shows that a fine line between the competence of the EU and the Member States must be drawn, applying what may be called a 'harmonisation' or 'legislative test'. A major problematic area within the CJEU's Opinion was that certain international agreements required the ratification by both the Member States and the EU. To mitigate this conflict and maintain EU unity at the international level, the CJEU sought to stress the 'close cooperation between the Member States and the Community institutions, both in

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<sup>75</sup> Pieter J. Kuijper, 'The Conclusion and Implementation of the Uruguay Round Results by the European Community' (1995) 6 *European Journal of International Law* 222.

<sup>76</sup> *Ibid*, 223.

<sup>77</sup> Opinion of the Court of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, EU:C:1994:384

<sup>78</sup> The exclusive competence of the EU, in most if not all matters, was heavily contested by the Council and the MS, primarily grounded in the rationale that the limitation on the CCP was to ensure it would not become a loophole for the EU to get around other legal basis and lead to the harmonisation of internal matters within having the legal basis to bring about such changes.

<sup>79</sup> Opinion of the Court of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, EU:C:1994:384, paragraph 103.

the process of negotiation and conclusion and in the fulfilment of the commitments entered into'.<sup>80</sup>

The Treaty of Amsterdam sought to 'rectify the situation',<sup>81</sup> and Article 133(5) EC Treaty empowered the Council to extend the scope and application of the CCP procedures to cover agreements on services and IP. This development was not a formalised extension of the CCP. It did allow the CCP to 'also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property'.<sup>82</sup> Article 133(6) of the EC Treaty as amended by the Treaty of Nice then required that:

'agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services, shall fall within the shared competence of the Community and its Member States. Consequently, in addition to a Community decision taken in accordance with the relevant provisions of Article 300, the negotiation of such agreements shall require the common accord of the Member States. Agreements thus negotiated shall be concluded jointly by the Community and the Member States'.

While the Treaty of Nice was a step forward, the result was seen as 'complex and far from satisfactory to ensure an efficient and effective EU voice in international trade diplomacy'.<sup>83</sup>

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<sup>80</sup> Opinion of the Court of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, EU:C:1994:384, paragraph 108.

<sup>81</sup> Marise Cremona, 'EC External Commercial Policy After Amsterdam: Authority and Interpretation Within Interconnected Legal Orders' in Joseph H.H Weiler (ed), *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?* (Oxford University Press, 2000); Rafael Leal-Arcas, 'Is EC trade Policy Up to Par?: A Legal Analysis Over Time – Rome Marrakesh, Amsterdam, Nice, and the Constitutional Treaty' (2007) 13(2) *Colombia Journal of European Law*, 305.

<sup>82</sup> EC Treaty (Nice) Article 133(5).

<sup>83</sup> Youri Devuyt, 'The European Union's Competence in International Trade After the Treaty of Lisbon' (2011) 39 *Georgia Journal of International and Comparative Law* 651. See generally Marise Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy After Nice' (2002) 4 *Cambridge Yearbook of European Legal Studies* 61; Christoph Herrmann, 'Common Commercial Policy After Nice: Sisyphus Would Have Done a Better Job' (2002) 39 *Common Market Law Review* 7; Rafael Leal-Arcas, 'Is EC Trade Policy Up To Par?: A Legal Analysis Over Time – Rome Marrakesh, Amsterdam, Nice, and the Constitutional Treaty, (2007) 13(2) *Colombia Journal of European Law*, 305.

The CJEU jurisprudence partially reflects the complex relationship between EU law and WTO law. In *Opinion 1/08*,<sup>84</sup> the Court held that the WTO trade agreements relating to transport services would be a shared competence. According to de Waele, even if '[t]o the mind of the courts, Intellectual Property rights did not relate specifically to international trade, these affect internal trade just as much (if not more)'.<sup>85</sup> In this connection, it is worth highlighting that, concurrent to the foundation and development of the relationship between the EU and the WTO has also developed, but not without challenges being defined as 'a history of sailing into troubled waters'.<sup>86</sup> While its merits were immediately acknowledged, 'this watershed in global economic governance came at a price'.<sup>87</sup> In both *Christian Dior*,<sup>88</sup> and *Merck Genéricos*,<sup>89</sup> the CJEU examines the question of competence of a field which had not yet been delegated, thus falls within the competence of the Member States. In such instances, the CJEU found that the protection of IPRs and measures adopted for that purpose did not fall within the scope of the former EC. During the early days of this turbulent relationship, the Court faced the question of the EU's competence in relation to the GATT. The failure to include the EU within GATT negotiations would have led to its collapse.<sup>90</sup>

As mentioned in Chapter Two, in *International Fruit Company*,<sup>91</sup> the CJEU held that the EU had assumed the powers of the Member States in relation to areas within

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<sup>84</sup> Opinion of the Court of 30 November 2009, *Opinion pursuant to Article 300(6) EC*, Opinion 1/08, EU:C:2009:739. In which the CJEU had considered the scope of the CCP should reflect the scope of WTO Agreements.

<sup>85</sup> Henri de Waele, *Layered Global Player Legal Dynamics of EU External Relations* (Springer 2011) 69

<sup>86</sup> Miquel Montañá i Mora, 'The Practical Consequences of the CJEU Judgment of 18 July 2013 Changing Its Doctrine on the Respective Competences of the EU and its Member States to Apply the TRIPS Agreement: Have We Seen the Tip of the Daiichi Iceberg Yet?' (2017) 48(7) *International Review of Intellectual Property and Competition Law* 784, 785.

<sup>87</sup> Joris Larik, 'No mixed feelings: The post-Lisbon Common Commercial Policy in Daiichi Sankyo and Commission v. Council (Conditional Access Convention)' (2015) 52 *Common Market Law Review* 779, 779.

<sup>88</sup> Judgment of the Court of 14 December 2000, *Dior and Others*, Case C-300/98, EU:C:2000:688.

<sup>89</sup> Judgment of the Court of 11 September 2007, *Merck Genéricos*, Case C-431/05, EU:C:2007:496, however, this was more so in relation to the direct applicability of TRIPS, but failure to account for this could have had a knock-on effect to GATT, hence its inclusion here.

<sup>90</sup> Miquel Montañá i Mora, 'The Practical Consequences of the CJEU Judgment of 18 July 2013 Changing Its Doctrine on the Respective Competences of the EU and its Member States to Apply the TRIPS Agreement: Have We Seen the Tip of the Daiichi Iceberg Yet?' (2017) 48(7) *International Review of Intellectual Property and Competition Law* 784, 787 citing Guy de Lacharrière, 'L' Examen par le GATT du Traité de Rome instituant la Communauté Economique Européenne' (1958) *Annuaire Français de Droit International Année 4* 621,634.

<sup>91</sup> Judgment of the Court of 13 May 1971, *NV International Fruit Company and others v*

the scope of GATT. The EU had become the successor to the Member States in those areas. The question then turned to whether the GATT norms would have a direct effect on the EU and the Member States or would some legalisation be required. The CJEU looked to the flexibilities afforded by the GATT provisions, finding they would not have a direct effect, and for this reason, they could not be used as a parameter to assess the validity of EU measures allegedly in breach of them.<sup>92</sup> The CJEU has since softened this stance, allowing the use of GATT provisions as a parameter for the validity of EU measures.<sup>93</sup> Firstly, in instances where the EU measures in question make an explicit reference to GATT provisions.<sup>94</sup> Secondly, if the EU intended to implement a GATT obligation.<sup>95</sup>

Following the creation of the WTO as the successor to GATT, the question once again arose regarding the position of provisions and norms in the EU legal order. In *Portugal v. Council*,<sup>96</sup> the CJEU stuck to its earlier position and refused the direct effect of international trade agreements on the EU legal order.<sup>97</sup> The CJEU was said to have ignored the academic criticism of the decision of this finding and upheld its

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*Commission of the European Communities*, Joined Cases 41-44/70, EU:C:1971:53.

<sup>92</sup> A similar outcome relating to bilateral trade agreements was found in Judgment of the Court of 30 April 1974, *Haegeman v. Belgian State*, Case 181/73, EU:C:1974:41; Judgment of the Court of 9 February 1982, *Polydor Limited and RSO Records Inc. v Harlequin Records Shops Limited and Simons Records Limited*, Case 270/80, EU:C:1982:43.

<sup>93</sup> If neither of the two conditions arose, then the CJEU would continue to uphold International Fruit Company, as seen in Judgment of the Court of 5 October 1994, *Federal Republic of Germany v Council of the European Union*, Case C-280/93, EU:C:1994:367.

<sup>94</sup> Judgment of the Court of 22 June 1989, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities*, Case 70/87, EU:C:1989:254.

<sup>95</sup> - Judgment of the Court of 7 May 1991, *Nakajima All Precision Co. Ltd v Council of the European Communities*, Case C-69/89, EU:C:1991:186.

<sup>96</sup> Judgment of the Court of 23 November 1999, *Portuguese Republic v Council of the European Union*, Case C-149/96, EU:C:1999:574. While the issue at hand related to the human right provision, the important element was the consistency of the CJEU refusing the direct effect on the legal order.

<sup>97</sup> The CJEU held two lines of logic for this decision, firstly, the agreements didn't clarify their method of enforcement regarding dispute or non-compliance by WTO members and secondly, other WTO member nations would not agree to adopting of WTO norms in their own legal order, thereby placing the EU at a competitive disadvantage if the CJEU was compelled to follow WTO decisions while other Courts were not.

line of logic in subsequent case law.<sup>98</sup> However, in *Hermès*,<sup>99</sup> the CJEU did highlight the indirect effect of international provisions, stemming from the requirement of EU rules to be interpreted in light of its international obligations under the GATT and WTO Agreements.<sup>100</sup> However, scholars noted that ‘it is no substitute to direct effect when it comes to legality review’.<sup>101</sup> Ultimately, it is left to the political institutions of the EU to ensure compliance with its own international trade obligations and rules, and it has been seen the political institutions are acting in a positive and proactive manner with regard to the WTO norms receiving ever-increasing prominent roles in the legislative process.

While the Constitutional Treaty did not enter into force, the developments it made in relation to the CCP were carried over and adapted to the Treaty of Lisbon. The relevant subsections of Article 207 TFEU on the CCP are identical to that of the Constitutional Treaty’s Article III-315. As a result of this constitutional development, the commercial aspects of IP and Foreign Direct Investment were then fully integrated into the CCP.<sup>102</sup> However, they will still be subject to the rules for concluding the agreement as stated under Article 207(4) TFEU. The latter provision requires that ‘the Council shall act unanimously where such agreements include provisions for which unanimity is required for the adoption of internal rules’.<sup>103</sup>

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<sup>98</sup> See, respectively, Judgment of the Court of 4 November 1997, *Parfums Christian Dior v Evora*, Case C-337/95, EU:C:1997:517; Judgment of the Court of 12 March 2002, *Omega Air and Others*, Joined Cases C-27/00 and C-122/00, EU:C:2002:161; Judgment of the Court of 30 September 2003, *Biret International v Council*, Case C-93/02, EU:C:2003:517, Case T-18/99, *Cordis Obst und Gemuse Großhandel GmbH v Commission*; Judgment of the Court of 9 September 2008, *FIAMM and Others v Council and Commission*, Joined cases Case C-120/06 P and C-121/06 P, EU:C:2008:476; Judgment of the Court of First Instance of 12 July 2001, *T. Port v Council*, Case T-2/99, EU:T:2001:186, Judgment of the Court of First Instance of 14 December 2005, *Beamglow v Parliament and Others*, Case T-383/00, EU:T:2005:453.

<sup>99</sup> Judgment of the Court of 16 June 1998, *Hermès International v FHT Marketing Choice*, Case C-53/96, EU:C:1998:292.

<sup>100</sup> Judgment of the Court of 4 November 1997, *Parfums Christian Dior v Evora*, Case C-337/95, EU:C:1997:517.

<sup>101</sup> Henri de Waele, *Layered Global Player Legal Dynamics of EU External Relations* (Springer 2011) 74.

<sup>102</sup> Marc Bungenberg, ‘Going Global? The EU Common Commercial Policy After Lisbon’ (2010) 1 *European Yearbook of International Economic Law* 123, 132; Angelos Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Policy’ (2008) 4 *Croatian Yearbook European Law and Policy* 101.

<sup>103</sup> Youri Devuyt, ‘The European Union’s Competence in International Trade after the Treaty of Lisbon’ (2011) 39 *Georgia Journal of International and Comparative Law* 639, 653-654. Devuyt further notes that this is a less restrictive requirement than under the Treaty of Nice, which required ‘unanimity for agreements in trade in services and IP relating to a field in which when the [EU] had not yet exercised its powers by adopting internal rules’.

### 3.3. *The Current Scope and Limits of the Common Commercial Policy*

The evolution of the CCP traced above shows, as discussed, an extension of the scope of this external competence. Cremona puts forward that the Treaty of Lisbon created an even closer link between the CCP and the internal policies of the EU, in particular, the internal market.<sup>104</sup> However, in the *Conditional Access Case*,<sup>105</sup> the CJEU reiterated that:

‘it follows from Article 207(1) TFEU – and, in particular, from the second sentence of that provision, in the words of which the common commercial policy belongs within the context of ‘the Union’s external action’ – that the common commercial policy relates to trade with non-member countries, not to trade in the internal market’.<sup>106</sup>

Cremona also notes that the extent *ratione materiae* of the CCP is still subject to limitations.<sup>107</sup> The Court has considered falling into the CCP those issues that are related to trade, i.e. an ‘immediate and direct effect on trade’. Most recently in *Opinion 2/15*,<sup>108</sup> the Court, citing its previous case law, held that it is:

‘settled case-law that the mere fact that an EU act, such as an agreement concluded by it, is liable to have implications for trade with one or more third States is not enough for it to be concluded that the act must be classified as falling within the common commercial policy. On the other hand, an EU act falls within that policy

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<sup>104</sup> Marise Cremona, ‘The Changing Nature of the EU’s Common Commercial Policy’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 5. Cremona further notes that will the CCP and internal policies are close, this is not a perfect ratio or transfer. That ‘the CCP is not simply a conduit for transmitting internal policy priorities into external policy-making; we cannot see the CCP as simply an extension of the internal market into the external sphere’.

<sup>105</sup> Judgment of the Court of 22 October 2013, *Commission v Council (Conditional Access)*, Case C-137/12, ECLI:EU:C:2013:675.

<sup>106</sup> *Ibid*, paragraph 56.

<sup>107</sup> Marise Cremona, ‘The Changing Nature of the EU’s Common Commercial Policy’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 5. Cremona further notes that will the CCP and internal policies are close, this is not a perfect ratio or transfer. That ‘the CCP is not simply a conduit for transmitting internal policy priorities into external policy-making; we cannot see the CCP as simply an extension of the internal market into the external sphere’.

<sup>108</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376.

if it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it'.<sup>109</sup>

Over the last decade and a half, ever-increasing importance has been placed on IP matters within broader trade agreements,<sup>110</sup> and also within the CCP, through the extension of its scope to encompass the commercial aspects of IP. Scholars note, by way of analogy to the increased scope of trade in service,<sup>111</sup> that it can be assumed the CCP coverage of the commercial aspects of IP includes the TRIPS Agreement.<sup>112</sup> Furthermore, as the purpose of the expansion of the CCP to include commercial aspects of IP was to increase the EU's effectiveness in the development of trade agreements, it would be appropriate to ensure a dynamic interpretation of the Treaty provision existed.<sup>113</sup>

The limitations of the CCP have, however, become extremely visible in connection with the recent negotiation of both CETA and TTIP, but also of the new generation of EU FTAs which:

‘exemplifies the continuing importance of trade policy and illustrates the close connection and tension between EU external economic policy, its broader foreign policy objectives and its own internal policy preferences’.<sup>114</sup>

With regard to the CETA negotiations, for example, in June 2016, the Luxembourg Parliament, the Dutch Parliament, and Hungarian Parliament took the position that that agreement was mixed and could not be ratified by the EU alone under the CCP legal basis. This followed a position adopted by the Council classifying CETA as

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<sup>109</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraph 36.

<sup>110</sup> As discussed below in Part III.

<sup>111</sup> See generally Markus Krajewski, *Of Modes and Sectors: External Relations, Internal Debates, and the Special Case of (Trade in) Services, in Law* in Marise Cremona (ed), *Developments in EU External Relations Law*, (Oxford University Press, 2008) 193–94.

<sup>112</sup> Angelos Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Policy’ (2008) 4 *Croatian Yearbook European Law and Policy* 101,108.

<sup>113</sup> Angelos Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Policy’ (2008) 4 *Croatian Yearbook European Law and Policy* 101,109.

<sup>114</sup> Marise Cremona, ‘The Changing Nature of the EU’s Common Commercial Policy’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 5. These newer FTAs are discussed in Chapter Six Section 3.

an agreement covering mixed EU and Member State competences.<sup>115</sup> The bone of contention concerned, not IP matters, but rather foreign direct investment. The CJEU held, in *Opinion 2/15* on the EU-Singapore agreement, that in accordance with Article 207(1) TFEU EU, acts concerning ‘foreign direct investment’ fall within the common commercial policy. According to the Court:

‘[t]his definition of the scope of the common commercial policy so far as concerns foreign investment reflects the fact that any EU act promoting, facilitating or governing participation — by a natural or legal person of a third State in the European Union and vice versa — in the management or control of a company carrying out an economic activity is such as to have direct and immediate effects on trade between that third State and the European Union, whereas there is no specific link of that kind with trade in the case of investments which do not result in such participation’.<sup>116</sup>

Only non-direct foreign investment falls out of the EU exclusive competence.<sup>117</sup> A limitation to the scope of the CCP also stems from Article 207(6) TFEU, which states that:

‘[t]he exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation’.

A cursory glance of this provision could be viewed as prohibiting the adoption of external measures under the CCP, which would be beyond the measures which could be adopted based on internal competence or venture to fields in which internal harmonisation was intentionally excluded.<sup>118</sup> However, this is not the case.<sup>119</sup>

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<sup>115</sup> David Kleinmann and Gesa Kübek, ‘The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15’ (2018) 45(1) *Legal Issues of Economic Intergration* 13.

<sup>116</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraph 84.

<sup>117</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraphs 236-238.

<sup>118</sup> Jan Ceysens, ‘Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution’ (2005) 32 *Legal Issues Economic Integration* 259, 279–81.

<sup>119</sup> Angelika Hable, ‘The European Constitution and the Reform of External Competences’ in Lenka Rovna and Wolfgang Wessels (eds), *EU Constitutionalisation: From the Convention to the Constitutional Treaty 2002-2005: Anatomy, Analysis, Assessment*

Firstly, it cannot be interpreted as to establish a parallelism between the internal and external competence, similar to the CJEU's restrictive application in *Opinion 1/94*.<sup>120</sup> Secondly, Article 207(6) TFEU cannot be interpreted as preventing the adoption of measures under the CCP that would interfere with fields, such as cultural and health services, where international harmonisation was excluded, as to do so would be contrary to the exclusion in the first place.<sup>121</sup> Third and finally, Article 207(6) TFEU is only meant 'to delimit the external from the internal sphere' and 'to prevent the exclusive character of the powers under the CCP encroaching upon the internal delimitation of competences'.<sup>122</sup> This means that the EU may include in international agreements issues that are outside the scope of its internal competence (e.g. health services), but this will not lead the EU to acquire internal competence on the matters. In other words, Article 207(6) TFEU serves a limitation on the internal application of CCP applicable agreements.<sup>123</sup> Scholars have also described provision as allowing the EU to implement international agreements as far as it enjoys internal legislative competence. Otherwise, the EU requires the Member States to implement international agreements.<sup>124</sup>

#### **4. The European Union External Competences on Intellectual Property Matters: The Road towards Exclusivity**

As mentioned above, IP matters have come to fall within the CCP. Originally IP was considered as part of the general competence for property and international trade. Under the Treaty of Nice, the 'commercial aspects of IP' were specifically

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(European Institute for European Policy, 2006) 171–76

<sup>120</sup> Opinion of the Court of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, EU:C:1994:384.

<sup>121</sup> Markus Krajewski, 'Of Modes and Sectors: External Relations, Internal Debates, and the Special Case of (Trade in) Services, in law' in Marise Cremona (ed), *Developments in EU External Relations Law*, (Oxford University Press, 2008) 194.

<sup>122</sup> Angelika Hable, 'The European Constitution and the Reform of External Competences' in Lenka Rovna and Wolfgang Wessels (eds), *EU Constitutionalisation: From the Convention to the Constitutional Treaty 2002-2005: Anatomy, Analysis, Assessment* (European Institute for European Policy, 2006) 174.

<sup>123</sup> Markus Krajewski, 'Of Modes and Sectors: External Relations, Internal Debates, and the Special Case of (Trade in) Services, in law' in Marise Cremona (ed), *Developments in EU External Relations Law*, (Oxford University Press, 2008) 194.

<sup>124</sup> Markus Krajewski, 'Of Modes and Sectors: External Relations, Internal Debates, and the Special Case of (Trade in) Services, in law' in Marise Cremona (ed), *Developments in EU External Relations Law*, (Oxford University Press, 2008) 194.

mentioned to fall within the scope of the CCP.<sup>125</sup> This explicit competence over the ‘commercial aspects of IP’ was then retained under Article 207(1) TFEU. While the competence over IP is an expressed competence, there remain questions over the precise scope of the commercial aspect. This uncertainty concerned the extent to which the EU can act alone on IP matters, in particular, the extent (and the exclusivity) of EU competences in the field of IP. Cremona succinctly summarises this uncertainty as:

‘the procedural clash between “EU-only” and “mixity”’: the question whether an international agreement is to be concluded by the EU alone, or alternatively, may or must include the Member States as contracting parties in their individual capacity’.<sup>126</sup>

This was particularly evident in the interpretation of IP within the context of Article 207(1) TFEU and Article 3(2) TFEU. The CJEU has discussed the matter in a series of cases, the most important of which are discussed below, and the picture that appears is that IP matters fall within the exclusive competence of the EU, either by being part of the CCP, or in light of the ERTA doctrine and by virtue of Article 3(2) TFEU

#### ***4.1. Daiichi Sankyo: The Commercial Aspects of Intellectual Property as part of the Common Commercial Policy***

One of the most prominent cases in this respect is *Daiichi Sankyo*.<sup>127</sup> This case centred on a request for a preliminary ruling regarding the of Articles 27 and 70 of TRIPS and the marketing of a generic medical product whose active ingredient was a substance allegedly patented by Daiichi Sankyo. The CJEU was called to examine if the TRIPS provisions fell within a field for which the Member States have a shared competence and, in examining this question, the CJEU examined the scope of the CCP. The Commission, as the intervening party, argued that TRIPS was fully

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<sup>125</sup> 133(5) TEEC states that the competence afforded in the preceding paragraphs will ‘also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property’.

<sup>126</sup> Marise Cremona, ‘Redefining the Boundaries of the Common Commercial Policy and the ERTA Doctrine: Opinion 3/15, Marrakesh Treaty’ (2008) 55 *Common Market Law Review* 823, 883.

<sup>127</sup> Judgment of the Court of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:520.

within the scope of the CCP. Further, the Commission argued that there was a difference between Article 207(1) TFEU and former Article 113 EC Treaty. Advocate General Cruz Villalón described the core of the issue to be ascertained as:

‘the extent to which the matter governed by the TRIPS Agreement – and therefore the interpretation of the relevant law – now falls within the exclusive competence for commercial policy in so far as they constitute commercial aspects of intellectual property’.<sup>128</sup>

The Advocate General also clarifies that:

‘it should be beyond dispute that the concept of ‘commercial aspects of intellectual property’ within the meaning of Article 207(1) TFEU must be an autonomous concept of European Union law and that the Court must be independently responsible for its interpretation, instead of its meaning being determined, in a more or less stable or consistent way, by the agreements to which the European Union is a party (whether the TRIPs Agreement or other similar ones). The difficulty which developing that concept undeniably raises is a separate matter: that task will from the outset require the abandonment of any abstract or ex ante definition. Instead, the concept must be developed gradually’.<sup>129</sup>

Hence, taking the stance of evaluating the ‘specific link between each individual TRIPS provisions and international trade on a case-by-case basis, Advocate General Cruz Villalón held that the provision detailing the scope and the use of IP, including Article 27 of TRIPS does not relate to or concerned the ‘commercial aspects of IP’ and as such would be outside the scope of Article 207(1) TFEU.<sup>130</sup>

The CJEU, following the previous line of case law concerning the scope of the CCP,<sup>131</sup> came to a different conclusion. The Court held that:

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<sup>128</sup> Opinion of Advocate General Cruz Villalón of 31 January 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:49, paragraph 40.

<sup>129</sup> Opinion of Advocate General Cruz Villalón of 31 January 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:49, paragraph 58

<sup>130</sup> Opinion of Advocate General Cruz Villalón of 31 January 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:49, paragraphs 58-81.

<sup>131</sup> Opinion of the Court of 6 December 2001, *Opinion pursuant to article 300 EC*, Opinion 2/00, EU:C:2001:664 paragraph 40; Judgment of the Court of 12 May 2005, *Regione autonoma Friuli-Venezia Giulia and ERSA*, Case C-347/03, EU:C:2005:285, paragraph 75; and Judgment of the Court of 8 September 2009, *Commission v Parliament and Council*, Case C-411/06,

‘of the rules adopted by the EU in the field of intellectual property, only those with a specific link to international trade are capable of falling within the concept of ‘commercial aspects of intellectual property’ in Article 207(1) TFEU and hence the field of the common commercial policy’.<sup>132</sup>

TRIPS would seem to have ‘a specific link with international trade’.<sup>133</sup> The CJEU ultimately found that when providing in Article 207(1) TFEU that the:

‘commercial aspects of intellectual property’ are now fully part of the common commercial policy, the authors of the TFEU could not have been unaware that the terms used in that provision correspond almost literally to the very title of the TRIPS Agreement’.<sup>134</sup>

Additionally, the CJEU held, that it remains altogether open to the EU to legislate on the subject of IP by virtue of the competence relating to the field of the internal market. However, acts adopted on this basis which has the intention of a specific validity for the EU, are required to comply with the rules concerning the availability, scope and the use of the IPRs in TRIPS. This is required as the rules under TRIPS, which were previously in effect, intended to standardise certain rules on IP at the international level and would thereby facilitate international trade.<sup>135</sup>

The CJEU concluded that all TRIPS provisions, on the merit of being part of the WTO system of governing trade, had this ‘specific link’.<sup>136</sup> In this decision, it seems that the CJEU has somewhat fulfilled the Commission’s desire for wider competence to act. The Commission sought the expansion to the competence as it would allow them to act with greater efficiency and consistency within the EU’s trade policy. Additionally, in doing so, the CJEU returned to the more flexible approach to the CCP of earlier decisions,<sup>137</sup> and brought the WTO Agreements within the scope of Article 207(1) TFEU, in line with *Opinion 1/08*.

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EU:C:2009:518, paragraph 71.

<sup>132</sup> Judgment of the Court of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:520, paragraph 52.

<sup>133</sup> Judgment of the Court of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:520, paragraph 53.

<sup>134</sup> Judgment of the Court of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:520, paragraph 55.

<sup>135</sup> Judgment of the Court of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:520, paragraphs 58-61.

<sup>136</sup> Judgment of the Court of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:520, paragraph 53.

<sup>137</sup>See generally Marise Cremona, ‘A Policy of Bits and Pieces? The Common Commercial

As noted by Van Damme, while it appears ‘the objectives of the TRIPS Agreement in general and Part II of the Agreement in particular’<sup>138</sup> and related provisions may have changed since *Opinion 1/94*, they are the same.<sup>139</sup> This raises the question of whether *Daiichi Sankyo* means that the measures approved by the Member States to give effect to the provisions of the TRIPS Agreement when it came into force are no longer valid. From a broad perspective, it is suggested that the national courts of the Member States are no longer competent to apply or to interpret the TRIPS Agreement nor its specific provisions.<sup>140</sup> However, it must be noted Article 1(1) of TRIPS still allows the Member States to give appropriate effect to TRIPS and implementation matters within their justification.

The judgment has been criticised on a number of grounds. Firstly, as the CJEU did not explicitly state what would amount to the ‘specific link’. Secondly, the CJEU made no attempt at distinguishing the different forms of IP nor offered guidance on how to do so.<sup>141</sup> Thirdly, some scholars suggest that the CJEU engaged in a superficial exploration, that rather than determine the subject matter, the CJEU held TRIPS as a result of its adoption within the trade agreement framework as trade-related.<sup>142</sup> Additionally, the CJEU was seen as not having provided the tools necessary to solve the inevitable future questions regarding competence in relation to IP.

This, in turn, highlighted a number of lingering questions. Firstly, how does the CCP competence relates to IP matters outside the WTO Agreements? Secondly, will subsequent and similar or identical agreements fall within the scope of Article

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Policy after Nice’ (2002) 4 Cambridge Yearbook of European Legal Studies 61; Angelos Dimopoulos and Petroula Vantsiouri, ‘Of TRIPS and Traps: The Interpretative Jurisdiction of the Court of Justice of the EU over Patent Law’ (2014) 39 European Law Review 210.

<sup>138</sup> Judgment of the Court of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:520, paragraph 57.

<sup>139</sup> Isabella Van Damme, ‘C-414/11 Daiichi: the impact of the Lisbon treaty on the competence of the European Union over the TRIPS Agreement’ (2015) 4(1) Cambridge Journal of International and Comparative Law 77, 77.

<sup>140</sup> Miquel Montañá i Mora, ‘The Practical Consequences of the CJEU Judgment of 18 July 2013 Changing Its Doctrine on the Respective Competences of the EU and its Member States to Apply the TRIPS Agreement: Have We Seen the Tip of the Daiichi Iceberg Yet?’ (2017) 48(7) International Review of Intellectual Property and Competition Law 784, 803.

<sup>141</sup> Angelos Dimopoulos and Petroula Vantsiouri, ‘Of TRIPS and Traps: The Interpretative Jurisdiction of the Court of Justice of the EU over Patent Law’ (2014) 39 European Law Review 210, 220.

<sup>142</sup> Yole Tanghe, ‘The Borders of EU Competences with Regard to the International Regulation of Intellectual Property Rights: Constructing a Dam to Resist a River Bursting Its Banks’ (2016) 32(82) Utrecht Journal of International and European Law 27, 30.

207 TFEU by default? Thirdly, what is the impact of *Daiichi Sankyo* on EU agreements which contain IP protection provisions but are not of an international trade nature?<sup>143</sup> The first and third questions are somewhat related; there is an overlap in the non-commercial aspect of IP. This is a growing concern in the implementation of IP protection and if a balance between the protection of commercial and non-commercial elements can be found is addressed in Chapter Six. The second question will linger by the very nature of the CCP as there will always be the potential for its expansion and development. This is particularly true with the increasing complexity and scale of agreements the EU is currently engaged in. The CJEU also faced criticism for their reasoning to bring the entire TRIPS Agreement within the competence afforded under the CCP.<sup>144</sup> The CJEU faced criticism for their acceptance of the potential of cross-suspension of concessions within WTO Agreements. However, this is problematic due to the ill-fitting nature of cross-suspension with IP protection issues and general trade-related issues. Further, to do so would continue the superficial inclusions of TRIPS provisions within the CCP on the merit of their ‘trade-related’ aspects, something the CJEU previously rejected.<sup>145</sup> The CJEU found further action in reference to the goal of the Preamble to TRIPS to ‘promote effective and adequate protection of intellectual property rights’, *Daiichi Sankyo* can be seen as a large shift in the interpretation the CJEU has taken of the TRIPS Agreement.<sup>146</sup> Additionally, the CJEU’s use of ‘trade-related aspects’ and ‘commercial aspects of IP’ faced a high level of criticism for what the implication of the similar wording entailed. There has been a large amount of academic debate on this matter.<sup>147</sup>

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<sup>143</sup> The non-commercial aspects of IP provisions are discussed in detail in subsequent chapters.

<sup>144</sup> Judgment of the Court of 18 July 2013, *Daiichi Sankyo and Sanofi-Aventis Deutschland*, Case C-414/11, EU:C:2013:520, paragraph 54–60.

<sup>145</sup> Opinion of the Court of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, EU:C:1994:384, paragraphs 64–65.

<sup>146</sup> Shifting from a process of internal market harmonisation to the facilitation of trade.

<sup>147</sup> *Inter alia* Marise Cremona, ‘Allocation of Competences in the Field of External Relations’ in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press, 2014) 70–71; Piet Eeckhout, *EU External Relations Law* (Oxford University Press, 2011) 285–286; Marek Krajewski, ‘The Reform of Common Commercial Policy’ in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford University Press, 2012) 301; Holger P. Hestermeyer, ‘The Notion of ‘Trade-Related’ Aspects of Intellectual Property Rights: From World Trade to EU Law-and Back Again’ (2013) 44 *International Review Intellectual Property and Competition Law* 925, 928; Christoph Hermann, ‘Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job’ (2002) 39 *Common Market Law Review* 9, 18–19; Piet Eeckhout, ‘Exclusive External Competences: Constructing the EU as an International Actor’ in CJEU (ed), *The Court of Justice and the Construction of*

*Daiichi Sankyo* shows the CJEU endorsing the perspective that protecting IP will reduce international trade distortions. The TRIPS Preamble does highlight the possibility of IP protection measures acting as barriers to trade and to maintain a proportional response.<sup>148</sup> As such, the classification of TRIPS provisions as ‘commercial aspects of IP’ is seen as consistent with that of the CCP. However, the argument that the provisions of the TRIPS agreements need to be inherently ‘trade-related’ as distorted IP protection would only serve to hinder global trade and run contrary to the goals of TRIPS is again heavily contested.<sup>149</sup> This approach, taken by the CJEU can be seen as a justified one, given the important position IP now find itself in the global trade agenda that to artificially separate the scope of the CCP from that of the WTO would be ineffective and would, in turn, would likely distorted trade. As such, the CJEU’s decision was in line with the global position that the TRIPS Agreement is part of the global trade system and that the decision respects the rationale of the CCP competence in this field.

#### ***4.2. Broadcasting Rights: Intellectual Property as an Exclusive Competence Outside the Common Commercial Policy***

Shortly after *Daiichi Sankyo*, the CJEU was tasked with the question regarding the scope of competence to act in relation to the Convention of the Council of Europe on the neighbouring rights of broadcasting organisations (the Convention).<sup>150</sup> The matter is covered by a suite of Directives governing the broadcaster’s rights in respect of licensed material.<sup>151</sup> The case was brought by the Commission, further to a joint decision by the Council and the Member States to authorise joint

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*Europe: Analyses and Perspectives on Sixty Years of Case Law* (T.M.C. Asser Press 2013).

<sup>148</sup> This is a heavily contentious issue and is discussed in detail in subsequent chapters. Additionally, the argument that the provisions of the TRIPS agreements need to be inherently ‘trade-related’ as distorted IP protection would only serve to hinder global trade and run contrary to the goals of TRIPS is again heavily contested.

<sup>149</sup> This is discussed in detail in Part III.

<sup>150</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151.

<sup>151</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001], OJ L 167/10; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006], OJ L 372/12. The development of such rights are discussed in Chapters One and Two, while the inclusion of such rights within the various agreements is discussed in Part III.

participation by the EU and the Member States into the negotiation and signing of the Convention. The Commission argued that:

‘throughout the procedure leading to [the Convention’s] adoption, had maintained that the EU has exclusive competence in the matter and opposed the adoption of a ‘hybrid act’ by the Council and the Representatives of the Governments of the Member States’.<sup>152</sup>

The Commission disagreed with the Council’s decision on both substantive and procedural grounds and sought an annulment action under Article 263 TFEU.<sup>153</sup> The Commission argued that the EU had an exclusive external competence to negotiate and conclude the Convention. The Commission based this claim on four pleas:

‘The first plea alleges infringement of Article 2(2) TFEU and Article 3(2) TFEU. The other pleas, advanced irrespective of the exclusive or shared nature of the competences of the European Union in the present case, allege, secondly, breach of the procedure and the conditions to authorise negotiations of international agreements by the European Union; thirdly, violation of the voting rules in the Council provided for in Article 218(8) TFEU; and, fourthly, breach of the objectives set out in the TFEU and TEU and the principle of sincere cooperation laid down in Article 13 TEU’.<sup>154</sup>

The Commission further argued that exclusive competence stems from the need:

‘in accordance with the case-law developed as from the judgment in *ERTA*, now codified by Article 3(2) TFEU, the European Union has exclusive external competence where, as in the present case, the international commitments fall, at least to a large extent, within the scope of the common rules which it established’.<sup>155</sup>

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<sup>152</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 34.

<sup>153</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 38.

<sup>154</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 43.

<sup>155</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 44.

The Commission also addressed the question of the scale of the Convention. The Commission acknowledged that while the entire Convention did not fall within their scope of exclusive external competence, a significant portion of the Convention did. As such, this did ‘not preclude the European Union’s competence in that area from being exclusive’.<sup>156</sup> Finally, the Commission argued that the rights affected by the Convention ‘form part of a consistent and balanced body of intellectual property rules intended to ensure the unity of the legal order of the European Union in that area’.<sup>157</sup> As a result of this close link between the various stakeholders, ‘any change to the rights of one group or the other would be such as to influence the interpretation and application of the EU rules as a whole’.<sup>158</sup>

The Council, supported by the Czech Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, the Republic of Poland and the United Kingdom, rejected the Commission’s claim of exclusive competence. The Council put forward that the Convention:

‘falls within an area of shared competences between the European Union and its Member States, namely that of the internal market, which encompasses protection of intellectual property’.<sup>159</sup>

As a result, the Council suggested that the Member States should retain the shared competence and the involvement within the negotiations ‘to ensure the unity of the external representation of the European Union’.<sup>160</sup> The Council and the Member States further rejected the Commission’s claim that the significant portion of the Convention fell within the exclusive competence and that this would be sufficient to grant exclusive competence over the entire Convention.<sup>161</sup> The Council argued that the last clause of Article 3(2) TFEU was the codification of the *ERTA* judgment and subsequent cases by ‘refusing to enshrine the test of ‘an area already largely

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<sup>156</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 47.

<sup>157</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 48.

<sup>158</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 48.

<sup>159</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 49.

<sup>160</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 49.

<sup>161</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 50.

covered by the EU rules’<sup>162</sup> From this, the Council and the Member States disputed the exclusive external competence on the grounds the Convention ‘might go beyond the existing EU rules’ in a number of ways.<sup>163</sup>

The CJEU would then examine the first plea put forward by the Commission, which at the core related to the infringement of Article 3(2) TFEU. The CJEU looked to the *ERTA* case and how it:

‘defined the nature of the international commitments which Member States cannot enter into outside the framework of the EU institutions, where common EU rules have been promulgated for the attainment of the objectives of the Treaty’.<sup>164</sup>

The CJEU held that these ‘words must therefore be interpreted in the light of the Court’s explanation with regard to them in the judgment in *ERTA*’.<sup>165</sup> The existence of either ‘a risk that common EU rules might be adversely affected by international commitments, or that the scope of those rules might be altered’,<sup>166</sup> would then justify the EU to hold an exclusive external competence ‘where those commitments fall within the scope of those rules’.<sup>167</sup> This has been consistently addressed by the CJEU.<sup>168</sup> This includes the creation of obligations or entering of commitments by the Member States outside the EU framework, ‘even if there is no possible contradiction between those commitments and the common EU rules’.<sup>169</sup>

The CJEU looked at the pre-existing body of law under the ‘centre of gravity test’. In doing so, the CJEU concluded that the content of the negotiations for the

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<sup>162</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 52.

<sup>163</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraphs 55-57.

<sup>164</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 66.

<sup>165</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 67.

<sup>166</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 68.

<sup>167</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 68.

<sup>168</sup> Opinion of the Court of 19 March 1993, *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the EEC Treaty*, Opinion 2/91, EU:C:1993:106, paragraph 25; Judgment of the Court of 5 November 2002, *Commission v Denmark*, Case C-467/98, EU:C:2002:625, paragraph 82; Opinion of the Court of 7 February 2006, *Lugano Convention*, Opinion 1/03, EU:C:2006:81, paragraphs 120 and 126.

<sup>169</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 71.

Convention ‘falls within an area covered to a large extent by common EU rules and that those negotiations may affect common EU rules or alter their scope’<sup>170</sup>. This conclusion was reached through a detailed analysis of the rules adopted by the EU. The possibility that those rules are endangered by international commitments determines the existence of the exclusive competence of the EU. It is important to note that *Broadcasting Rights* follows the rationale in recent case law, where the CJEU confirmed a broad of both the exclusive external competence and the harmonisation of IP within the EU.<sup>171</sup> In doing so, the CJEU rejected the argument that the question of the rights relating to broadcasting was beyond the scope covered by EU rules. Furthermore, with the application of the *ERTA* principle, the CJEU seems to come to the conclusion that those IP aspects not related to trade might still be covered by the exclusive competence of the EU where common rules have been adopted by virtue of the principle of parallelism.

It seems that this case is in line with the finding in *Opinion 1/03*,<sup>172</sup> which also allowed the operation of implied EU exclusivity. Unlike in *Opinion 1/94*,<sup>173</sup> in which the CJEU found IP harmonisation to be insufficient to trigger the *ERTA* principle. In the circumstance relating to IP, chiefly the EU Directives governing neighbouring rights, this would be enough to trigger the *ERTA* principle as the harmonised framework now established homogeneous protection for broadcasting. This would be sufficient to imply an exclusive competence in the field of IP, as a similar extension and harmonisation had occurred in patent law.

The CJEU rejected the claim made by the Council and the Member States, that the negotiation fell under a shared competence, and held that the negotiation fell within the scope of EU rules and that the negotiation may affect or alter the scope of said

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<sup>170</sup> Judgment of the Court 4 September 2014, *Commission v Council (Broadcasting Rights)*, Case C-114/12, EU:C:2014:2151, paragraph 102.

<sup>171</sup> Judgment of the Court 26 November 2014, *Green Network*, Case C-66/13, EU:C:2014:2399; Opinion of the Court of 14 October 2014, *Opinion pursuant to Article 218(11) TFEU*, Opinion 1/13, EU:C:2014:2303; Judgment of the Court of 16 July 2009, *Infopaq International*, Case C-5/08, EU:C:2009:465; Judgment of the Court of 4 October 2011, *Football Association Premier League and Others*, Joined Cases C-403/08 and C-429/08, EU:C:2011:631; Judgment of the Court 13 February 2014, *Svensson and Others*, Case C-466/12, EU:C:2014:76; Judgment of the Court 7 March 2013, *ITV Broadcasting and Others*, Case C-608/11, EU:C:2013:147.

<sup>172</sup> Opinion of the Court of 7 February 2006, *Nouvelle convention de Lugano*, Opinion 1/03, EU:C:2006:81

<sup>173</sup> Opinion of the Court of 15 November 1994, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, Opinion 1/94, EU:C:1994:384.

rules.<sup>174</sup> Further, based on this analysis, the CJEU found it ‘unnecessary to examine the other pleas raised by the Commission in support of its action’.<sup>175</sup> In doing so, the CJEU left certain elements unresolved and could give rise to future issues. This was partly seen when the CJEU had on different grounds to include IP within the exclusive competence of the EU. Some scholars have noted the creation of a paradox of sorts from this decision by the CJEU,<sup>176</sup> that the:

‘[i]mplied exclusive competence for external action is the consequence of the existence and the exercise of internal competence. By contrast, explicit exclusive competence for external action can have consequences for the internal distribution of competences between the EU and the Member States’.<sup>177</sup>

#### **4.3. The Commercial Aspect of Intellectual Property: Opinion 2/15**

After *Daiichi Sankyo*, the CJEU was subsequently required to re-address the matter of the commercial aspects of IP in *Opinion 2/15*.<sup>178</sup> The Commission, under Article 218(11) TFEU, requested an opinion on the scope of the powers of the EU in relation to the conclusion of the EU-Singapore Free Trade Agreement. The Commission sought clarification as to whether the competence to conclude the EU-Singapore FTA was entirely within the EU exclusive competence or if it would be a shared competence. The EU-Singapore FTA broached the question of competence due to the comprehensive nature of this new generation of FTAs, which facilitates the EU as an international actor. Neframi argues that this ‘view of making the Union a global international actor’,<sup>179</sup> would be in line with the competence of Article 21

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<sup>174</sup> Judgment of the Court 4 September 2014, *Commission v Council*, Case C-114/12, EU:C:2014:2151, paragraph 102.

<sup>175</sup> Judgment of the Court 4 September 2014, *Commission v Council*, Case C-114/12, EU:C:2014:2151, paragraph 104.

<sup>176</sup> Miquel Montañá i Mora, ‘The Practical Consequences of the CJEU Judgment of 18 July 2013 Changing Its Doctrine on the Respective Competences of the EU and its Member States to Apply the TRIPS Agreement: Have We Seen the Tip of the Daiichi Iceberg Yet?’ (2017) 48(7) *International Review of Intellectual Property and Competition Law* 784, 785.

<sup>177</sup> Isabella Van Damme, ‘C-414/11 Daiichi: the impact of the Lisbon treaty on the competence of the European Union over the TRIPS Agreement’ (2015) 4(1) *Cambridge Journal of International and Comparative Law* 77, 85-86.

<sup>178</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376.

<sup>179</sup> Eleftheria Neframi, ‘The Competence to Conclude the New Generation of Free Trade Agreements: Lessons from Opinion 2/15’ in Julien Chaisse (ed), *China-European Union Investment Relationships* (Elgar Edwards 2018) 33.

TEU. The importance, as Cremona notes, cannot be overstated. Cremona further notes that:

‘Opinion 2/15 forms an important part of the Court’s interpretation of the Lisbon Treaty’s codification of EU law on external competence; not only the interpretation of the (enlarged) scope of the CCP but also the application of Article 3(2) TFEU on exclusivity as regards external agreements, and the basis on which external powers may be derived from internal competence-conferring provisions. In this it forms part of a broader picture and indeed case law since Opinion 2/15 was delivered has already added to, and nuanced, the picture’.<sup>180</sup>

The Council and the Member States argued that the EU did not hold sufficient exclusive competence to conclude the FTA. They argued that certain aspects of the FTA were shared competence or a competence held by the Member States. This interpretation was followed by Advocate General Sharpston on whether the EU had the exclusive competence to conclude the EU-Singapore Agreement. That in relation to the comprehensive scope of the EU-Singapore Agreement:

‘the exercise by the European Union of its exclusive competence under Article 207(1) TFEU as regards the entire TRIPS Agreement (59) does not mean that it is competent to regulate each and every matter covered by that agreement in the internal market. Nor can such exercise modify the allocation of external competences between the Member States and the European Union as regards intellectual property rights in general’.<sup>181</sup>

Advocate General Sharpston further argued that:

‘what matters for the purposes of Article 207(1) TFEU is whether an agreement containing provisions on intellectual property protection relates specifically to international trade. That should be determined by examining whether the agreement is essentially intended to promote, facilitate or govern trade (rather than harmonising the laws of the Member States); (329) whether it has direct and immediate effects on such trade; and whether its

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<sup>180</sup> Marise Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore' (2018) 14(1) *European Constitutional Law Review* 231, 235.

<sup>181</sup> Opinion of Advocate General Sharpston of 21 December 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2016:992 paragraph 108.

objective is to reduce distortions of international trade by ensuring, in the territory of each Party, that the economic interests in the monopolies which intellectual property rights create are effectively and adequately protected'.<sup>182</sup>

The CJEU examined whether there were sufficiently close links within the Agreement's trade objective for the various provisions to fall within the CCP, thereby granting exclusive competence to the EU. Building on the earlier case law, the CJEU determined that the IP provisions of the agreement fell within the CCP.<sup>183</sup> Chapter 8 of the EU-Singapore agreement on services was already within the scope of the CCP.<sup>184</sup> The CJEU, in examining the Chapter on IP, affirmed the objective held sufficiently specific links to international trade, that such provisions were 'first, a reminder of existing multilateral international obligations and, secondly, bilateral commitments'.<sup>185</sup> The CJEU further clarified the purpose of these provisions in relation to the enforcement aspects, ensuring both parties implement an 'adequate level' of protection so as to ensure 'a degree of homogeneity' in standards of protection of intellectual property rights and enforcement.<sup>186</sup> It is important to note; this was explicitly stated not to be about the harmonisation of the level of protection.<sup>187</sup>

Interestingly, in this decision, the CJEU also addressed additional issues related to the scope of the CCP and its objectives, which for the purpose of the analysis conducted in Part III, is worth mentioning. The CJEU departed from the Advocate General firstly in relation to the question of sustainable development and trade. While Cremona notes this concept as something not traditionally a part of trade instruments,<sup>188</sup> the CJEU did find this fell within the CCP. The CJEU concluded the

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<sup>182</sup> Opinion of Advocate General Sharpston of 21 December 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2016:992 paragraph 435.

<sup>183</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraph 36.

<sup>184</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraph 54.

<sup>185</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraphs 121-124.

<sup>186</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraph 135.

<sup>187</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraph 126.

<sup>188</sup> Marise Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore' (2018) 14(1) *European Constitutional Law Review* 231, 243.

‘objectives of sustainable development henceforth form an integral part of the common commercial policy’.<sup>189</sup>

The CJEU would also depart from the opinion of the Advocate General,<sup>190</sup> who held that Articles 3(5) and 21 TEU could fall within the EU’s competence to act, they ‘cannot affect the scope of the common commercial policy laid down in Article 207 TFEU’ or ‘modify the scope of the European Union’s competence’.<sup>191</sup> In this departure, the CJEU indicated a willingness to consider the external objective under Article 21 TEU, and how this expansion of the CCP ‘serves as an instrument for pursuing a more ambitious, normative global agenda’ in line with Article 21 TEU.<sup>192</sup> Furthermore, the CJEU appears open to a reform to trade under Article 3(5) TEU. The CJEU held that:

‘the broader objectives of the Singapore Agreement could be subsumed under the trade policy, without having needing to be categorized as ancillary or indicated to the precedent purpose’.<sup>193</sup>

While the CJEU took this broader view of the CCP, both the Advocate General and the CJEU, held the EU did not possess an exclusive competence to conclude the FTA. This rationale by the CJEU primarily relates to the inclusion of Chapter 9 of the FTA on investment.<sup>194</sup> Cremona further notes this as the CJEU not fully answering the Commission’s questions while putting forward mixity for political reasons rather than a strict legal necessity.<sup>195</sup> *Opinion 2/15*, however, leaves open the fate of investor-state dispute settlement in future EU trade agreements.<sup>196</sup>

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<sup>189</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraph 157.

<sup>190</sup> Opinion of Advocate General Sharpston of 21 December 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2016:992 paragraph 495.

<sup>191</sup> Opinion of Advocate General Sharpston of 21 December 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2016:992 paragraphs 495

<sup>192</sup> Joris Larik, ‘Sincere cooperation in the Common Commercial Policy: Lisbon, a ‘Joined-Up’ Union, and ‘Brexit’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 86.

<sup>193</sup> Marise Cremona, ‘Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore’ (2018) 14(1) *European Constitutional Law Review* 231,243.

<sup>194</sup> Opinion of the Court of 16 May 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 2/15, EU:C:2017:376, paragraph 305.

<sup>195</sup> Marise Cremona, ‘Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore’ (2018) 14(1) *European Constitutional Law Review* 231, 237.

<sup>196</sup> The legacy of this unresolved matter is discussed briefly in Section III in relation to the development of CETA.

Notwithstanding, the importance of Opinion 2/15 cannot be overstated. Cremona notes:

‘Opinion 2/15 confirms the potential of Article 21 TEU to play a real role in shaping not only the practice of EU external policy but also the boundaries of its external competence’.<sup>197</sup>

#### ***4.4. The Commercial Aspect of Intellectual Property: Opinion 3/15***

However, while the EU exclusive competence recognised in *Daiichi Sankyo* and in *Broadcasting Rights* by the Court was relatively clear, those cases did not completely rule out the possibility of mixity in relation to IP matters. The issue came again under the scrutiny of the CJEU with regards to the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities (Marrakesh VIP Treaty).<sup>198</sup> The Commission justified this competence citing Articles 3(1) and 207(1) TFEU, hence claiming that the agreement was falling within the scope of the CCP. The Commission also claimed that:

‘were a legal basis other than Article 207 TFEU to be considered appropriate for the purpose of approving, in whole or in part, the Marrakesh Treaty, the European Union would have exclusive competence under Article 3(2) TFEU, which provides, inter alia, that the Union has exclusive competence for the conclusion of an international agreement in so far as that conclusion may affect common EU rules or alter their scope’.<sup>199</sup>

This was disputed by the Council and the Member States, that part of the agreement fell within the shared competences.<sup>200</sup> Thus, the Commission would not be able to conclude and ratify the Marrakesh VIP Treaty by itself.

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<sup>197</sup> Marise Cremona, 'Shaping EU Trade Policy Post-Lisbon: Opinion 2/15 of 16 May 2017: ECJ, 16 May 2017, Opinion 2/15 Free Trade Agreement with Singapore' (2018) 14(1) European Constitutional Law Review 231, 258-259.

<sup>198</sup> Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (WIPO Doc VIP/DC/8).

<sup>199</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114, paragraph 32.

<sup>200</sup> Marise Cremona, 'Redefining the Boundaries of the Common Commercial Policy and the ERTA Doctrine: Opinion 3/15, Marrakesh Treaty' (2008) 55 Common Market Law Review 883, 885.

Advocate General Wahl held that the conclusion of the Marrakesh Treaty, that it is linked to trade as the treaty provision influences the international exchange of goods and services, as well as the Treaty and its explicit links to TRIPS. Advocate General Wahl noted that:

‘[i]n its request, the only matter that the Commission seeks opinion of the Court is whether the European Union has exclusive competence to conclude the Marrakesh Treaty’.<sup>201</sup>

Advocate General Wahl, further noted that it is then ‘necessary to identify the correct substantive legal basis (or bases)’.<sup>202</sup> In doing so, Advocate General Wahl suggested the competence should have a dual basis under Article 19(1) and 207 TFEU.<sup>203</sup> This further recognised the Marrakesh VIP Treaty as ‘an instrument of the CCP’.<sup>204</sup> Firstly, this stems from the stimulation of international trade, through the increased availability of the reading material for the visually impaired. This stimulation is ‘very much at the heart of the system established by the Marrakesh Treaty’.<sup>205</sup> Secondly, Article 19(1) TFEU permits the EU to act to ‘take appropriate action to combat discrimination’ based on disability.<sup>206</sup>

The CJEU commenced its analysis by stating that:

‘[i]n order to determine whether the Marrakesh Treaty falls within the common commercial policy, it is necessary to examine both the purpose of that treaty and its content’.<sup>207</sup>

The Court further stated that:

‘the Marrakesh Treaty is, in essence, intended to improve the position of beneficiary persons by facilitating their access to published works, through

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<sup>201</sup> Opinion of Advocate General Wahl of 8 September 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2016:657, paragraph 30.

<sup>202</sup> Opinion of Advocate General Wahl of 8 September 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2016:657, paragraph 31.

<sup>203</sup> Opinion of Advocate General Wahl of 8 September 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2016:657, paragraph 38.

<sup>204</sup> Opinion of Advocate General Wahl of 8 September 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2016:657, paragraph 39.

<sup>205</sup> Opinion of Advocate General Wahl of 8 September 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2016:657, paragraph 73.

<sup>206</sup> Opinion of Advocate General Wahl of 8 September 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2016:657, paragraph 77.

<sup>207</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114, paragraph 62.

various means, including the easier circulation of accessible format copies”. Further having examined the content, the Court moved on to ascertain whether the agreement could fall within the scope of the CCP’.<sup>208</sup>

Ultimately, the CJEU examined the impact on the trade of the Marrakesh treaty and concluded that:

‘the rules of the Marrakesh Treaty which provide for the introduction of an exception or limitation to the rights of reproduction, distribution and making available to the public cannot be held to have a specific link with international trade such as to signify that they concern the commercial aspects of intellectual property referred to in Article 207 TFEU’.<sup>209</sup>

While significant from the perspective of the availability of material for the visually impaired, the impact on trade is, according to the CJEU, still minimal in a broader trade sense.<sup>210</sup> This, in part, mirrors Advocate General Wahl, who found:

‘the fact that some goods or services may ... be exchanged for purposes other than for making a profit ... does not imply that those goods or services are not traded’.<sup>211</sup>

In addition, the CJEU held that the Marrakesh VIP Treaty’s focus:

‘is not intended to promote, facilitate or govern, generally, all exchanges of accessible format copies, but rather those exchanges that take place between authorised entities’.<sup>212</sup>

The Court held that the rules of the Marrakesh Treaty governing the export and import of accessible format copies, there is no doubt that those rules relate to international trade in such copies. However, the CJEU examined the non-profit aspect of the Marrakesh VIP Treaty.<sup>213</sup> Overall, the CJEU found that the Marrakesh

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<sup>208</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114, paragraph 70.

<sup>209</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114, paragraph 86.

<sup>210</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 92.

<sup>211</sup> Opinion of Advocate General Wahl of 8 September 2016, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2016:657, paragraph 53.

<sup>212</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 92.

<sup>213</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 93.

VIP Treaty ‘intended to improve the position of beneficiary persons by facilitating their access to published works, through various means, including the easier circulation of accessible format copies’.<sup>214</sup> It concluded that:

‘the conclusion of the Marrakesh Treaty does not fall within the common commercial policy defined in Article 207 TFEU and, consequently, that the European Union does not have exclusive competence under Article 3(1)(e) TFEU to conclude that treaty’.

The Court, however, followed the line of *Broadcasting Rights*, in that, while considering the Treaty falling outside the scope of the CCP, it was still a matter of exclusive competence of the EU by virtue of Article 3(2) TFEU.

This rationale is thus reflective of the previous conclusions in *Broadcasting Rights*, regarding the EU’s internal competence to act:

‘where a body of rights gradually introduced by EU law reaches, as in the present case, an advanced stage and the envisaged international agreement seeks to consolidate and, at most, to marginally improve the protection of the right-holders concerned on peripheral aspects not currently covered by EU law, the European Union must have exclusive competence’.<sup>215</sup>

In sum, the CJEU would find that the Marrakesh VIP Treaty would not entirely fall within the CCP as defined under Article 207 TFEU on the grounds of trade. As such, the EU would not have the exclusive competence to conclude the Marrakesh VIP Treaty under Article 3(1)(e) TFEU.<sup>216</sup> However, following the *ERTA* doctrine and its case law, Article 3(2) TFEU would give the EU the required competence.

#### ***4.5. The Commercial Aspect of Intellectual Property: Commission v Council. (Lisbon Agreement)***

The exclusivity of IP matters has also been under further scrutiny, as is seen in *Commission v Council (Lisbon Agreement)*.<sup>217</sup> The CJEU was again requested to

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<sup>214</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 70.

<sup>215</sup> Judgment of the Court 4 September 2014, *Commission v Council*, Case C-114/12, EU:C:2014:2151, paragraph 46.

<sup>216</sup> Opinion of the Court of 14 February 2017, *Opinion pursuant to Article 218(11) TFEU*, Opinion 3/15, EU:C:2017:114 paragraph 101.

<sup>217</sup> Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraph 1.

examine whether an exclusive competence on IP was based on either Article 207 TFEU or under the ERTA doctrine. This followed a request by the Commission to annul the decision of the Council,<sup>218</sup> which had authorised the negotiations for a revision to the Lisbon Agreement for the Protection of Appellations of Origin and Geographical Indications.<sup>219</sup> The Council, in turn, sought for the matter to be dismissed, with the claim it had correctly departed from the Commission's original recommendation that it held the competence. The Council based this departure from the Commission's proposal on Articles 114 and 218(3) and (4).<sup>220</sup> In the request to annul the decision, the Commission was, in fact, asking the CJEU to once again clarify the scope of the CCP.<sup>221</sup> More specifically, the CJEU would have to examine the scope of the 'commercial aspects of IP' in relation to Article 207(1) TFEU.

Following from *Opinion 2/15* and *Opinion 3/15*, Advocate General Bot suggested that the Commission's claim that the matter fell within the scope of the Article 207(1) TFEU as it related to the commercial aspect of IP. Thereby falling within the CCP.<sup>222</sup> Further Advocate General Bot notes that 'under Article 3(1) TFEU, the Union has exclusive competence in the area of the common commercial policy'.<sup>223</sup> As such, this would be a sufficient basis for the CJEU to grant the annulment sought by the Commission.<sup>224</sup>

The CJEU in examining this matter matched the opinion of Advocate General Bot. Firstly, by confirming the position and applicability of Articles 3(1) TFEU and 207(1) TFEU.<sup>225</sup> Secondly, the Courts confirmed the CCP as being the correct

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<sup>218</sup>Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraph 1.

<sup>219</sup> The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (Lisbon 3 October 1958, 828 U.N.T.S 205).

<sup>220</sup> Opinion of Advocate General Bot of 26 July 2017, *Commission v Council*, Case C-389/15, EU:C:2017:604, paragraph 19.

<sup>221</sup> Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraph 45.

<sup>222</sup> Opinion of Advocate General Bot of 26 July 2017, *Commission v Council*, Case C-389/15, EU:C:2017:604, paragraph 44.

<sup>223</sup> Opinion of Advocate General Bot of 26 July 2017, *Commission v Council*, Case C-389/15, EU:C:2017:604, paragraph 45.

<sup>224</sup> Opinion of Advocate General Bot of 26 July 2017, *Commission v Council*, Case C-389/15, EU:C:2017:604, paragraph 93.

<sup>225</sup> Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraphs 46-47.

avenue to address the matter.<sup>226</sup> Finally, in reference to the case law discussed above,<sup>227</sup> the CJEU reaffirmed, in line with its previous case law:

‘that international commitments concerning intellectual property entered into by the European Union fall within the common commercial policy if they display a specific link with international trade in that they are essentially intended to promote, facilitate or govern such trade and have direct and immediate effects on it’.<sup>228</sup>

It was then necessary to determine whether the draft agreement would have a direct and immediate effect on trade in the area. The CJEU held ‘the aim of the draft revised agreement must be examined in light of the international agreements forming its context’.<sup>229</sup> The CJEU followed the opinion of Advocate General Bot and looked to the purpose of the draft agreement.<sup>230</sup> The agreement was not a stand-alone agreement. Rather, it would only serve as a further means for the parties to develop and enhance trade.<sup>231</sup> The CJEU held that the purpose of the draft agreement was to facilitate and govern trade, but in doing so, this would have a direct and immediate effect on trade.<sup>232</sup> The draft agreement:

‘falls within the exclusive competence which Article 3(1) TFEU confers on the European Union in the field of the common commercial policy envisaged in Article 207(1) TFEU’.<sup>233</sup>

While it is a relatively shorter judgment, in part as a result of the prior case law having charted a path on the scope of the CCP, the re-affirmation of these principles is still highly significant and welcomed. Although this case does not serve to show a hard or upper limit on the operational scope of the CCP, it does serve as a guiding point in the overall interpretation. As such, this will facilitate future questions on

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<sup>226</sup> Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraph 48.

<sup>227</sup> See *supra* Chapter Four Section 4.1.

<sup>228</sup> Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraph 49.

<sup>229</sup> Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraph 52.

<sup>230</sup> Opinion of Advocate General Bot of 26 July 2017, *Commission v Council*, Case C-389/15, EU:C:2017:604, paragraph 79

<sup>231</sup> Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraph 61-63.

<sup>232</sup> Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraph 74.

<sup>233</sup> Judgment of the Court of 25 October 2017, *Commission v Council*, Case C-389/15, EU:C:2017:798, paragraph 74.

the matter, as a result of the expansion of geographical indications within the newer generations of trade agreements.

#### ***4.6. The Constraints of Exclusive Competence on Intellectual Property Matters***

All the decisions examined above indicate that IP matters fall within the EU exclusive external competence, either because they fall under the CCP or because the EU has exercised its powers internally and has thus acquired competence externally. In its case law on the CCP, the CJEU referred consistently to the ‘specific link with international trade’.<sup>234</sup> The EU exclusivity implied under Article 3(2) TFEU relies on the criteria of the fact that the agreement is potentially or actually ‘affecting common EU rules or to alter their scope’ (which implies a certain degree of internal harmonisation).<sup>235</sup> However, it is still unclear of the extent to which that harmonisation needs to exist. Recent case law on the matter has shown the complexity of the situation in relation to neighbouring rights of broadcasting rights. In *C More Entertainment*,<sup>236</sup> the CJEU held that EU secondary law relating to the right of broadcasting organisations to retransmit broadcasts amounted to a minimal level of harmonisation. The CJEU would also state the secondary legislation restricts the aims to harmonise as far as required for the smooth and distortion-free operation of the internal market, allowing minor difference for Member States’ national legislation. As such, full harmonisation was not required, and the Member States were able to extend the exclusive right. This exclusive right was also the subject of *Broadcasting Rights*, where certain Member States referred to the Directive as part of an argument that the EU did not have the exclusive competence to negotiate the matter. However, the CJEU has considered, as seen above, the presence of EU legislation sufficient to affirm the exclusivity of EU competence, regardless of the level of harmonization achieved. As such, the CJEU held that the EU had exclusivity on the matter by way of the *ERTA* principle.<sup>237</sup> The

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<sup>234</sup> The specific link to international trade in this case were the aim of the CAS convention to extend the internal provisions to non-EU trading partners. The CJEU concluding the main aim of the Convention was to extend the supply of EU service providers beyond the EU, and thereby fell within the Article 207(1).

<sup>235</sup> However, the precise degree required is not clear and can vary.

<sup>236</sup> Judgment of the Court of 26 March 2015, *C More Entertainment*, Case C-279/13, EU:C:2015:199.

<sup>237</sup> Yole Tanghe, ‘The Borders of EU Competences with Regard to the International Regulation of Intellectual Property Rights: Constructing a Dam to Resist a River Bursting Its Banks’ (2016)

question of the EU's implied exclusivity is still active and will likely give rise to new cases.

## **5. Embedding Human Rights in European Union External Relations**

Alongside conferring to the Charter of Fundamental Rights the same legal value of the Treaties and providing for the EU's future accession to the European Convention on Human Rights (the ECHR), the Treaty of Lisbon introduced human rights obligations with regards to the EU's external action. As mentioned earlier in this thesis, Article 3(5) TEU affirms that the EU 'shall uphold and promote' its values (which include the respect for human rights, including the rights of persons belonging to minorities) in its relations with the wider world. This commitment is reiterated at various junctures in Article 21 TEU. This includes international agreements. However, Bartels then notes that:

'Article 21(3) TEU imposes a clear obligation on the EU to 'respect' human rights, which means, according to the standard usage of this term, that it must not by its own conduct violate human rights'.<sup>238</sup>

On the whole, it seems that after Lisbon, the EU has resorted, in a more extensive way, to various tools and has mainstreamed human rights in its own external action. The progressive extension of EU external competences discussed above, and the exclusive power on IP matters (progressively affirmed by the CJEU) have coupled with growing attention to human rights in EU international agreements. As such, this section briefly discusses the development of the EU's competence in relation to promoting and respecting human rights in the external context. This section does not discuss the topic in detail as it is only meant to give the necessary context for the analysis conducted in Chapter Six addresses the widened use of human rights provisions in trade agreements (human rights clauses) from the point of view of EU competences in action throughout the various agreements.

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32(82) Utrecht Journal of International and European Law 27, 41.

<sup>238</sup> Lorand Bartels, *A Model Human Rights Clause for the EU's International Trade Agreements* (German Institute For Human Rights, 2018) 17. Bartels further notes that it is unclear 'whether there is a further obligation to 'protect' human rights in relation to the acts of third parties'.

As noted previously, the original economic nature of the Treaty of Rome did not provide guidance on how to address the human rights concerns internally,<sup>239</sup> let alone as an external policy.<sup>240</sup> *Stauder* subsequently marked the end to the ‘initial reluctance to explicitly articulate the EU’s commitment towards human rights’.<sup>241</sup> This gradual process was still primarily focused on the internal dimensions, and there was no explicit reference to the EU’s external policy in this regard at this point.

However, the EU would (and continues to) evolve its ability to act in relation to external human rights matters. Following the Treaty of Rome and *Stauder*, development of human rights policy for the external sphere was minimal.<sup>242</sup> It was not until the development of the Treaty of Maastricht that the question of human rights as an aspect of the EU’s external policy was given significant consideration. In doing so, Article J(1)(2) of the Maastricht Treaty firmly placed duty to ‘develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms’ as an objective of the newly created CFSP. From this inclusion within the CFSP, the role of human rights was later expanded under Article 181(a) of the EC Treaty as amended by the Treaty of Nice. Article 181(a)(1) stated that the:

‘Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms’.

Article 181(1) in confirming the position and importance of human rights as an objective of both the CFSP and the general cooperation with its trading partners. This was expanded under the Treaty of Amsterdam and was subsequently amended under the Treaty of Lisbon. Article 2 TEU states that the:

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<sup>239</sup> Stijn Smismans, 'Fundamental Rights as a Political Myth of the EU: Can the Myth Survive?' in Sionaidh Douglas-Scott (ed), *Research Handbook on Fundamental Rights in the European Union* (Edgar Elgar, 2019). Smisman argues that this omission was a deliberate action rather than an accidental development.

<sup>240</sup> For a comprehensive overview of this development, see Gráinne de Búrca, ‘The Road Not Taken: The EU as a Global Human Rights Actor’ (2011) 105 *American Journal of International Law* 649.

<sup>241</sup> Annabel Egan and Laurent Pech, 'Respect for Human Rights as a General Objective of the EU's External Action' (2015) Leuven Centre for Global Governance Studies Working Paper 161/2015, 2.

<sup>242</sup> See *infra* Chapter Six Section 2 for the gradual inclusion of human rights within the Lomé Conventions and the related difficulties and issues.

‘Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.

Article 3(5) TEU further stated that ‘[i]n its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens’. The Treaty of Lisbon represented a significant milestone in placing human rights in a primary location of the EU legal order both internally as well as within the external policy. This is further seen within Article 21(1) TEU and how this cemented human rights at the centre of the EU’s external action.

Following the changes brought into effect with the Treaty of Lisbon, the EU began to take a more pro-active and engaged focused on the inclusion of human rights within its external action policy. However, the appropriateness of the inclusion of human right within the trade policy of the EU has been rightfully questioned by many of its trading partners.<sup>243</sup> The EU would subsequently begin measures to address this criticism, such as the Council’s 2012 Strategic Framework and the corresponding Action Plan for Human Rights and Democracy.<sup>244</sup> The purpose of which was to provide a guide for the mainstreaming of human rights in ‘all areas of its external action without exception’.<sup>245</sup>

Through Articles 3(5) and 21 TEU, the Treaty of Lisbon serves to explicitly reinforce the competence for the EU to act in commercial aspects of external trade, but in doing so, the EU must structure their trade policy to respect human rights. However, these Articles do not grant a competence for the EU to act in relation to human rights. This is further complicated by the lack of general competence for the EU to act in relation to human rights, which prevents the inclusion of more direct and enforceable obligations within the various agreements discussed in Part III.

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<sup>243</sup> The criticism of the inclusion of human rights clauses within trade agreements is discussed in detail *infra* Chapter Six Section 2.

<sup>244</sup> Council of the European Union, 'EU Strategic Framework on Human Rights and Democracy' (Luxembourg, 25 June 2012) 11855/12.

<sup>245</sup> Council of the European Union, 'EU Strategic Framework on Human Rights and Democracy' (Luxembourg, 25 June 2012) 11855/12, 2

## 6. Concluding remarks.

This chapter has discussed the scope of the EU external competences on IP matters, i.e. the competence that allows the EU to include IP provisions (including TRIPs-Plus provision) in international agreements. Due to the comprehensive approach adopted by the EU, the newer generation of agreements includes several provisions beyond trade in goods and services (including IP and investment provisions). Scholars have criticised the extended scope of the CCP, which now encompasses ‘provisions the likes of which to the common commercial policy is far from evident’.<sup>246</sup> However, from a strictly IP perspective, the analysis has endeavoured to show that there has been a gradual process, and the use of the CCP has not been unfettered. In fact, the case law above illustrates the growing scope of the EU to act exclusively in the external sphere, and the shift in the interpretation of what is considered trade and how these falls within the realm of the CCP. The case law also shows that the CJEU adopted a wide understanding of the concept of trade and the ‘specific link with trade’. However, this is not absolute, and the CJEU has denied such a link in a few instances. Thus, in CJEU case law, the link between IP and trade, while historic,<sup>247</sup> requires a balanced approach. Yet, the Court did affirm exclusivity on IP matters outside the scope of the CCP on the basis of the *ERTA* doctrine, and by making reference to Article 3(2) TFEU.

When it comes to the CCP, a final question that the chapter aimed to answer is: ‘does this expansion to the CCP ‘in the view of making the Union a global international actor’ match the ambition of the new generation of agreements?’.<sup>248</sup> The analysis conducted in this chapter, as it will be further discussed in Part III, shows that the CCP ‘serves as an instrument for pursuing a more ambitious, normative global agenda’.<sup>249</sup> As *Opinion 2/15* demonstrates,<sup>250</sup> the extension of the

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<sup>246</sup> Eleftheria Neframi, ‘The Competence to Conclude the New Generation of Free Trade Agreements: Lessons from Opinion 2/15’ in Julien Chaisse (ed), *China-European Union Investment Relationships* (Elgar Edwards 2018) 36.

<sup>247</sup> Opinion of the Court of 11 November 1975, *Opinion given pursuant to Article 228 (1) of the EEC Treaty*, Opinion 1/75, EU:C:1975:145.

<sup>248</sup> Eleftheria Neframi, ‘The Competence to Conclude the New Generation of Free Trade Agreements: Lessons from Opinion 2/15’ in Julien Chaisse (ed), *China-European Union Investment Relationships* (Elgar Edwards 2018) 33.

<sup>249</sup> Joris Larik, ‘Sincere cooperation in the Common Commercial Policy: Lisbon, a ‘Joined-Up’ Union, and ‘Brexit’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 86.

<sup>250</sup> Opinion of Advocate General Sharpston of 21 December 2016, *Opinion pursuant to Article*

EU competence has, in fact, developed hand in hand with growing attention to human rights. The protection of which has been embedded in international agreements, besides references to non-trade values and sustainable development as a key goal pursued by the EU. In that connection, Cremona further notes that this balanced approach:

‘suggests that trade policy-makers will need to consider not only the specific priorities of the CCP but also the objectives of the EU’s other policies, ranging from energy to public health, from environmental protection to migration, and its broader external policy framework’.<sup>251</sup>

The analysis conducted has also endorsed Cremona’s view that while ‘there are signs that the Lisbon Treaty’s attempt to integrate trade policy into the broader strategic objectives of EU foreign policy are having an effect, albeit gradually’.<sup>252</sup>

On the whole, the CJEU has expanded the scope of EU external competences to encompass IP. The latter has been either considered to be part of the CCP, or attracted in the sphere of EU competence by virtue of internal rules enacted the EU. The scope of the CCP is not a fully settled area yet, but remains ‘the most important constitutional battleground for European external relations’.<sup>253</sup> This is the backdrop to justify the inclusion of IP matters in trade agreements such as CETA, the EU-Singapore FTA, and in other agreements, which will be discussed in Part III.

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218(11) TFEU, Opinion 2/15, EU:C:2016:992, paragraph 82. ‘The EUSFTA is a very heterogeneous agreement. That means that, of necessity, the analysis to establish competence and its (exclusive or shared) nature will need (depending on the context) to focus on an individual chapter or groups of chapters of the EUSFTA, on a part or parts of that agreement or, occasionally, on an individual provision’.

<sup>251</sup> Marise Cremona, ‘The Changing Nature of the EU’s Common Commercial Policy’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 9.

<sup>252</sup> Marise Cremona, ‘The Changing Nature of the EU’s Common Commercial Policy’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 16.

<sup>253</sup> Markus Krajewski, ‘External Trade Law and the Constitution Treaty: Towards A Federal and More Democratic Common Commercial Policy?’ (2005) 42(1) *Common Mark Law Review* 91, 92. Marise Cremona, ‘The Changing Nature of the EU’s Common Commercial Policy’ in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 16.

**Part III**

**Assessing TRIPS-Plus Obligations in**

**European Union Agreements**

# - Chapter Five -

## TRIPS-Plus Obligations in European Union Agreements

### 1. Introduction

Having discussed the extent to which the EU external competence has developed to encompass IP,<sup>1</sup> reflecting the growth of IP legislation within the EU itself,<sup>2</sup> this chapter focuses on how EU agreements deal with IP protection. In particular, this chapter endeavours to undertake a ground-breaking analysis that will bring new perspectives to current scholarship.

Currently, the EU is engaging in a variety of agreements such as Free Trade Agreements (FTAs), Stabilisation Agreements and Association Agreements, or Economic Partnerships with a growing number of trading partners.<sup>3</sup> While the actual title and the legal basis of the agreements vary, based on the objectives pursued, a common trend is that they all include strong trade components and relevant IP provisions. This is most obviously the case for agreements concluded by the EU only under the CCP, but also for those agreements concluded outside the realm of the CCP. The core aims of these agreements, among others, are to open new markets for goods and services, increasing investment opportunities, removing custom duties and trade barriers, thereby making trade cheaper and more desirable. For example, Association Agreements with Mediterranean countries serve as part of the creation of the European Neighbourhood Policy,<sup>4</sup> and fit within the Euromed Initiative. The latter aims at building a comprehensive relationship between the EU

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<sup>1</sup> See *supra* Chapter Four.

<sup>2</sup> See *supra* Chapter Three.

<sup>3</sup> The competences of the respective agreements have been discussed in detail in Chapter Four. For the sake of clarity, 'agreement' will be used as a catch-all term for the various agreements unless otherwise noted. Additionally, as mentioned in the introduction, only completed agreements are discussed due to the ongoing and shifting nature of the negotiation process.

<sup>4</sup> This includes Albania, Algeria, Bosnia and Herzegovina, Egypt, Israel, Jordan, Lebanon, Montenegro, Morocco, Palestine, and Tunisia

and Southern Mediterranean countries developing mutual commitment to democracy and human rights, the rule of law, good governance and market economy principles. These agreements revolve around the creation of a ‘Euro-Mediterranean Free Trade Area’. The aims of which is the removal of ‘barriers to trade and investment between both the EU and Southern Mediterranean countries and between the Southern Mediterranean countries themselves’.<sup>5</sup> Moreover, all these agreements aim to develop a more stable policy environment by taking joint commitments on areas that affect trade, including IPRs, competition rules and the framework for public purchasing decisions.

Within these agreements, there is also a growing visibility of human rights by virtue of human rights clauses. For example, when it comes to IP-related international treaties, the most prominent example of the embedding of human rights is the Doha Declaration on the TRIPS Agreement and Public Health.<sup>6</sup> The Doha Declaration obligates the WTO members to actively address and incorporate human rights concerns and access to vital medicine. This primarily centred on the conflict between the creation of and access to generic versions of vital medicine and their patent-protected equivalents.<sup>7</sup> Additionally, and perhaps more prominently, this is

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<sup>5</sup> See at <<http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/>>.

<sup>6</sup> WTO, ‘Declaration on TRIPS and Public Health’, WT/MIN(01)/DEC/2, 20 November 2001.

<sup>7</sup> WTO, ‘Declaration on TRIPS and Public Health’, WT/MIN(01)/DEC/2, 20 November 2001 ‘4. The TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose. 5. Accordingly and in the light of paragraph 4 above, while maintaining our commitments in the TRIPS Agreement, we recognize that these flexibilities include: (a) In applying the customary rules of interpretation of public international law, each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives and principles. (b) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted. (c) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency. (d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4. 6. We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2001’.

reflective of the constitutional changes occurred in the EU itself.

Since the 1990s, the EU has concluded approximately 30 bilateral and multilateral agreements with Third Countries. It is also in the process of negotiating dozens of other agreements with key Asian and South American partners, as well as Australia, New Zealand, and India. Since the negotiation with the Association of South-East Asian Nations (ASEAN) has stalled, the EU has broken down the discussion to the bilateral level, due to conflict and strong disagreement within the region.<sup>8</sup> Drafts of the EU-Australia and EU-New Zealand agreements have been recently published, but further revisions are expected in late 2019.<sup>9</sup> Within most of these agreements, IP and human rights clauses remain a large and contentious issue. The negotiation process with India is said to have stalled in relation *inter alia* to these clauses but will restart soon following declarations of from both Parties to match ambition and intentions going into the negotiations.<sup>10</sup> The EU-Burma negotiations are ongoing. Following the division of the ASEAN regional agreement, the latest round in 2017 reported satisfactory progress but are pending further negotiation.<sup>11</sup> The EU is also negotiating an agreement with the Andean Community, reporting satisfactory progress ahead of the next round of negotiations.<sup>12</sup>

The negotiations processes are, in several cases, still open and subject to diverse and often competing political and economic trends in relation to IP matters. It is quite evident that TRIPS operates as the basis for all discussion by providing a standard of terms for all Parties and future negotiations to build from.

Against this background, this chapter conducts an unprecedented systematic review

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<sup>8</sup> In December 2009, EU Member States agreed that the Commission would pursue FTA negotiations in a bilateral format with countries of ASEAN. Michela Astuto, 'EU-ASEAN Free trade agreement- negotiations' <[https://www.ispionline.it/it/documents/Analysis\\_26\\_2010.pdf](https://www.ispionline.it/it/documents/Analysis_26_2010.pdf)>.

<sup>9</sup>European Commission, 'Overview of FTA and Other Trade Negotiations' [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf) 4-5 The Third Round of negotiations between the EU and Australia are scheduled for the week of the 25<sup>th</sup> of March 2019. The Third Round of negotiations with New Zealand are scheduled for the week of the 18<sup>th</sup> of February 2019.

<sup>10</sup>European Commission, 'Overview of FTA and Other Trade Negotiations' <[http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf)> 4 These negotiations were primarily said to have stalled in relation to issues relating to the UK-India relations, as well as issues relating to the production of generic pharmaceutical products in India, which were and still are, intended for distribution in the developing world.

<sup>11</sup>European Commission, 'Overview of FTA and Other Trade Negotiations' <[http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf)> 4.

<sup>12</sup> European Commission, 'Overview of FTA and Other Trade Negotiations' <[http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_118238.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf)> 5.

of the development of TRIPS-Plus provisions within EU agreements.<sup>13</sup> This chapter shows that the early agreements did not have well-developed IP protection, while current agreements endorsed TRIPS-plus protection. In that connection, TRIPS served an important function to ensure the terms and standards of TRIPS were being upheld as a ‘floor’ for protection. By examining development over a twenty-plus year period, from the entry into force of TRIPS until September 2019, this chapter charts the change in relation to the IP objectives in negotiations and the corresponding impact this has had on the various agreements.

After these introductory remarks, section 2 provides a brief overview of TRIPS-Plus provisions from a chronological perspective. The chronological overview identifies three different ‘eras’ in such a process of development. The chapter then moves to the conceptual perspective by examining the impact of IP provisions, and critically discussing the extent to which these clauses act as restriction and/or enhancement of trade. Across the chronological scope of this thesis, three key trends are observed in relation to IP and trade. Firstly, in some instances, IP protection and enforcement measures are used generally to protect the IP rightsholders by restricting trade between the EU and third countries, when a breach occurs. Secondly, IP protection and enforcement measures might function as restriction of cross border trade in cases where third countries’ IP protection doesn’t adequately protect IP rightsholders. Finally, in some instances IP protection and enforcement measures are used as a means to facilitate and to enhance trade. One important feature to note in this regard is that certain provisions may both facilitate and restrict trade, depending on the context and perspective. The final section discusses how these provisions have affected the individual elements of IP from a trade perspective. The chapter concludes by offering some commentary on likely future developments in ongoing negotiations of agreements.

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<sup>13</sup> TRIPS-plus is a general term for provisions which seek to introduce protection and enforcement measures beyond the levels found within TRIPS, but also protection and enforcement measures beyond for areas of IP that were not addressed in TRIPS.

## 2. Intellectual Property in European Union Agreements: A Chronological Overview

### 2.1. The 'Three Eras'

From a chronological perspective, it is argued that the development of IP provisions in EU international agreements can be divided into three 'eras'. The chronological classification highlights the trends in relation to IP provisions and allows for the analysis of adjacent agreements. This classification then builds and reflects on the constitutional development of the EU and with the expansion of the EU's competences on IP matters, as highlighted in Part II. In this respect, Nakanishi notes that the 'FTAs are becoming more comprehensive and mega-FTAs are appearing, all of them seemingly influence by each other'.<sup>14</sup> This reflects the expansion of EU external competences (and the broader scope of the Common Commercial Policy - CCP) highlighted in Chapter Four. Thus, the proposed division serves to show the growing scope of IP provisions across the three 'eras' identified. This chronological classification also highlights the influence that international IP law (discussed in Part I) displayed on the EU agreements.

The 'first era' encompasses the first few years following the entry into force of TRIPS (post-TRIPS agreements). The EU agreements concluded in this first era illustrate the early attempts to introduce standards of IP protection which would satisfy the Parties' TRIPS obligations, taking into account the limited scope of EU competences. The 'second era' of agreements was prompted by American-led developments in the early 2000s in relation to the digital landscape and IP infringement.<sup>15</sup> EU agreements in this era (between the early 2000s and 2008) were also deeply influenced by the EU internal constitutional developments, with the changes brought by the Treaty of Nice,<sup>16</sup> and by the international context in which attempts to revise TRIPS were occurring. Additionally, during this period, the flaws and limitations of TRIPS emerged. These flaws and limitations centred on contested

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<sup>14</sup> Yumiko Nakanishi, 'Characteristics of EU Free Trade Agreements in a Legal Context: A Japanese Perspective' in Marc Bungenberg, Markus Krajewski, Christian Tams, Jorg Philipp Terhechte, and Andreas R. Ziegler (eds), *European Yearbook of International Economic Law 2017* (Springer, 2017) 467. See also Eleftheria Neframi, 'The Competence to Conclude the New Generation of Free Trade Agreements: Lessons from Opinion 2/15' in Juven Chaisse (ed), *China-European Union Investment Relationships* (Elgar Edwards 2018) 32.

<sup>15</sup> See *supra* Chapter One Section 3.4.

<sup>16</sup> See *supra* Chapter Four Section 2.

development of the concept of IP and its value within the WTO system. As a result, this era is characterised by an exponential rise in the number of bilateral agreements concluded by the EU, which included full IP chapters in the attempt to bypass the problems encountered at the WTO level.<sup>17</sup> In particular, many of these agreements included new provisions that purported increased standards of protection of IP, often referred to as TRIPS-plus.

The 'third era' relates to agreements concluded from 2008 until the present, and mostly encompasses agreements concluded after the entry into force of the Treaty of Lisbon. This era is characterised by the further expansion and development of IP protection and enforcement measures in EU agreements, giving rise to what some scholars have classified as TRIPS-Plus-Plus.<sup>18</sup> The expansion of TRIPS-plus-plus provisions was prompted by the global move towards bi- and multi-lateral agreements negotiated outside the WTO system, and by correspondent adoption by the EU of several policy documents related to IP in EU external relations.<sup>19</sup> The third era is further characterised by the diversification of IP provisions. Such diversification is reflective of the geographical specificities and but mirrors to the constitutional development of the EU following the Treaty of Lisbon, which brought increased attention to sustainable development and human rights.

However, this thesis is also aware of the limits of such a division. The features or traits described above often blur as one era ends, and the next begins. Additionally, the overall development of EU agreements must take into consideration specific context or geographical issues. For example, while the Stabilisation and Association Agreements concluded with Moldova, Georgia, and the Ukraine fell within the third era, from an IP perspective, the provisions are not distinctive. However, when viewed in light of the purpose of those agreements of approximating the laws of those third countries to that of the EU, this becomes a higher standard of IP

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<sup>17</sup> See *supra* Chapter One Section 3.5.

<sup>18</sup> As discussed in Chapter One Section 4 TRIPS-Plus-Plus is not a standardised definition. Rather it's a general term used to indicate the upward expansion of provision from TRIPS as a basis. In essence, it operates as shorthand to show how far the current provisions have come. Additionally, it raises the question of whether TRIPS can continue to expand in such ratcheted manner or if there exists a limit or ceiling to the floor that is TRIPS.

<sup>19</sup> For example, European Parliament, An Assessment of the EU-Korea FTA, Directorate-General for External Policies Policy Department, <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA\\_ET\(2010\)133875\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA_ET(2010)133875_EN.pdf)>.

protection and in line with the more explicitly developed provisions of the era.

## ***2.2. The First Era: Post-TRIPS Agreements***

The very first FTA following the entry into force of TRIPS was completed by the EU and the Faroe Islands. Despite following the entry into force of TRIPS, it did not contain any reference to IP. However, this agreement can be seen as an exception as all the subsequent agreements included some form of IP protection. The subsequent Association Agreement between the EU and the Palestine Liberation Organization in 1997,<sup>20</sup> was the first to explicitly address IP under Article 33. Article 1 of the EU-Palestine agreement states the objectives of the agreement to include:

‘to establish the conditions for the progressive liberalization of trade, to foster the development of balanced economic and social relations between the Parties through dialogue and cooperation’.

While this provision did not explicitly refer to IP within the objectives of the agreement, the protection of IP seems, in fact, broadly encompassed by the reference to trade. This argument is supported, taking into account the whole agreement, and read from a holistic perspective. IP is then specifically addressed under Title II on ‘Payments, Capital, Competition, Intellectual Property, and Public Procurement’. Article 33(1) states that the Parties are required to:

‘ensure adequate and effective protection of intellectual, industrial and commercial property rights in accordance with the highest international standards, including effective means of enforcing such rights’.

This is an indirect reference to TRIPS as, in this period, TRIPS would be the ‘highest international standards’. In that regard, the EU-Palestine agreement is exemplary as it shows how the EU sought to expand TRIPS standard of protection to nations who had not ratified TRIPS at the time. Additionally, Article 33(2) provides a mechanism for the review of these standards. This review could be

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<sup>20</sup> Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, signed 1 July 1997, OJ L 187, 16 July 1997. Hereafter the EU-Palestine agreement.

commenced upon the request of either party. While in theory, this could be the case, in practice, it would be a mechanism for the EU to revise the standards as needed to suit their IP agenda. On a more general perspective, this agreement is significant in that the EU recognises the importance of IP in the realm of its own commercial policy and for global trade (as TRIPS itself does). Interestingly, however, even though the objectives of the agreement include balanced economic and social relations, such a balance does not seem to be reflected in the IP chapter and remains underdeveloped.<sup>21</sup>

This agreement was soon followed by the EU-Tunisia agreement.<sup>22</sup> Similarly, to the EU-Palestine agreement, the EU-Tunisia agreement was concluded with the intention, expressed within the preamble, to ‘promote trade and the expansion of harmonious economic and social relations between the Parties’. However, the EU-Tunisia agreement was also intended to promote ‘economic, social, cultural and financial cooperation’.<sup>23</sup> There is no reference to IP in the general provisions detailing the scope and objectives of the agreement. IP is, however, then mentioned under Article 28 as part of Common Provisions. Article 28 states that:

‘[t]he Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of... the protection of intellectual, industrial and commercial property ... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties’.

The EU-Tunisia agreement hence refers to the possibility for Parties to the agreement to introduce restrictions to general trade to protect IP as a facet of protecting trade. Annex VII then requires all Parties to accede to various multilateral treaties which served as precursors and in part contributed to the setting of the base standards of TRIPS. It can be argued that this obligated Tunisia, who while a member of the WTO and subsequently bound by the terms of TRIPS, to accede multiple treaties it did not negotiate (and in which, by contrast, many Member States of the EU had a strong, if not leading hand in the development).

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<sup>21</sup> This balance of objectives is discussed *infra* Chapter Six.

<sup>22</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, Signed 17 July 1995, OJ L 097, 30 March 1998. Hereafter the EU-Tunisia agreement.

<sup>23</sup> Article 1(2) of the EU-Tunisia agreement.

Article 39 of the agreement is the sole provision relating to the adoption of IP protection and enforcement measures. This replicates Article 33 of the EU-Palestine agreement. Article 39(1) obligates the Parties to provide ‘suitable and effective protection of intellectual, industrial and commercial property rights’ to the ‘highest international standards’ (which is, as mentioned above, an implicit reference to the TRIPS). Furthermore, the Parties are also obligated to provide ‘effective means of enforcing such rights’.<sup>24</sup> The identical adoption of the requirement to protect IP under the EU-Tunisia agreement and the EU-Palestine agreement shows the willingness of the EU to impose the obligation to respect international standards that the EU itself had significantly contributed to.

### ***2.3. The Second Era: The Rise of TRIPS-Plus Provisions***

#### *2.3.1. The Increase of Intellectual Property Protection*

The early agreements which this thesis allocate within the ‘first era’ show an initial trend, which is developed further in the ‘second era’ agreements, commencing in the early 2000s which are examined below. In those agreements, the EU further emphasised the linkage among trade, economic development and IP protection. This mirrored, as discussed below, the concurrent constitutional developments occurred with the Treaty of Nice and the development of the CCP. At the dawn of the new millennium, the EU completed a number of agreements with its trading partners. Many of these agreements were concluded under Article 133 EC Treaty (as modified by the Treaty of Nice). As discussed in Chapter Four, Article 133(5) of the Treaty of Nice permitted the CCP to ‘also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property’. This constitutional development, in fact, displayed significant effects of trade agreements. Those ‘second era’ agreements are also exemplary of the expanded scope of the EU’s external action and the broader scale of the association agreements. By the same token, they mirror the extension of EU action on IP internally.<sup>25</sup> Moreover, as highlighted above these agreements sit well within the international landscape and seem to reflect, albeit implicitly, the

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<sup>24</sup>Article 39(2) of the EU-Tunisia agreement.

<sup>25</sup> See *supra* Chapter Three Section 5.

dissatisfaction about TRIPS and the discussion about novel and stronger level of IP protection.<sup>26</sup>

The agreements concluded in the early 2000s include the EU-Morocco agreement,<sup>27</sup> the EU-Israel agreement,<sup>28</sup> and the EU-Mexico agreement.<sup>29</sup> Each agreement stated the liberalisation of trade in goods and services as a core objective. Each of the agreements cites the ‘reciprocal liberalization of trade in goods and services’.<sup>30</sup> While this does not explicitly reference IP as part of trade, their obligations under TRIPS would require IP protection to be considered as a trade enhancement measure. As mentioned above, each of the countries are members of the WTO, and as such, have already ratified or acceded to the IP conventions as part of TRIPS obligations. WTO membership is significant, as the broad provisions requiring the ‘highest international standards’ would have the minimum level of protection of TRIPS as an operational basis.

In both the EU-Morocco agreement and the EU-Israel agreement, Article 39(1) obligates the provision of ‘adequate and effective protection of intellectual, industrial and commercial property rights in accordance with the highest international standards’. Additionally, Article 39(2) provides the ability to revise this standard, if deemed appropriate by either or both Parties. While in practice, the provision would serve more as a tool for the EU rather than Morocco or Israel, in theory, a revision of the standard could be requested by any of the Parties. This provision is also identical to the provisions in the EU-Tunisia agreement and the EU-Palestine agreement. However, at this point at the international level, there had been calls for reform and revisions to TRIPS. This reform and revisions included the introduction of additional protection measures for the digital landscape and

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<sup>26</sup> See *supra* Chapter One Section 3.

<sup>27</sup>Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, signed 26 February 1996, OJ L 70, 18 March 2000. Hereafter the EU-Morocco agreement.

<sup>28</sup>Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, signed 20 November 1995, OJ L 147, 21 June 2000. Hereafter the EU-Israel agreement.

<sup>29</sup>Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, signed 8 December 1997, OJ L 157, OJ L 276, 28 October 2000. Hereafter the EU-Mexico agreement.

<sup>30</sup> Article 4 of the EU-Mexico agreement, Article 1(2) of the EU-Israel agreement, Article 1(2) of the EU-Morocco agreement.

further exceptions and limitations in relation health.<sup>31</sup> In that connection, the possibility of revision was more likely, and it is argued that the provision got more prominence in the agreement.

The EU-Mexico agreement illustrates, in a more decisive manner, the influence of both the constitutional developments and the search for an increased level of protection of IP globally. The increased level of protection for IP in this agreement can, also, be attributed to the Mexican obligations within the North America Free Trade Agreement (NAFTA) and the influence the US had in NAFTA to pursue its IP agenda. Article 12(1) in fact highlights the ‘the great importance [Parties] attach to the protection of intellectual property rights’ and requires the provision of ‘adequate and effective protection in accordance with the highest international standards, including effective means to enforce such rights’. While the latter echoes provisions in previous agreements, a significant innovation was the clarification of which elements of IP were to be encompassed. This marked the first time IP was explicitly ‘defined’ within the agreements. In particular, Article 12(1) states that IP encompasses:

‘copyright, including the copyright in computer programmes and databases, and neighbouring rights, the rights relating to patents, industrial designs, geographical indications including designation of origins, trademarks, topographies of integrated circuits, as well as protection against unfair competition as referred to in Article 10 bis of the Paris Convention for the Protection of Industrial Property and protection of undisclosed information’.

A significant inclusion within Article 12(1) is the recognition and protection afforded to the copyright of computer programmes and databases. Article 12 mirrors not only the EU’s internal position towards the copyright of computer programme and database,<sup>32</sup> but also the broader re-evaluation of copyright protection at the dawn of the new millennium.<sup>33</sup> Similarly to other agreements above,<sup>34</sup> Article 12(2) of the EU-Mexico agreement allows for the revision of the

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<sup>31</sup> See *supra* Chapter One Section 3.

<sup>32</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996], OJ L 77/20.

<sup>33</sup> See *supra* Chapter Two Section 3.3.

<sup>34</sup> See *supra* Chapter Six Section 2.2.

standards if requested by either or both of the Parties, but it includes the phrase that this is subject to ‘the relevant multilateral conventions on intellectual property’. The inclusion of this phrase shows the influence of the international context of the EU agreements.<sup>35</sup> Further mirroring the internal developments,<sup>36</sup> this also suggests a greater priority afforded to IP protection and enforcement measures than in previous agreements.

At the same time, the EU completed the EU-South Africa agreement.<sup>37</sup> In a similar manner to the above agreements, Article 1(d) states that the objective pursued by both Parties is to ‘promote the expansion and reciprocal liberalisation of mutual trade in goods, services and capital’. The agreement, in comparison to the other three agreements,<sup>38</sup> develops significantly in relation to IP. Article 46(1) obligates Parties to ‘ensure adequate and effective protection of intellectual property rights in conformity with the highest international standards’. Article 46(1) then obligates Parties to improve these standards where and when appropriate from the perspective of TRIPS. The EU-South Africa agreement then obligates to the Parties to ratify existing international treaties and standards. In comparison to the previous agreements, this agreement is far more comprehensive and explicit under Article 46(3)<sup>39</sup> and Article 46(5).<sup>40</sup> Article 46(7), identically to Article 12(1) of the EU-Mexico agreement then defines IP in a broad and encompassing manner, to include:

‘[c]opyright, including the copyright on computer programmes and

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<sup>35</sup> See *supra* Chapter One.

<sup>36</sup> See *supra* Chapter Two Section 4.

<sup>37</sup> Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, signed 11 October 1999, OJ L 311, 4 December 2012. Hereafter the EU- South Africa agreement.

<sup>38</sup> The EU-Israel agreement, the EU-Morocco agreement, and the EU-Mexico agreement.

<sup>39</sup> Article 46(3) of the EU-South African agreement states that ‘[t]he Community and its Member States confirm the importance they attach to the obligations arising from the: (a) Protocol to the Madrid Agreement concerning the International Registration of Marks (Madrid 1989); (b) International Convention for the Protection of Performers, Producers of Phonogram and Broadcasting Organisations (Rome 1961); (c) Patent Cooperation Treaty (Washington 1979 as amended and modified in 1984)’.

<sup>40</sup> Article 46(5) of the EU-South African agreement states that ‘[t]he Parties confirm the importance they attach to the following instruments: (a) the provisions of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (Geneva 1977 and amended in 1979); (b) Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971); (c) International Convention for the Protection of New Varieties of Plants (UPOV) (Geneva Act, 1978); (d) Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1977 modified in 1980); (e) Paris Convention for the Protection of Industrial Property (Stockholm Act, and amended in 1979) WIPO; (f) WIPO Copyright Treaty (WCT), 1996’.

neighbouring rights, utility models, patents, including biotechnical inventions, industrial designs, geographical indications, including appellations of origin, trade marks and service marks, topographies of integrated circuits, as well as the legal protection of databases and the protection against unfair competition as referred to in Article 10 bis of the Paris Convention for the Protection of Industrial Property and protection of undisclosed information on know-how’.

This agreement is significant, as the EU arguably supports the developments of the internal legal framework within South Africa, which then placed South Africa in a position to ratify many of the international treaties it was previously unable to ratify.

In 2001 the EU completed the EU-Macedonia agreement.<sup>41</sup> This was a Stabilisation and Association Agreement and was intended to pave the way to Macedonia’s future application to the EU. IP is mentioned briefly in relation to restricting access to markets in Article 41.<sup>42</sup> Article 41 serves to further illustrate the ever-closer linkage of trade and IP. Article 71(1) in a similar fashion to previous agreements, obligates the Parties to ‘ensure adequate and effective protection and enforcement of intellectual, industrial and commercial property rights’. To achieve this goal, Macedonia was granted a five-year period to implement ‘a level of protection of intellectual, industrial and commercial property rights similar to that existing in the [EU], including effective means of enforcing such rights’.<sup>43</sup> Article 71(3) then requires Macedonia to accede to the existing international Treaties as laid down Annex VII.<sup>44</sup>

On the whole, these ‘second era’ agreements show that the EU prompted Third Countries to accept a higher standard of IP protection in exchange for favourable

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<sup>41</sup> Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part, signed 9 April 2001, OJ L 85, 23 March 2004. Hereafter the EU-Macedonia agreement.

<sup>42</sup> Article 41 of the EU-Macedonia agreement states that. ‘[t]his Agreement shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures of artistic, historic or archaeological value or the protection of intellectual, industrial and commercial property, or rules relating to gold and silver. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties’.

<sup>43</sup> Article 71(2) of the EU-Macedonia agreement.

<sup>44</sup> It is worth noting, at that time, Macedonia had not acceded to these Treaties due internal political development as part of former Yugoslavia.

trading terms and tariffs. This is so because, of the four trading partners with whom the EU concluded international agreements, none are noted as being particularly strong IP exporting nations. Rather they gain their respective competitive advantages through lower labour and production costs. In contrast, the EU was the one seeking such higher levels of IP protection. Having failed to achieve those higher level during the TRIPS negotiations,<sup>45</sup> the EU was active in including a higher level of protection of IP in its own negotiations (without having to offer much in the way of trade concessions).

This trend is even more evident in the association agreements concluded with countries of the Mediterranean area. In 2002 the EU concluded the EU-Jordan agreement.<sup>46</sup> This was an Association Agreement as part of the EU's agenda in the Mediterranean region. It came about after the US-Jordan FTA, which can be seen as the true dawn of the TRIPS-Plus era, in that the US-Jordan agreement sought to address the global change in IP infringement and the requirement of new protection and enforcement methods. Article 2(1) of the EU-Jordan states the objective to 'establish the conditions for the progressive liberalisation of trade in goods, services and capital' which would include IP as a growing component. The growing importance on IP is then evident from Article 27 and the explicit inclusion of protection of IP as a ground for the 'prohibitions or restrictions on imports, exports or goods'. Again, the linkage with trade is further highlighted by the requirement not to create 'arbitrary discrimination or a disguised restriction on trade'.<sup>47</sup> The EU-Jordan agreement then discusses IP under Chapter 2 'Competition and Other Economic Matters'. This title reflects the general objective of Article 2(1) of 'progressive liberalisation' of trade. However, at the same time, the title is reflective of the still underdeveloped position of IP in global trade. Article 56(1) of the EU-Jordan agreement requires the Parties to ensure the 'adequate and effective protection of intellectual, industrial and commercial property rights in accordance with the highest international standards'. Article 56(2) then includes a revision mechanism to address potential problems which may arise in creating and

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<sup>45</sup> See *supra* Chapter One.

<sup>46</sup> Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part, signed 24 November 1997, OJ L 120, 15 May 2002. Hereafter the EU-Jordan agreement.

<sup>47</sup> Article 27 of the EU-Jordan agreement.

upholding this ‘adequate and effective protection’. Again, this mechanism can theoretically be invoked by both parties, but in practice, it would be solely done by the EU. Notably, Annex VII of the EU-Jordan agreement contained a commitment by Jordan to accede to the same international IP conventions as required by previous agreements and by TRIPS. On the whole this agreement tends to embrace the growing trend of IP protection and enforcement provisions beyond those standards found in TRIPS. This is particularly evident in the language used in Article 68, which obligates the Parties to ‘develop structures and bodies for the protection of intellectual, industrial, and commercial property, for standardisation and for setting quality standards’. Article 68 was aimed to ensure compliance of the Parties to IP protection and ensuring the correct application of Article 56(2).

Provisions similar to those of the EU-Jordan agreement were included in the Association Agreement between the EU and Lebanon.<sup>48</sup> The EU-Lebanon agreement obliged Parties to ‘ensure adequate and effective protection of intellectual, industrial and commercial property rights in conformity with the highest international standards’.<sup>49</sup> Article 38 was then complemented by a revision mechanism available to the Parties if ‘problems in the area of intellectual property protection affecting trading conditions occur’.<sup>50</sup> Subsequently, the Association Agreement between the EU and Egypt,<sup>51</sup> and the Association Agreement between the EU and Algeria,<sup>52</sup> included nearly identical provisions.<sup>53</sup> Annex VI of both agreements requires the Parties to accede a series of IP convention. As with previous agreements, arguably this could be seen as Egypt and Algeria agreeing to

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<sup>48</sup>Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon, of the other part, signed 17 June 2002, OJ L 143, 30 April 2006. Hereafter the EU-Lebanon agreement.

<sup>49</sup> Article 38(1) of the EU-Lebanon agreement.

<sup>50</sup> Article 38(1) of the EU-Lebanon agreement.

<sup>51</sup>Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part, signed 25 June 2001, OJ L 304, 30 September 2004. Hereafter the EU-Egypt agreement.

<sup>52</sup>Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, signed 12 April 2002, OJ L 265, 10 October 2005. Hereafter the EU-Algeria agreement.

<sup>53</sup> Article 37(1) of the EU-Egypt agreement and Article 44(1) of the EU-Algeria agreement. Article 47(c) of the EU-Egypt agreement additionally required the Parties to ‘develop structures and bodies for the protection of intellectual, industrial, and commercial property, for standardisation and for setting quality standards’. A similar provision was present within the EU-Algeria agreements, this related more to general standardisation and conformity mechanisms. However, this would implicitly include IP.

accept higher levels of IP protection and enforcement in line with the EU, in exchange for favourable trade terms.

The EU-Albania agreement concluded in 2006,<sup>54</sup> fell within the wider category of economic and political Stabilization Agreements. This was concluded as part of aligning Albania's legal framework with that of the EU as part of a future application for EU membership. From an IP perspective, it follows the provisions in the previous agreements. This is firstly seen in relation to general trade positions where the Parties will not 'preclude prohibitions or restrictions on imports, exports or goods in transit justified on ..., protection of intellectual, ... property'.<sup>55</sup> Again, this explicit inclusion of IP protection links its operation to trade and the obligation to prevent unjustified barriers to entry which explicitly include IP.<sup>56</sup> IP is then addressed under Title VI 'Approximation of Laws, Law Enforcement and Competition Rules'. Article 73(1) obligates the 'adequate and effective protection and enforcement of intellectual, industrial and commercial property rights'. Article 73(2) then obligates Albania to ensure this is to levels 'similar to that existing in the Community' rather than the prior seen 'highest international standards'. This approach is in line with the previous Stabilisation and Association agreements as part of their potential accession of EU membership. The applicant nation, in this instance, Albania is aligning and approximating its legal framework with that of the EU. This alignment is further seen with Article 73(2) which obligates Albania to accede to a number of IP related conventions as stated in paragraph 1 of Annex V of the EU-Albania agreement. In doing so, this has a two-fold effect. Firstly, it contributes to the obligations of Article 73(2) as the EU had previously adopted such conventions. Secondly, the EU (or its Member States) would have had a strong position in shaping and developing such conventions. This development then continues the exportation of EU rules as a possible global norm.<sup>57</sup>

This eastern expansion by the EU continued with the Stabilization and Association

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<sup>54</sup>Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, of the other part, signed 12 June 2006, OJ L 165, 4 June 2014. Hereafter the EU-Albania agreement.

<sup>55</sup> Article 42 of the EU-Albania agreement.

<sup>56</sup> Article 42 of the EU-Albania agreement.

<sup>57</sup> While this would not be as significant in relation to EU-Albania trade, these provisions would have to be extended or at least operate as a minimum standard of terms for Albania's future trade agreements.

Agreement between the EU and Montenegro in 2007.<sup>58</sup> As with the EU-Albania agreement, one of the key objectives is ‘to support the efforts of Montenegro to develop its economic and international cooperation, including through the approximation of its legislation to that of the Community’.<sup>59</sup> From an IP perspective, this is seen under Title III of the agreement of ‘Common Provisions’. Again this illustrates the linkage of IP with trade in a general capacity, that the agreement ‘shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of ... the protection of intellectual, industrial and commercial property’.<sup>60</sup> Again, this is balanced against other trade objectives and ‘[s]uch prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade’.<sup>61</sup>

IP is explicitly discussed under Title VI ‘Approximation of Law, Law Enforcement and Competition Rules’. The inclusion of IP within Title VI not only serves to indicate its compliance with Article 1(2)(d) but also illustrates the then position of international IP obligations. However, it must be viewed with the caveat of the approximation of Montenegro’s legislation to that of the EU. While this approximation satisfies the obligation of the adoption of international standards, this will still be filtered through an EU perspective. Additionally, as Montenegro is approximating its legislation to that of the EU, the inclusion of IP with commercial and industrial property is not an indication of a lower priority as a trade objective. IP is then discussed under Article 75 of the EU-Montenegro agreement. This single provision outlines the obligations for the Parties to ‘confirm the importance that they attach to ensuring adequate and effective protection and enforcement of intellectual, industrial and commercial property rights’.<sup>62</sup> While this applies to both Parties, this is principally a levied Montenegro obligation as the EU has previously implemented such enforcement and protection measures. The general objective of Article 1(2)(d) is addressed in relation to IP in Article 75(3) which obligates Montenegro to take:

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<sup>58</sup>Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, signed 15 October 2007, Official Journal 108, 29 April 2010. Hereafter the EU-Montenegro agreement.

<sup>59</sup> Article 1(2)(d) of the EU-Montenegro agreement.

<sup>60</sup> Article 45 of the EU-Montenegro agreement.

<sup>61</sup> Article 45 of the EU-Montenegro agreement.

<sup>62</sup> Article 75(1) of the EU-Montenegro agreement.

‘the necessary measures in order to guarantee no later than five years after entry into force of this Agreement a level of protection of intellectual, industrial and commercial property rights similar to that existing in the Community, including effective means of enforcing such rights’.

Montenegro is then obligated to accede to the various ‘multilateral conventions on intellectual, industrial and commercial property rights referred to in Annex VII’.<sup>63</sup>

The EU-Montenegro agreement was then followed in the Interim Agreement between the EU and Bosnia and Herzegovina, in 2008.<sup>64</sup> This agreement was concluded as part of aligning the legal framework of Bosnia and Herzegovina to that of the EU to facilitate a future application for EU membership and strengthen the relationships between the Parties. The EU-Bosnia and Herzegovina agreement followed the format of the EU-Montenegro agreement with some minor variations. Under the EU-Bosnia and Herzegovina agreement, IP is again broadly linked with trade under Article 28. Article 28 permits ‘prohibitions or restrictions on imports, exports or goods in transit’ for the ‘protection of intellectual, industrial and commercial property’. Again, the operation of Article 28 is conditional that such prohibitions and restrictions do not create ‘a means of arbitrary discrimination or a disguised restriction on trade between the Parties’.<sup>65</sup> The inclusion of IP with industrial and commercial property is not problematic when viewed within the overall context of the agreement and the alignment with the EU positions. IP is then discussed under Title III ‘Other Trade and Trade-related provisions’. This inclusion further indicates the growing linkage of IP and general trade. However, the discussion of IP is then addressed within a single provision under Article 38. As noted above, it was drafted under the heading of ‘intellectual, industrial and commercial property rights’.<sup>66</sup> Article 38 follows an identical format to Article 75 of the EU-Montenegro agreement. Article 38 then introduces the general obligation of ensuring ‘adequate and effective protection’ and the ‘enforcement of intellectual,

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<sup>63</sup> Article 75(4) of the EU-Montenegro agreement.

<sup>64</sup> Interim Agreement of Trade and Trade-related matter between the European Community, of the one part, and Bosnia and Herzegovina, on the other part, signed 18 June 2008, OJ L 169, 30 June 2008. Hereafter the EU-Bosnia and Herzegovina agreement.

<sup>65</sup> Article 28 of the EU-Bosnia and Herzegovina agreement.

<sup>66</sup> Article 38 of the EU-Bosnia and Herzegovina agreement.

industrial and commercial property rights'<sup>67</sup> to levels 'similar to that existing in the [EU]'.<sup>68</sup> This requirement is then followed with the obligation for Bosnia and Herzegovina to adopt a number of 'multilateral conventions on intellectual, industrial and commercial property rights referred to in Annex VI'.<sup>69</sup>

### *2.3.2. The Increase of Intellectual Property Protection but Balanced Between the European Union and Central-South American Countries: A Prelude to the 'Third Era'*

While chronologically the Associate Agreement between the EU and Chile concluded in 2002,<sup>70</sup> falls in this second era, it marks a departure from what was seen in the agreements discussed above and links to the developments that characterize the third (post-Lisbon) era, examined below. This divergence is first evident from the objectives of the agreement encompassing a comprehensive agenda between the Parties. Article 1(2) includes the objective of the:

'promotion of sustainable economic and social development and the equitable distribution of the benefits of the Association are guiding principles for the implementation of this Agreement'.

This inclusion is significant as it obligates a stronger consideration of social development and the human rights concerns associated with the various elements of IP. This inclusion then places a comparably higher threshold for human rights concerns when determining the operation of IP protection provisions within the agreement. This explicit (and arguably enforceable) obligation is an aspect that will become more visible in later agreements, in particular, agreements with South and Central American trading partners.

Article 32(1) shows a departure from the previously seen standardised term of ensuring the 'adequate and effective protection of intellectual, industrial and commercial property in conformity with the highest international standards'. Rather

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<sup>67</sup> Article 38(1) of the EU-Bosnia and Herzegovina agreement.

<sup>68</sup> Article 38(3) of the EU-Bosnia and Herzegovina agreement.

<sup>69</sup> Article 38(4) of the EU-Bosnia and Herzegovina agreement.

<sup>70</sup> Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, signed 18 November 2002, OJ L 352, 30 December 2002. Hereafter the EU-Chile agreement.

Article 32(1) requires the Parties to:

‘agree to cooperate, according to their own capabilities, in matters relating to the practice, promotion, dissemination, streamlining, management, harmonisation, protection and effective application of intellectual property rights, the prevention of abuses of such rights, the fight against counterfeiting and piracy, and the establishment and strengthening of national organisations for control and protection of such rights’.

This provision is significant as both the language and the operation of the provision illustrate a clear reflection of the broader objectives of Article 1(2) as opposed to the previously seen obligations of ensuring the ‘adequate and effective’ IP protection. In doing so, Article 32 includes some guidance on how this should be achieved and acknowledging the variety of applications. Additionally, a key aspect to note in this provision is the inclusion of ‘according to their own capabilities’. Thus, the provision is in part reflective of the flexibility afforded under TRIPS, but also to the growing understanding that a one size fits all approach may not be entirely suitable for IP. Furthermore, the provisions explicitly include the phrase ‘the prevention of abuse of such rights’. This marks a stark contrast with other contemporary agreements of the era and represents a prelude to what is seen in agreements concluded after the entry into force of the Treaty of Lisbon. Other agreements included provisions which allowed the restriction of trade to protect IP provided it did not create ‘arbitrary discrimination or a disguised restriction on trade between the Parties’. However, in those agreements the protection against the abuse of the IPRs was solely focused on preventing a negative impact on trade and, more generally, on other economic considerations. By contrast, the provision in this agreement is phrased as ‘the prevention of abuses of such rights’. When read in light of Article 1(2) and the non-defined nature of abuses, this would indicate a broader obligation the public to prevent abuse. In doing so, this would be applying a strong consideration to the human rights concerned with the various IP elements. This rationale emerges also in the phrase ‘protection and effective application’ of IPRs. This broader understanding and application of IP is then facilitated with a definition of IP elements under Article 32(2)(a) to include:

‘copyright and related rights, trademarks, geographical indications, traditional expressions or complementary quality mentions, industrial

designs, patents, layout-designs (topographies) of integrated circuits, protection of undisclosed information, control of anti-competitive practices in contractual licences, enforcement and other matters relating to the protection of intellectual property rights’.

IP is then discussed again under Title VI ‘Intellectual Property Rights’ and presents a significant departure from the previous agreements, with the discussion of IP as a separate aspect of trade. While this discussion is brief, it nonetheless illustrates an understanding of the unique requirements of IP. Article 168 returns to the standardised requirement to provide ‘adequate and effective protection of intellectual property rights in accordance with the highest international standards, including effective means of enforcing such rights’. However, unlike in other contemporary agreements, this is required to be balanced against the higher thresholds seen in Article 32(1). As such, the highest international standards will include a stronger and possibly more visible human rights aspect than seen in other agreements.

#### ***2.4. The Third Era: The Move Towards TRIPS-Plus-Plus and the Search for a Balance***

As highlighted above,<sup>71</sup> from the early 2000s, IP began to occupy a more visible and contested area of negotiation. The EU agreements mirror the global rise of bilateral and multilateral agreements, including many new or expanded IP protection provisions. The introduction of TRIPS-Plus provisions was, however, considered still insufficient. This led to further expansion in agreements concluded in a post-Lisbon environment. Such expansion was to the point of envisaging a maximum level of protection. These provisions are then informally referred to as TRIPS-plus-plus, indicating a significant departure from the TRIPS provisions.

On the one hand, these TRIPS-plus-plus provisions are reflective of the EU efforts within the Anti-Counterfeiting Trade Agreement (ACTA) negotiations, which commenced in 2008.<sup>72</sup> The purpose of ACTA was to address problematic aspects

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<sup>71</sup> See *supra* Chapter Six Section 2.3.

<sup>72</sup> European Commission (2007), European Commission seeks to negotiate major new international anti-counterfeiting pact, Press Release of 23 October 2007 (IP/07/1573). (26 March 2008) - Recommendation from the Commission to the Council to authorise the

of international IP in a forum outside that of the WTO and WIPO.<sup>73</sup> In doing so, ACTA would create a new and separate international framework to address the enforcement and protection of IP. This proposed framework would include a particular focus on targeting counterfeit goods, generic pharmaceuticals, and online infringement. As such, the EU's involvement in ACTA can be seen as the start of the third era of TRIPS-Plus provisions. The nature of ACTA, as well as its glacial pace of development, meant it was not an active concern in the mid-2000s. However, as the development of IP protection continued, and the matter became more fraught and contested within the WTO system, ACTA became a more prominent and promising option.

On the other hand, the enhancement of IP protection in this context is also the result of internal EU developments. Firstly, the external competences of the EU itself had significantly expanded with the Treaty of Lisbon.<sup>74</sup> Secondly, there had been a significant level of development of what constitutes both IP protection and the enforcement of IP measures within the EU itself which was then mirrored externally.<sup>75</sup>

While Association Agreements with candidate and neighbouring countries, albeit concluded in 2008 and 2009, can be viewed as falling in the second era as the EU followed what it had previously done in the same type of agreements,<sup>76</sup> trade agreements negotiated in the late 2000s with trading partners such as the Cariforum countries, Korea or, most recently, Singapore are those fully reflective of the developments highlighted above. In that connection, it seems that Association Agreements with neighbouring countries or candidate countries still include IP provisions that require the approximation of IP protection and enforcement legislation as that of the EU. At the same time, the neighbouring countries or candidate countries are also required to accede to a number of international IP conventions, many of which the EU has strongly shaped.<sup>77</sup>

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Commission to open negotiations of a plurilateral anti-counterfeiting trade agreement.

<sup>73</sup> See *supra* Chapter One.

<sup>74</sup> Article 207 TFEU.

<sup>75</sup> See *supra* Chapter Two Section 2 and Section 3.

<sup>76</sup> The Stabilisation and Association Agreement concluded by the EU and Serbia in 2010 is an example of this process. Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, signed 23 July 2012, OJ L 278, 18 October 2013. Hereafter EU-Serbia.

<sup>77</sup> A more retroactive approach can also be seen in the agreement between the EU and Iraq

#### *2.4.1. Ushering the 'Third Era': The EU-Cariforum Agreement*

The first agreement that falls within this era is the Economic Partnership Agreement with the Cariforum nations,<sup>78</sup> which was concluded in 2008.<sup>79</sup> The EU-Cariforum agreement marked a significant development in the area of IP protection and enforcement. This was reflective of the developments of the previous decade. The concept of IP as a part of overall trade was firmly established in the global economy, with the view of IP as another commodity of trade. The EU-Cariforum agreement was the first to significantly address how IP protection could engage with and foster economic development. The EU-Cariforum agreement recognised that:

‘the protection and enforcement of intellectual property plays a key role in fostering creativity, innovation and competitiveness, and are determined to ensure increasing levels of protection appropriate to their levels of development’.<sup>80</sup>

However, in doing so, the agreement shows awareness by the Parties of the possibilities for abuse and unjust burden on the Cariforum nations for unilateral adoption of the ‘highest international standards’. In that connection, the agreement stipulates that:

‘adequate and effective enforcement of intellectual property rights should take account of the development needs of the CARIFORUM States, provide a balance of rights and obligations between rightsholders and users and allow the EC Party and the Signatory CARIFORUM States to protect public health and nutrition’.<sup>81</sup>

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concluded in 2012. This approach can in part be attributed to the attempts of the EU to aid and facilitate the reconstruction and development of Iraq. Additionally, Iraq was a member of the WTO at this point. The EU had previously supported Iraq’s request to join in 2004. As such, this agreement would be a strong benefit for the application process. Within the EU-Iraq agreement, IP is briefly discussed as a component of general trade in relation to the prohibition and restriction of trade under Article 42(7). See the Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, signed 11 May 2012, OJ L204, 31 July 2012. Hereafter the EU-Iraq agreement.

<sup>78</sup> The Cariforum nations are a collection of Caribbean nations engaged in economic dialogue with the EU. It includes Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, the Dominican Republic, Grenada, Guyana, Haiti, Jamaica, Saint Lucia, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Suriname, and Trinidad and Tobago.

<sup>79</sup> Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part, signed 10 October 2009, OJ L 289, 30 October 2008. Hereafter the EU-Cariforum agreement.

<sup>80</sup> Article 131(2) of the EU-Cariforum agreement.

<sup>81</sup> Article 139(2) of the EU-Cariforum agreement.

The EU-Cariforum agreement includes a comprehensive scope of the classification of IP elements under Article 139, defining IP as:

‘copyright (including the copyright in computer programmes, and neighbouring rights); utility models; patents including patents for biotechnological inventions; protection for plant varieties; designs; layout-designs (topographies) of integrated circuits; geographical indications; trade marks for goods or services; protection for data bases; protection against unfair competition as referred to in Article 10bis of the Paris Convention for the Protection of Industrial Property, and protection of undisclosed confidential information on know how’.

The EU-Cariforum further breaks from the previous classification of ‘intellectual, industrial, and commercial property’. In fact, the EU-Cariforum subdivides the IP based chapter into each of the traditional IP elements. This division allows the EU-Cariforum agreement to adequately address technical matters concerning the specific IP element (e.g. patents, copyright, trademark, design), as well as the related international Treaties associated with each element. This approach marks the start of an increasing in-depth application of IP protection and enforcement provisions going forward with the EU agreements. The increased emphasis is reflective of the development within the EU following the Treaty of Lisbon, as well as the broader global development. In particular the more prominent position of IP as a component of both trade under the CCP,<sup>82</sup> its position and protection as a human right,<sup>83</sup> and its overall position within the EU objectives.<sup>84</sup>

#### *2.4.2. The EU-South Korea Agreement*

A similar approach to that adopted in the EU-Cariforum can be subsequently seen in the Free Trade Agreement between the EU and South Korea signed in 2009 and was finally ratified in 2015.<sup>85</sup> This agreement is characterised by a distinctive emphasis on IP protection, which, at least in part, reflects the Parties’ active role in

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<sup>82</sup> Article 207 TFEU.

<sup>83</sup> Article 21 TEU.

<sup>84</sup> Article 3(3) and 3(5) TEU.

<sup>85</sup> Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part signed 12 October 2010, OJ L 127, 14 April 2011. Hereafter the EU-Korea agreement.

the negotiation and development of the ACTA framework. As noted in a study published by the European Parliament,<sup>86</sup> the IP provisions in the agreement:

‘represent a significant shift towards a more offensive approach on the part of the EU in IP that shows clear similarities with the approach that the United States has adopted in its free trade agreements’.<sup>87</sup>

In the same study, it is highlighted that:

‘[t]he EU-South Korea Free Trade Agreement is one of the first bilateral trade agreement in which the explicit TRIPS-plus mandate of the ‘Global Europe’ strategy has been incorporated’.<sup>88</sup>

The EU-Korea agreement discusses IP as a dedicated and separate topic of trade under Chapter 10. The position of IP as a part of trade is first expressed in Article 10(1).<sup>89</sup> Article 10(1)(a) states the objectives of the EU-Korea agreement are ‘to facilitate the production and commercialisation of innovative and creative products in the Parties’ and ‘achieve an adequate and effective level of protection and enforcement of intellectual property rights’. The EU-Korea agreement offers some guidance on what these levels of IP protection are and how they can be achieved. By obligating the Parties to ratify the international Treaties found within Annex 1C of TRIPS. In particular, Article 10(5), which lists IP conventions which the Parties must accede to, each of which the EU has had a strong hand in the negotiation and implementation. This is complemented by re-stating and re-affirming what is to be considered IP for the purpose of this agreement.<sup>90</sup> Within Chapter 10 of the EU-

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<sup>86</sup> European Parliament, *An Assessment of the EU-Korea FTA*, Directorate-General for External Policies Policy Department, available at <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA\\_ET\(2010\)133875\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA_ET(2010)133875_EN.pdf)>.

<sup>87</sup> European Parliament, *An Assessment of the EU-Korea FTA*, Directorate-General for External Policies Policy Department, available at <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA\\_ET\(2010\)133875\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA_ET(2010)133875_EN.pdf)>, 84.

<sup>88</sup> European Parliament, *An Assessment of the EU-Korea FTA*, Directorate-General for External Policies Policy Department, <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA\\_ET\(2010\)133875\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA_ET(2010)133875_EN.pdf)>, 83.

<sup>89</sup> Within the EU-Korea agreement, provisions within the various chapters are referred to as Articles of the chapter number e.g., the first provision of Chapter 10 is Article 10(1).

<sup>90</sup> Article 10(5) defines IP to include ‘(a) copyright, including copyright in computer programs and in databases, and related rights; (b) the rights related to patents; (c) trademarks; (d) service marks; (e) designs; (f) layout-designs (topographies) of integrated circuits; (g) geographical indications; (h) plant varieties; and (i) protection of undisclosed information. 3. Protection of intellectual property includes protection against unfair competition as referred to in article 10

Korea agreement, the various IP elements are then comprehensively discussed. This wide-ranging approach is reflective of the contemporary challenges related to the emergence of new technologies.

On the whole, the EU- Korea agreement is seen as more comprehensive than previous EU bilateral agreements. Moreover, as highlighted in previous studies,<sup>91</sup> many provisions, such as protection of copyright in the digital environment or industrial designs as well as enforcement measures are reflective of EU legislation. At the same time, the EU-Korea agreement retains the permission for the Parties to include exemptions or limitations on the various elements of IP.<sup>92</sup> If the Parties do seek to introduce such exemptions and limitations, there is no obligation to include them to achieve a set level of protection. This is a stark contrast to the ‘an adequate and effective level of protection and enforcement’ measures of the IP elements previously seen within the agreements.

The EU-Korea agreement also contains an explicit reference to genetic resources, traditional knowledge, and folklore. While they are discussed as a single provision, the Parties are obligated to ‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities’.<sup>93</sup> Additionally, the Parties are obligated to:

‘promote their wider application with the involvement and approval of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices’.<sup>94</sup>

This inclusion is significant. It was the first time that those issues were mentioned in an EU FTA, while genetic resources, traditional knowledge, and folklore were previously ignored by other agreements.

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bis of the Paris Convention for the Protection of Industrial Property (1967)’.

<sup>91</sup> European Parliament, An Assessment of the EU-Korea FTA, Directorate-General for External Policies Policy Department, <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA\\_ET\(2010\)133875\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2010/133875/EXPO-INTA_ET(2010)133875_EN.pdf)>, 83-84.

<sup>92</sup> Article 10(11) of the EU-Korea agreement.

<sup>93</sup> Article 10(40)(1) of the EU-Korea agreement.

<sup>94</sup> Article 10(40)(1) of the EU-Korea agreement.

#### *2.4.3. The EU-Central America Agreement*

The development seen in the EU-Korea agreement continued in 2012, in the subsequent Association Agreement between the EU and Nicaragua, Honduras, Panama, El Salvador, and Costa Rica.<sup>95</sup> This Association Agreement built on the EU-Cariforum agreement, placing a greater focus towards ‘increased trade and investment among the Parties’.<sup>96</sup> While this provision on the purpose of the agreement does not explicitly address IP protection, IP would be considered as a component of trade and investment. Additionally, Article 2(h) provision requires the Parties to take into ‘account special and differential treatment in order to reduce structural asymmetries existing between both regions’. Article 55 provides guidance on how to address the structural asymmetries between the Parties by recognising the ‘importance of cooperation and technical assistance in the field of intellectual property’.<sup>97</sup>

IP is then discussed under Part IV ‘Trade’ within the EU-Central American agreement, specifically under Title VI ‘Intellectual Property’. Again, the title itself is significant, as while it discusses IP as a component of trade, this is conducted in a self-contained manner. In doing so, the EU-Central America agreement addresses the unique nature of IP and the dual obligations to protect IP, while also removing the structural asymmetries between the Parties. Article 78 sets out the general provisions of Part IV. IP is addressed under Article 78(g) and obligates:

‘the adequate and effective protection of intellectual property rights, in accordance with international obligations in force between the Parties, so as to ensure the balance between the rights of the right-holders and public interest, taking into consideration the differences between the Parties and the promotion of technology transfer between the regions’.

Significantly, the EU-Central America agreement places emphasis on the balance to be achieved between IP protection and competing interest. In fact, it provides that IP must be protected in a manner to ‘ensure the balance between the rights of

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<sup>95</sup> Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other, signed 29 June 2012, OJ L 346, 15 December 2012. Hereafter the EU-Central America agreement. This agreement was originally negotiated by the EU and Nicaragua, Honduras, Panama, El Salvador, and Costa Rica.

<sup>96</sup> Article 2(h) of the EU-Central America agreement.

<sup>97</sup> Article 55(1) of the EU-Central American agreement.

the right-holders and public interest'.<sup>98</sup> Such obligations were similar to those found within the EU-Cariforum agreement.

Article 229 details the nature and scope of the overall IP provisions, as well as the definition of IP within the agreement.<sup>99</sup> In doing so, this addresses the requirements to consider and reflect upon the importance of human rights concerns with the EU-Central America agreement. An explicit reference is made to considerations in relation to the public health concerns,<sup>100</sup> the conservation of biological resources,<sup>101</sup> and the importance and protection afforded to indigenous people.<sup>102</sup> The EU-Central America agreement, however, still solidly links IP to trade and refers explicitly to the TRIPS in Article 228(a) by requiring that:

‘[t]he Parties shall ensure an adequate and effective implementation of the international treaties dealing with intellectual property to which they are Parties, including the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "TRIPS Agreement"). The provisions of this Title shall complement and further specify the rights and obligations between the Parties under the TRIPS

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<sup>98</sup> Article 78(g) of the EU-Central America Agreement.

<sup>99</sup> Article 229(3) of the EU-Central America agreement reads as follows: ‘a) For the purposes of this Agreement, intellectual property rights embody copyright, including copyright in computer programs and in databases, and related rights; rights related to patents; trademarks; trade names; industrial designs; layout-designs (topographies) of integrated circuits; geographical indications, including designations of origin; plant varieties and protection of undisclosed information; (b) for the purposes of this Agreement, as regards unfair competition, protection will be granted in accordance with Article 10bis of the Paris Convention for the Protection of Industrial Property (Stockholm Act, 1967)’.

<sup>100</sup> Article 229(2) of the EU-Central America agreement states that ‘(a) the Parties recognise the importance of the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November, 2001 by the Ministerial Conference of the World Trade Organisation. In interpreting and implementing the rights and obligations under this Title, the Parties shall ensure consistency with this Declaration; the Parties shall contribute to the implementation and respect the Decision of the WTO General Council of 30 August, 2003 on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, as well as the Protocol amending the TRIPS Agreement, done at Geneva on 6 December, 2005’.

<sup>101</sup> Article 229(4) of the EU-Central America agreement states ‘[t]he Parties recognise the sovereign right of States over their natural resources and the access to their genetic resources in accordance with what is established in the Convention on Biological Diversity (1992). No provision in this Title shall prevent the Parties from adopting or maintaining measures to promote the conservation of biological diversity, the sustainable utilization of its components and the fair and equitable participation in the benefits arising from the utilization of genetic resources, in conformity with what is established in that Convention’.

<sup>102</sup> Article 229(5) of the EU-Central America agreement requires Parties to ‘recognise the importance of respecting, preserving and maintaining the indigenous and local communities' knowledge, innovations and practices that involve traditional practices related to the preservation and the sustainable use of biological diversity’.

Agreement and other international treaties in the field of intellectual property’.

The EU-Central America agreement then addresses the concerns of IP protection and enforcement in a comprehensive manner across the various IP elements. Article 260(1) requires the Parties to include ‘measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights’. However, this enforcement ‘shall be fair, proportionate and equitable’ but it shall not give rise to ‘unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays’.<sup>103</sup> These obligations are further balanced against the prevention ‘the creation of barriers to legitimate trade’.<sup>104</sup> Thus, ensuring provisions are in line with the obligations under Article 78(g).

Overall, the language of the EU-Central America agreement presents an interesting development compared to previous agreements of this ‘third era’ and with agreements of the previous eras. The obligations of Article 2(h) require a more balanced approach between TRIPS-plus protection and broader human rights concerns. However, while Parties have a degree of discretion with respect to the exemptions and limitations of IPRs to protect human rights. Furthermore, these exemptions and limitations must not unduly restrict the lawful commercial exploitation of the IP by the rightsholders.

#### *2.4.4. The European Union Agreements with other South American Countries*

The EU continued its trade development policy attempting to conclude a regional FTA with its South American trading partners. However, this FTA stalled and broke down due to ongoing political difficulties within the region. The EU hence continued its negotiations with Colombia and Peru, completing an FTA with the Parties in 2012.<sup>105</sup> Following the completion of the EU-Colombia and Peru agreement, Ecuador applied for and was granted permission to accede the EU-Colombia and Peru agreement in 2017. The following year, Bolivia formally

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<sup>103</sup> Article 260(1) of the EU-Central America agreement.

<sup>104</sup> Article 260(1) of the EU-Central America agreement.

<sup>105</sup> Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, signed 26 June 2012, OJ L 354, 21 December 2012. Hereafter the EU-Colombia & Peru agreement.

applied to seek accession to the EU-Colombia and Peru agreement.

Within this EU-Colombia and Peru agreement, IP is discussed as an isolated topic, in this instance, under Title VII ‘Intellectual Property’. Again, this serves to illustrate the significance the Parties place on IP as a component of trade, but also in the broad development policies. The significance is evident from the dual objectives in relation to IP and the public interest under Article 4(g) which obligates the Parties the creation of:

‘adequate and effective protection of intellectual property rights, in accordance with international rules in force between the Parties, while ensuring a balance between the Rights of intellectual property rightsholders and the public interest’.

However, in achieving this dual objective, Parties should act in order to contribute ‘to transfer and dissemination of technology and favour social and economic welfare and the balance between the rights of the holders and the public interest’.<sup>106</sup>

In a similar fashion to the EU-Central America agreement, and consistently with this dual objective, the Parties are obligated to re-affirm their obligation to TRIPS and IP agreements under WIPO.<sup>107</sup> The Parties are also required to ‘to maintain a balance between the rights of intellectual property holders and the interest of the public’.<sup>108</sup> However, the public interest is defined and is ‘actionable’ under Article 196(3). Article 196(3) provides a comprehensive, yet non-exhaustive scope of public interest and includes ‘education, culture, research, public health, food security, environment, access to information and technology transfer’. The concept of public interest thus encompasses all human rights that encroach IP, which has been discussed in Part I of this thesis. Particular emphasis is given to health. Article 197 highlights the requirement of the Parties to permit and implement exceptions and flexibilities of IP protection measures to ‘protect public health and nutrition, and to guarantee access to medicines’.<sup>109</sup> Furthermore, the Parties must ensure recognition and consistency with the Doha Declaration.<sup>110</sup>

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<sup>106</sup> Article 195(b) of the EU-Colombia and Peru agreement.

<sup>107</sup> Article 196(1) of the EU-Colombia and Peru agreement.

<sup>108</sup> Article 196(3) of the EU-Colombia and Peru agreement.

<sup>109</sup> Article 196(1) of the EU-Colombia and Peru agreement.

<sup>110</sup> Article 197(2) of the EU-Colombia and Peru agreement requires the Parties to ‘recognise the importance of the Declaration of the Fourth Ministerial Conference in Doha and especially the Doha Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001

In a similar manner to these balancing of obligations and interests relating to health issues, the EU-Colombia and Peru agreement includes provisions for the protection of biodiversity and traditional knowledge from an IP protection perspective.<sup>111</sup> The inclusion of those provisions is significant as it mirrors the amplified objectives of EU external relations as indicated in Article 21 TEU (and Article 3(5) TEU). While those provisions build upon the EU-Cariforum and EU-Central America agreements, they go even further. In particular, Article 201 of the EU-Colombia and Peru agreement discusses the protection of biodiversity and Traditional Knowledge in a fairly comprehensive manner. In doing so, both biodiversity and Traditional Knowledge are framed from an IP perspective. Moreover, Article 201 includes explicit requirements to respect the dual objectives of Article 4(g). These include a duty to ‘preserve and maintain knowledge, innovations and practices of indigenous and local communities’ and to ‘promote their wider application conditioned to the prior informed consent of the holders of such knowledge, innovations and practices’.<sup>112</sup> Furthermore, in accordance with Article 15(7) of the Convention of Biological Diversity (CBD),<sup>113</sup> the Parties commit to ‘reaffirm their obligation to take measures with the aim of sharing in a fair and equitable way the benefits arising from the utilization of genetic resources’.<sup>114</sup>

The EU-Colombia and Peru agreement subsequently discusses the remaining elements of IP under Articles 202-223. Under the terms of these Articles, the Parties are explicitly obligated to accede to various multilateral conventions related to the various elements of IP. While the requirement to ratify such conventions has been a salient feature within EU negotiated agreements, the explicit requirement to accede to the various conventions is a reflection of the importance of the global context in the development of balanced trade relations.

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by the WTO Ministerial Conference and its subsequent developments. In this sense, in interpreting and implementing the rights and obligations under this Title, the Parties shall ensure consistency with this Declaration’.

<sup>111</sup> Article 201 of the EU-Colombia and Peru agreement.

<sup>112</sup> Article 201(3) of the EU-Colombia and Peru agreement.

<sup>113</sup> Article 15(7) of the CBD states: ‘Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms’.

<sup>114</sup> The EU-Colombia and Peru agreement Article 201(4).

The prominence given to GIs, under Articles 207 to 214, is also significant. These Articles entail a significant expansion compared to previous agreements are reflective of the importance associated with GIs by the EU.

Article 234 then discusses the enforcement measures for IP within the EU-Colombia and Peru agreement. Article 234(1) obligates the Parties to ‘provide for measures, procedures and remedies as established under this chapter, which are necessary to ensure the enforcement of intellectual property rights’. Article 234(2) positions the strength of the enforcement procedures in a broad and encompassing manner to include ‘measures, procedures and remedies that are expeditious, effective, and proportionate, and constitute a deterrent to further infringements’. Additionally, Article 234(2) further strengthens the link of IP as a component of trade with the requirement that such measures should not give rise to abuse and ‘creation of barriers to legitimate trade’.

The EU-Colombia and Peru agreement then concludes its IP focus with explicit protection and enforcement provision for online activities and the liability of internet service providers. Article 250 obligates the Parties:

‘to enforce copyright and related rights in the digital environment, each Party shall provide for the measures set out in this Section for intermediary service providers where they are in no way involved with the information transmitted’.

Article 250 seeks to ensure the provision of ‘adequate and effective level of protection and enforcement’ in the digital environment as required by Article 195(b). At the same time, Article 250 obligates the ‘free movement of information services’ which would satisfy the second requirement of Article 195(b). The protection of Article 250 is then expanded for the internet service provider acting as a mere conduit,<sup>115</sup> caching content,<sup>116</sup> or merely hosting it.<sup>117</sup> This section concludes with the imposition of a general duty to monitor.<sup>118</sup> Articles 251-254 provisions closely mirror the E-Commerce Directive, save for the most minor of

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<sup>115</sup> Article 251 of the EU-Colombia and Peru agreement.

<sup>116</sup> Article 252 of the EU-Colombia and Peru agreement.

<sup>117</sup> Article 253 of the EU-Colombia and Peru agreement.

<sup>118</sup> Article 254 of the EU-Colombia and Peru agreement.

cosmetic alterations, further illustrating indicating the strength of the EU in the negotiation.

#### *2.4.5. Other EU Agreements in the Context of Neighbourhood Policy*

In 2014, the EU continued its trade and development agenda as part of its European Neighbourhood Policy (ENP). Under the ENP, the EU completed Association Agreements with the Ukraine,<sup>119</sup> Moldova,<sup>120</sup> and Georgia.<sup>121</sup> These agreements differed from previous agreements from within the ENP stemming from the expansion to the competence of the EU following the Treaty of Lisbon.<sup>122</sup> These agreements were developed and negotiated a number of years later than previous agreements in the region. As such, the global and internal EU developments concerning IP protection and enforcement have a significant impact. While those agreements may differ in a few parts, they are largely identical from an IP perspective. Hence, they will be discussed together.

In contrast to agreements with the South and Central Americas trading partners, these agreements IP provisions are mostly trade-focused and do not contain provisions which require a balance between IP and other competing rights. This is evident from the fact that the objectives of the Chapter on IP are to:

‘(a) facilitate the production and commercialisation of innovative and creative products in the Parties; and (b) achieve an adequate and effective level of protection and enforcement of intellectual property rights’.<sup>123</sup>

This focus on trade and other commercial aspects within the agreements’ IP provisions are further illustrated in relation to the scope and nature of the agreements. By ensuring:

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<sup>119</sup>Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, signed 21 March 2014, OJ L161, 29 March 2014. Hereafter the EU-Ukraine agreement.

<sup>120</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part signed 27 July 2014, OJ L 260, 30 August 2014. Hereafter the EU-Moldova agreement.

<sup>121</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, signed 27 July 2014, OJ L 261, 30 August 2014. Hereafter the EU-Georgia agreement Article agreement.

<sup>122</sup> See *supra* Chapter Four.

<sup>123</sup> Article 157 of the EU-Ukraine agreement, Article 227 of the EU-Moldova agreement, and Article 150 of the EU-Georgia agreement.

‘the adequate and effective implementation of the international treaties dealing with intellectual property to which they are Parties including the Agreement on Trade-related Aspects of Intellectual Property Rights, contained in Annex 1C to the WTO Agreement’.<sup>124</sup>

Unlike the previous South and Central American agreements, there are no obligations to consider the public interest or human rights in the implementation of IP provisions. These agreements define IP without reference to many of the elements brought into the international discussion in recent years, such as the protection of biodiversity and or traditional knowledge.<sup>125</sup> Moreover, the agreements do not contain a general obligation for the Parties to consider the Doha Declaration within the general provisions of the agreements, albeit a cursory mention to it is made in relation to patents protection. Additionally, the provisions for the commercially based IP elements are greatly expanded (far beyond what was provided in previous agreements). The expansion serves to show the importance the EU attributes to each. This is particularly evident in relation to GIs.<sup>126</sup>

The enforcement sections within these agreements are then extremely detailed in comparison to the previous agreements concluded in what this thesis has termed ‘the second era’. For example, the EU-Ukraine agreement opens with a re-statement of the Parties’ obligations under TRIPS, specifically Section III of TRIPS.<sup>127</sup> Article 235 then introduces the right to information for the identification of infringement. Under this provision, the IPRs holders may seek the disclosure of the identity of infringers. Article 236 introduced the availability of a suite of remedies available to the IP rightsholder, the remedies follow not only the Directives of the EU but also how they have been interpreted by the CJEU over the years. EU-Ukraine also contains a specific subsection on online service providers and how IP protection needs some specific framework for online infringement.<sup>128</sup>

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<sup>124</sup> Article 158(1) of the EU-Ukraine agreement, Article 228(1) of the EU-Moldova agreement, and Article 151(1) of the EU-Georgia agreement.

<sup>125</sup> Article 158(2) of the EU-Ukraine agreement, Article 228(2) of the EU-Moldova agreement, and Articles 151(2) and 151(3) of the EU-Georgia agreement.

<sup>126</sup> European Commission, ‘Geographical indications and TRIPs: 10 Years Later... A roadmap for EU GI holders to get protection in other WTO Members’ <[https://trade.ec.europa.eu/doclib/docs/2007/june/tradoc\\_135088.pdf](https://trade.ec.europa.eu/doclib/docs/2007/june/tradoc_135088.pdf)>.

<sup>127</sup> Article 230 of the EU-Ukraine agreement.

<sup>128</sup> This may expand the restrictions on trade to online activities.

#### 2.4.6. *The Most Recent Agreements*

In the last few years, the EU has been quite active on the international scene undertaking the negotiation of and concluding various agreements. In 2016 the Economic Partnership Agreement between the EU and the Southern African Development Community was concluded.<sup>129</sup> From an IP perspective, the EU-SADC agreement is quite brief and represent perhaps an exception, compared to the other agreements of the ‘third era’ analysed above. IP protection is addressed under the heading of ‘Cooperation on Protection of Intellectual Property Rights’ in Article 16. This is the sole provision dealing with IP within the EU-SADC agreement. That said, the provision while brief does provide a significant level of protection for IP which is in line with the level afforded in the ‘third era’ agreement. This provision obligates the parties to affirm their commitments under the Cotonou agreement as well as TRIPS. Significantly, this is phrased as ‘their rights, obligations and flexibilities’.<sup>130</sup> This is complemented by Article 16(2) which obligates Parties to ensure:

‘adequate, effective and non-discriminatory protection of intellectual property rights (‘IPRs’), and provide for measures for the enforcement of such rights against infringement thereof, in accordance with the provisions of the international agreements to which they are a party’.

The EU-SADC agreement then discussed the protection and cooperation of GIs in a significantly more detailed manner. This mirrors what seen in other agreements such as the EU-Central America and the EU-Korea agreement. While first recognising the duty to cooperate under Articles 22 to 24 of TRIPS, the Parties must also ‘recognise the importance of GIs and origin-linked products for sustainable agriculture and rural development’.<sup>131</sup> This recognition is supplemented with a duty to cooperate with ‘reasonable requests to provide information and clarification to each other on Geographical Indications and other IPR related matters’.<sup>132</sup> The

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<sup>129</sup> Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, signed 10 June 2016, OJ L 250 16 September 2016. The SADC is made up of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Mozambique, the Republic of Namibia, the Republic of South Africa, and the Kingdom of Swaziland. Hereafter the EU-SADC agreement.

<sup>130</sup> Article 16(1) of the EU-SADC agreement.

<sup>131</sup> Article 16(3) of the EU-SADC agreement.

<sup>132</sup> Article 16(4) of the EU-SADC agreement.

explicit reference to GIs within the provisions illustrates the additional importance placed by the Parties on GIs (in comparison to the traditional elements of IP).

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU was completed in 2017.<sup>133</sup> Within CETA, IP is addressed in a comprehensive manner under Chapter 20. CETA adopts a commercially focused perspective and focuses strongly on protecting the IP. This commercially focused perspective is evident from the dual objectives which shape IP provisions. Article 20(1) states that:

‘[t]he objectives of this Chapter are to: (a) facilitate the production and commercialisation of innovative and creative products, and the provision of services, between the Parties; and (b) achieve an adequate and effective level of protection and enforcement of intellectual property rights’.

In achieving these aims, the Parties, the IP provisions within the agreement are said to ‘complement the rights and obligations between the Parties under the TRIPS Agreement’.<sup>134</sup> CETA however, also addresses (as other agreements such as the EU-Korea agreement) IP protection and public health concerns under Article 20(3). In doing so, CETA obligates the Parties to not only ‘recognise the importance of the Doha Declaration on the TRIPS Agreement and Public Health’ but to ensure when interpreting and implementing the IP protection provisions this is consistent with the Doha Declaration.<sup>135</sup> Furthermore, this obligation to interpret and implement in a manner consistent with the Doha Declaration applies to the implementation of CETA as a whole, rather than just in relation to Patent protection (as seen in the EU-Central America agreement). CETA then continues to address various IP elements in a significant and comprehensive manner in Section B of the chapter, and regulates the enforcement of IPRs under Section C. Article 20(30) obligates the Parties to:

‘ensure that procedures for the enforcement of intellectual property rights are fair and equitable, and are not unnecessarily complicated or costly, nor entail unreasonable time-limits or unwarranted delays. These procedures

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<sup>133</sup> Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, 14 January 2017.

<sup>134</sup> Article 20(2)(1) of CETA.

<sup>135</sup> Article 20(2) of CETA.

shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse’.

The commercially focused nature of the agreement is also evident in relation to enforcement. While enforcement measures are required to be ‘fair and equitable’, Article 20(30) does not include a reference to specific public concerns. CETA also includes IP enforcement measures with a comprehensive discussion of enforcement in relation to border measures under Section D. While these provisions relate to the technical and operational aspects of border measures, the inclusion itself is significant.

One of the more recent FTAs, finalised in 2014, but not concluded until 2018, is the EU-Singapore agreement.<sup>136</sup> The IP is addressed under Chapter 10 of the Agreement. Article 10(1)(a) obligates the Parties to ensure an ‘adequate and effective level of protection of intellectual property rights and the provision of measures for the effective enforcement of such rights’.<sup>137</sup> The EU-Singapore agreement further requires the Parties to observe the obligations of TRIPS and makes explicit reference to the transfer and dissemination of technology,<sup>138</sup> as well as stipulates that Parties must ensure the:

‘measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development’.<sup>139</sup>

The EU-Singapore agreement, mirroring other agreements in this ‘third era’, obligates the Parties to re-affirm their ‘commitments under the international treaties dealing with intellectual property, including the TRIPS Agreement’.<sup>140</sup> Significantly, the obligations to protect biodiversity and public interests are absent.

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<sup>136</sup> Hereafter the EU-Singapore agreement. While the text of the agreement has been finalised, due to the original nature of the agreement to include investment and dispute resolution, presented some issue regarding the EU’s competence to act on the matter. This led to the delay of the signature of the EU-Singapore agreement until *Opinion 2/15* held the EU held sufficient competence to conclude the agreements. This is discussed *supra* Chapter Four Section 4. However, elements relating to Foreign Direct Investment and the associated settlement mechanism were moved to a separate agreement due to lingering questions regarding their competence.

<sup>137</sup> Article 10(1)(b) of the EU-Singapore agreement Article 10(1)(b).

<sup>138</sup> Article 7 of TRIPS.

<sup>139</sup> Article 8 of TRIPS.

<sup>140</sup> Article 10(2) of the EU-Singapore agreement.

While the question of IP and health is addressed under Article 10(30),<sup>141</sup> this is only applicable to patent-related provisions rather than a guiding principle, as seen in the agreements with South and Central American agreements.

The EU and Japan completed an FTA in 2018.<sup>142</sup> Similarly to CETA, the EU-Japan agreement seeks higher and more expansive IP protection measures.<sup>143</sup> However, Article 14(2) includes the obligation to take into account the public policy objectives of the Parties across the goal of promoting innovation and creativity, fostering competition through IP, and facilitate the diffusion of information, knowledge, technology, culture and the arts. Significantly, Article 14(2) ends with the obligation to take ‘into account the interests of relevant stakeholders including rightsholders and users’. While this is still strongly operating from the perspective of the commercial aspects, it is an important inclusion as it brings users at the forefront.

The EU and Vietnam have also recently completed an FTA.<sup>144</sup> The EU-Vietnam agreement discusses IP under Chapter 12 and includes a robust development of the various IP elements, as well as enforcement provisions. Article 12(1) of the chapter states that the objectives of the chapter are to:

‘(a) facilitate the creation, production and commercialization of innovative and creative products between the Parties contributing to a more sustainable

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<sup>141</sup> ‘The Parties recognise the importance of the Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001 by the Ministerial Conference of the WTO, at Doha. In interpreting and implementing the rights and obligations under Sub-Section E (Patents) and Sub-Section F (Protection of Test Data Submitted to Obtain an Administrative Marketing Approval to put a Pharmaceutical Product on the Market), the Parties shall ensure consistency with this Declaration. 2. The Parties shall respect the Decision of the WTO General Council of 30 August 2003 on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, as well as the Decision of the WTO General Council of 6 December 2005 on Amendment of the TRIPS Agreement, adopting the Protocol Amending the TRIPS Agreement’.

<sup>142</sup> Hereafter the EU-Japan agreement.

<sup>143</sup> Article 14(1) states that ‘[i]n order to facilitate the production and commercialisation of innovative and creative products and the provision of services between the Parties and to increase the benefits from trade and investment, the Parties shall grant and ensure adequate, effective and non-discriminatory protection of intellectual property and provide for measures for the enforcement of intellectual property rights against infringement thereof, including counterfeiting and piracy, in accordance with the provisions of this Chapter and of the international agreements to which both Parties are party. A Party may, but shall not be obliged to, provide more extensive protection for, or enforcement of, intellectual property rights under its law than is required by this Chapter, provided that such protection or enforcement does not contravene the provisions of this Chapter’.

<sup>144</sup> Hereafter the EU-Vietnam agreement. The text agreement has been finalised and is currently awaiting signatures by the Parties following an announcement in late June 2019.

and inclusive economy for the Parties; and (b) achieve an adequate and effective level of protection and enforcement of intellectual property rights’.

Article 12(1)(2), however, requires that:

‘[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’.

Article 12(2) further refers to the ‘balance between the rights of intellectual property holders and the interest of the public’.<sup>145</sup>

On the whole, these most recent agreements (either concluded or near conclusion) show a strong level of IP protection and place emphasis on the commercial value attached to IPRs. However, references to other public interests seem to allude to the intention to achieve a fairer balance between IP and competing rights. Reference to users in the most recent agreements is also reflective of greater levels of awareness of competing rights, in particular (allegedly) the right to access cultural goods and services and the right to education.

The chronological trends highlighted above show a move towards an expansion of IP provisions in EU agreements, which have become more comprehensive and, albeit with some exceptions, the search for a level of protection beyond the TRIPS. What has been termed as ‘third era’ of agreements also shows agreements that take into account specific geographical concerns and are tailored to the situation of certain countries. In some instances, this tailoring exercise translates into the inclusion of clauses meant to balance IP protection with other competing interests.

### **3. Intellectual Property Provisions in Agreements as a Restriction of Trade**

Having charted in a systematic way the chronological development of the agreements, Section 3 and the subsequent Section 4 examine the IP provisions from functional perspectives.

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<sup>145</sup> Article 12(2)(1) of the EU-Vietnam agreement.

### ***3.1. Intellectual Property as a Restriction to Trade by its Very Nature and as a Tool to Address Divergence***

IP chapters in EU agreements conceptualise IP protection as a restriction of trade, i.e. as a permitted barrier to liberalised trade to protect the commercial interests of IP holders. At the same time conceiving of IP as a permissible restriction of trade, as it will be discussed in the subsequent session, the IP provisions can also serve as an enhancement of trade in a direct or indirect manner.<sup>146</sup>

This function of IP chapters in EU agreements stems from the very nature of IP, as its mere existence can be then seen as an obstacle or restriction on trade, which had been a notable issue prompting the development of TRIPS,<sup>147</sup> but it has also been seen in relation to EU internal sphere and how IP developed as an exception to the free movement of goods. The role of IP chapters as a restriction to trade represents a trade-off when there is a divergence in IP protection. In that connection, one must take into account that developed nations diverge on certain IP elements, and how this divergence in IP standards create a barrier to trade. This is evident in the dispute between the EU and the US over the protection of GIs. The EU views the inadequate protection of GIs as a cause to restrict trade as their products would be at risk otherwise. In the EU agreements negotiated in the third era, analysed above, there is a strong development and expansion of GIs, which fulfils this function of allowing restriction to trade to protect GIs. In CETA, the protection and operation of GIs were continuously flagged as a potential conflict. Both CETA and the EU-Japan agreements allow for a restriction of trade in the circumstances where one Party has allegedly infringed IP.

Attempts to strike a balance between the protection of IP and the liberalisation of trade is further complicated when one considers the non-economic nature of IP elements, or as defined in this thesis, the human right nature of the right of the author, and the balance between IP and competing rights. These elements are examined in Chapter Six, which interrogates the level commodification of IP<sup>148</sup> as

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<sup>146</sup> See *infra* Chapter Five, Section 4.

<sup>147</sup> See *supra* Chapter One Section 3.3.

<sup>148</sup> Hannu Wager and Jayashree Watal, Human Rights and International Intellectual Property Law, in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar, 2015) 150. See also Philippe, 'Human Rights and Intellectual Property in the TRIPS Era' (2007) *Human Rights Quarterly* 29, 403.

well as positions and abuse of power,<sup>149</sup> and lingering elements of colonialism.<sup>150</sup> The further section focuses on how the rationale of IP chapters as a restriction of trade have emerged across the three eras.

### ***3.2. Intellectual Property as a Restriction to Trade across the Three Eras***

The rationale for IP measures as a tool to restrict trade is very visible in the first and second era agreements, but more generally across the three eras. For example, within the first era, the EU-Palestine agreement, states that Parties are required to introduce effective protection and enforcement methods for IP ‘in accordance with the highest international standards, including effective means of enforcing such rights’.<sup>151</sup> Where protection is not ensured, the rightsholder can claim an infringement and ultimately stop the commercialisation of the good in question. In a similar vein, Article 28 of the EU-Tunisia agreement states that the Parties:

‘shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of... protection of intellectual, industrial and commercial’.

In a similar vein within the second era, the EU-Morocco, EU-Israel, and EU-South Africa agreements allow for the restriction on the importation of goods for ‘the protection of intellectual, industrial and commercial property’.<sup>152</sup> However, it is provided that ‘[s]uch prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties’.<sup>153</sup> While it can be said that IP can act as a restriction to trade, these agreements also reaffirm the importance of providing ‘adequate and effective protection in accordance with the highest international standards, including

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<sup>149</sup> Donald Kenyon and John Kunkel, ‘Australia and the European Union in the World Trade Organisation: partners or adversaries?’ (2005) 59(1) *Australian Journal of International Affairs* 55, 56.

<sup>150</sup> Peter Drachos, *Intellectual Property, Indigenous People and their Knowledge* (Cambridge University Press, 2014); Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press, 1997).

<sup>151</sup> Article 33(1) of the EU-Palestine agreement.

<sup>152</sup> Article 39(1) of the EU-Morocco agreement, Article 39(1) of the EU-Israel agreement, Article 46(1) of the EU-South Africa agreement.

<sup>153</sup> Article 28 of the EU-Morocco agreement, Article 27 of the EU-Israel agreement, Article 27 of the EU-South Africa agreement.

effective means to enforce such rights'.<sup>154</sup> This protection facilitates the commercialisation of the good and the protection of the rights of the IP holders. These provisions are further complemented by provisions requiring the Parties include a mechanism for this standard of protection to be revised or reviewed if and when, with an underlying emphasis on when, these Articles impede trade.<sup>155</sup>

Although the above agreements include variations regarding the mechanism to review and update the 'adequate and effective' protective standards, it must be noted that there is very little detail or guidance on how to conduct this update. This opens up the risk of creating asymmetrical obligations between the Parties and weakening of a trade partner *vis-à-vis* the EU trade policy.

IP protection is characterised as a restriction to trade in post-TRIPS agreement and in subsequent eras. For example, similarly to previous agreements, Article 27 of the EU-Jordan agreement permits the restriction on the trade of goods in the name of 'the protection of intellectual, industrial and commercial property'. Again, this is limited in effect that such 'prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between the Parties'.<sup>156</sup> As mentioned above in Section 2 of this chapter, Article 56 also included an express reference to 'highest international standard' of protection. Article 56(2) also mandates the revision of the protection standards if they endanger trading. Similar provisions are also included in subsequent agreements with Lebanon,<sup>157</sup> Egypt,<sup>158</sup> Algeria,<sup>159</sup> and Bosnia and Herzegovina.<sup>160</sup> With regards to the latter, notable is the fact that a five-year period is provided to Bosnia to introduce protection and enforcement measures in line with EU standards.

The conceptualisation of IP as a limit to trade remains evident in the third era of the agreements and is embodied in the strengthening of the provisions related to enforcement measures. For example, while the EU-Korea agreement opens with a

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<sup>154</sup>Article 39(1) of the EU-Morocco agreement, Article 39(1) of the EU-Israel agreement. However, Article 46 of the EU-South Africa agreement formulates this obligation in direct reference to the Parties' obligations under TRIPS rather than an explicit obligation within the agreement.

<sup>155</sup> Article 39(2) of the EU-Morocco agreement, Article 39(2) of the EU-Israel agreement, Article 46(2) of the EU-South Africa agreement.

<sup>156</sup> Article 27 of the EU-Jordan agreement

<sup>157</sup> Article 38(2) of the EU-Lebanon agreement.

<sup>158</sup> Article 37(2) of the EU-Egypt agreement.

<sup>159</sup> Article 44(2) of the EU-Algeria agreement.

<sup>160</sup> Article 28 of the EU-Bosnia and Herzegovina agreement.

broad statement regarding the use IP to ‘facilitate the production and commercialisation of innovation and creative products’ while also seeking to ‘achieve an adequate and effective level’ of IP protection,<sup>161</sup> Parties are obliged to (either provide or ensure) there are effective remedies against IP infringement. The language of the enforcement section of the agreement indicates that IP can justify a restriction to trade, where such a restriction is necessary to protect the rights of the IP rightsholder. In doing so, would facilitate more stringent levels of control over IP related goods, in particular, the cross-border trade of these goods to the detriment of general trade.<sup>162</sup> To counter this, Article 10(42)(2)(D) included a requirement that such provisions are ‘effective, proportionate, and dissuasive’.

The EU-Ukraine agreement includes specific provisions related to the limitation or the termination of trade measures between the EU and Ukraine. Article 176 prohibits the creation, proliferation, or use of technology which seeks to circumvent the IP protection on goods. Building on the provisions found in earlier agreements, Article 176(1) goes further by applying to all instances in which the ‘person concerned carries out in the knowledge, or with reasonable grounds for knowing, that he/she is pursuing’ the circumvention of IP protection. The inclusion of ‘reasonable grounds for knowing’ presents a robust mechanism for the restriction of trade of technologies which may facilitate the circumvention of IP. The EU-Ukraine agreement includes detailed enforcement provisions which allow the rightsholder to seek protection, which ultimately may lead to a restriction of trade. Similar provisions and approach are then present within both the EU-Moldova agreement and the EU-Georgia agreement. For example, Articles 280-284 of the EU-Moldova agreement and Articles 154-158 of the EU-Georgia agreement provide for mechanisms that allow producers to restrict the exploitation of their copyrighted goods by third parties. As with the EU-Ukraine agreement, there was a significant development in relation to the restriction on the development, creation, and distribution of technical measures which seek to circumvent IP protection measures.<sup>163</sup>

It must be noted, the general obligations related to enforcement measures provided

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<sup>161</sup> Article 10(1) of the EU-Korea agreement.

<sup>162</sup> Article 10(41)(2)(b) of the EU-Korea agreement.

<sup>163</sup> Article 287 of the EU-Moldova agreement, Article 160 of the EU-Georgia agreement.

respectively in Article 318(1) of the EU-Moldova agreement and in Article 190(1) of the EU-Georgia agreement require that:

‘complementary measures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to *avoid the creation of barriers to legitimate trade* and to provide for safeguards against their abuse’.<sup>164</sup> (emphasis added)

This level of enforcement and subsequent restrictions are akin to those found within the EU, again suggesting an alignment of the IP standards of Moldova and Georgia to those of the EU for future accession. Again, the enforcement provisions include significant requirements which facilitate the domestic courts to adequately apply the enforcement and restriction measures sought by the Parties. The agreements end with robust Articles on the border enforcement of protections and the ability of the restriction or seizure on the importation and exportation of goods suspected to be in violation of the rightsholders’ IP.<sup>165</sup> These Articles permit the restriction or seizure on suspicion of the alleged infringement.<sup>166</sup>

A similar approach to IP as a restriction to trade is present in the EU-Vietnam agreement other more recent FTAs. Articles 4(2)-4(6) of the EU-Vietnam agreement provides a wide range of possibilities for the rightsholders to restrict the trade of goods by third Parties which infringe IP, albeit these provisions state enforcement measures should be proportionate and seek to prevent the restriction of legitimate trade.<sup>167</sup> This ability to restrict the movement of goods is provided under Article 17 and Article 18.

The inclusion of provisions restricting trade or facilitating the restriction of trade under the guise of protecting IP can be further found in the EU-Singapore agreement.<sup>168</sup> That agreement requires Parties to introduce a domestic mechanism to facilitate the enforcement of IPRs and protection measures.<sup>169</sup> Similar provisions can be found in both CETA and the EU-Japan agreement.<sup>170</sup> Their inclusion is noteworthy as they were significant Parties pushing for ever-higher levels of

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<sup>164</sup> Article 318(3) of the EU-Moldova agreement, Article 190(3) of the EU-Georgia agreement.

<sup>165</sup> Article 330 of the EU-Moldova agreement, Article 200 of the EU-Georgia agreement.

<sup>166</sup> Article 330(2) of the EU-Moldova agreement, Article 200(2) of the EU-Georgia agreement.

<sup>167</sup> Article 12 of the EU-Vietnam agreement.

<sup>168</sup> Article 10(1)(b) of the EU-Singapore agreement.

<sup>169</sup> Article 10(1)(b) of the EU-Singapore agreement.

<sup>170</sup> Article 14(2) of the EU-Japan agreement, Article 20(1) of CETA.

protection within international agreements, in both ACTA and the revival of the Trans-Pacific Partnership Agreement (TPP). Furthermore, the position of IP within the EU-Japan agreement was noted as a highly contested area of the negotiation.

On the whole, within all the agreements across the three eras identified above, IP protection was seen as a justified restriction on trade. However, in the more recent agreements, the enforcement measures acquire a more prominent position and are comprehensively discussed. On the whole, all agreements, in some way, try to prevent abuse from the side of the rightsholder and consequent undue restriction of trade.

#### **4. Intellectual Property Provisions in Agreements as an Enhancement of Trade**

##### ***4.1. Enhancing Trade as a Rationale for Intellectual Property Protection***

At the same time as allowing the restriction of trade, this thesis suggests that IP provisions within the various agreements fulfil another (somewhat competing) rationale, that of serving as a tool to enhance trade. First, the existence of the IP provisions, as well as the clarity of protection and enforcement measures, aims to increase trade of IP-protected goods across the Parties of the agreement. This argument is centred on the idea of by providing stability and knowledge of ‘adequate and effective’ protection, the IP rightsholder would be incentives to trade in the nation in particular or be willing to invest in the production of protected work for the sale to the broader public. This thesis suggests that there would be little incentive for future investment in an area if the IP assets were not protected. In that regard, IP provisions could also be seen as a stimulus to Foreign Direct Investment (FDI) between not only Parties concerned with the specific agreement, but at the global level. While there is debate regarding the precise correlation of IP protection provisions and FDI,<sup>171</sup> the majority of scholarship suggests that stronger IP protection encourages and facilitates trade-related investment.<sup>172</sup> Additionally,

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<sup>171</sup> Kausik Gangopadhyay and Debasis Mondal, 'Does Stronger Protection of Intellectual Property Stimulate Innovation?' (2012) 116(1) *Economic Letters* 80, 80. Gangopadhyay and Mondal note how IP is at least needed at minimum levels to sustain the innovation.

<sup>172</sup> Keith E Maskus, 'Lessons from Studying the International Economics of Intellectual Property Rights' (2000) 53 *Vanderbilt Law Review* 2219, 2221-2222; David M. Gould and William C. Gruben, 'The Role of Intellectual Property Rights in Economic Growth' (1996) 48(2) *Journal of Development Economics* 323, 324; Cassandra Mehlig Sweet and Dalibor Sacha Eterovic Maggio, 'Do Stronger Intellectual Property Rights Increase Innovation?' (2015) *World*

analysis has shown while the short-term costs of the adoption of these IP provisions may be high for developing nations, the long-term benefits are overwhelmingly positive.<sup>173</sup>

The inclusion and acceptance of IP provisions serve to enhance the trade capacities across a number of fronts. From the EU perspective, for example, the expansion of GIs recognition and protection is vital for trade of agrifood. For the Third Countries, the acceptance and active enforcement of these IP provisions grants the lucrative trading traffics and access to the EU market. More generally, for developed nations this opens and expands export markets on favourable conditions, increasing their ability to export.<sup>174</sup> Additionally, these provisions serve as a ‘conduit for technology acceptance and economic development’.<sup>175</sup> This, in turn, leads to innovation and further economic growth as a result.

#### ***4.2. How Intellectual Property served as an Enhancement of Trade Across the Three Eras***

In the post-TRIPS era, as seen above, IP provisions were mostly included as a legitimate cause for restricting trade. IP itself was not seen as a means to enhance trade. However, it is able arguably that respect of IP standards contributed to making Third countries with which the EU concluded agreements more attractive for FDI.

The ‘second era’ agreements start emphasising the role of IP as a means in fostering

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Development 665,674; Keith E. Maskus, ‘The Role of Intellectual Property Rights in Encouraging Foreign Direct Investments and Technology Transfer’ (1998) 9 Duke Journal of Competition and International Law 109,119; Keith E. Maskus and Mohan Penubarti, ‘How Trade-Related are Intellectual Property Rights?’ (1995) 39(3) Journal of International Economics 227, 229-230.

<sup>173</sup> Keith E. Maskus, ‘Intellectual Property Rights and Economic Development’ (2000) 32(3) Case Western Reserve Journal of International Law 472, 495.

<sup>174</sup> Frederick M. Abbot, ‘The WTO TRIPS Agreement and Global Economic Development’ (1996) 72 Chicago-Ken Law Review 385, 387. Abbot notes while such provisions may not be in the direct interest of the developing nations, the benefit from accepting such provisions such as the favourable trade terms and access to the WTO incentives their acceptance. This balance of power is discussed in Chapter Six in detail.

<sup>175</sup> Robert E. Evenson, ‘Comment: Intellectual Property Rights and Economic Development, by Keith E. Maskus’ (2001) 33 Case Western Reserve Journal of International Law 187,188; Keith E. Maskus, ‘Intellectual Property Rights and Economic Development’ (2000) 32(3) Case Western Reserve Journal of International Law 472,478., Markus suggests that ‘intellectual property rights could play a significant role in encouraging innovation, product development, and technical change’.

trade through innovation based on the use of the IP in question. The EU-Cariforum agreement expresses the importance of innovation and creativity for economic development. In that connection, IP protection has been recognised by the Parties as ‘a crucial element in their economic partnership’.<sup>176</sup> This importance is reaffirmed in Article 131(2) which states that IP ‘plays a key role in fostering creativity, innovation and competitiveness’. In this regard, it is relevant to note that protection of IP required by all Parties must be at levels that are ‘appropriate to their levels of development’.<sup>177</sup> The EU-Korea agreement represents a further example of the importance of IP provisions and how they are underpinned by the objective of direct enhancement to trade. The EU-Korea agreement opens the chapter on IP with a broad statement of using IP to ‘facilitate the production and commercialisation of innovation and creative products’ while also seeking to ‘achieve an adequate and effective level’ of IP protection.<sup>178</sup> Further, Article 10(11) emphasises the commercial aspect of IP by providing protection and enforcement measures in favour of the IP rightsholders. Such measures would serve to enhance trade in an IP dependent economy such as that of Korea (but also that of the EU).

In the third era, the EU-Central America agreement also emphasises the role of IP as a driver to innovation and a tool to enhance trade. It also recognises the importance of the protection of IP for the purpose of facilitating creativity or innovation.<sup>179</sup> In later association agreements such as those with the Ukraine, Moldova, and Georgia, the use of IP provisions for the enhancement of trade can be seen in numerous provisions, often relating to the clarifying instances of technological developments. In those agreements, IP provisions indicate a pre-emptive alignment with the then standards of IP within the EU and preparing for the future entrance to the internal market. Aligning IP protection to EU standards would bring stabilization and clarity and would create favourable conditions for increased market engagement and FDI. The development of the enhancement of trade through the IP provisions within CETA and later the EU-Japan agreement followed a similar development. In that connection, it is again worth noting the economic positions of the negotiating Parties, which are all developed nations with

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<sup>176</sup>Article 131(1) of the EU-Cariforum agreement.

<sup>177</sup>Article 131(2) of the EU-Cariforum agreement.

<sup>178</sup>Article 10(1) of the EU-Korea agreement.

<sup>179</sup> Articles 228(b) and 231(4) of the EU-Central America agreement.

a strong emphasis on IP industries.

AS mentioned above, in many of the more recent agreements, the increased importance placed on the protection of GIs is evident.<sup>180</sup> In these agreements, protection of GIs is not only meant to allow trade restrictions in case of infringement as discussed in Section 3 above, but it is also meant to foster the commercialisation of protected goods in Third Countries. This increased emphasis stemmed from the value of GIs exported by the EU and the proportion of food and drinks.<sup>181</sup>

## **5. TRIPS-Plus Provision and their Impact on Specific Elements of Intellectual Property**

Having discussed the development and expansion of IP provisions as well as the increased level of protection in a chronological fashion, and after having, from an analytical point of view highlighted the double function that IP provisions display, this section then discusses the impact and effects of TRIPS-plus provision on the individual elements of IP. The purpose of this section is to highlight and critically analyse how TRIPS-plus provisions have affected the development of the various IP elements. While there may be common trends, this individual focus allows an in-depth examination of how certain elements were and remain subject to significant changes. Furthermore, by examining the IP elements individually, their development within the various agreement can be linked back to the internal development of IP within the EU, but also the influence of the constitutional developments of the EU.

### **5.1. Copyright**

As one of the traditional elements of IP, copyright (expanded to include copyright-related matters) has been placed upon an increased emphasis in EU agreements. In fact, EU agreements have primarily focused on how to introduce new forms of

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<sup>180</sup> Deve Gangjee, *Relocating the Law of Geographical Indications* (Cambridge University Press, 2015).

<sup>181</sup> Tanguy Chever, Christian Renault, Séverine Renault, and Violaine Romieu, (2012), 'Value of production of agricultural products and foodstuffs, wines, aromatised wines and spirits protected by a Geographical Indications (GI)', European Commission, available at <[https://ec.europa.eu/agriculture/external-studies/valuegi\\_en](https://ec.europa.eu/agriculture/external-studies/valuegi_en)>. The authors note the value of GIs at €11.5 billion and 15% of the total value of food and drinks exported by the EU.

protection for new media, but also to restrict new methods to infringe copyright. Most recent EU agreements have taken into account the need for restricting the trade of new technology to protect existing copyrighted works.

In EU agreements, provisions related to copyright have expanded significantly from the earlier standards of TRIPS. This is evident from the explicit mentioning of the multilateral conventions related to copyright and how their ratification or re-affirmation by the Parties forms as a core aspect of the agreements themselves. Significantly, however, many of the conventions were not negotiated by many of Parties who were then encouraged by the EU to ratify and implement their standards.

Provisions dealing with copyright protection for the digital environment have become more visible in EU agreements. In particular, the third era agreements began including specific sections to deal with online activities. In doing so, the Parties sought to provide ‘adequate and effective protection’ in a manner which was not a barrier to the legitimate trade of the online service provider. This balance was reflective of the internal balance sought by the CJEU in its case law, examined in Chapter Two of this thesis.

Overall, the agreements have standardised the protective terms for copyright works. However, these provisions are entirely related to trade and thereby the commercial aspects of copyright, rather than protecting the right of the author. Moreover, in many agreements, restriction on the use of copyrighted works, to protect the rightsholder, might endanger the development of transformative work stemming from the original one, hampering innovation arising from this transformative work.

## ***5.2. Trademarks***

In the EU agreements analysed above it is provided that Parties ‘shall’ provide ‘adequate and effective’ trademark protection for goods. As discussed above,<sup>182</sup> this protection has the dual purpose of both enhancing and restricting trade. However, these dual goals are not mutually exclusive. With regard to trademarks, the focus has been on allowing the restriction to the trade of goods before or while entering

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<sup>182</sup> See *supra* Chapter Five Section 3 and 4.

the internal market. In doing so, the agreements were shaped by the internal developments of the EU in relation to the limitations on the free movement of goods and how this had been interpreted by the CJEU.<sup>183</sup> The protection of the rightsholder has been paramount, allowing for the seizure of trademark infringing goods. This would also serve to enhance trade, again on the grounds of certainty, leading to a willingness by producers of goods to develop and engage with nations knowing that their resources will be protected.

### **5.3. Patent**

While patent law is considered a traditional and established element of IP, its development in the EU took a significantly different path when compared to that of copyright and trademark, as already discussed in Chapter Two of this thesis. This is also reflected in EU agreements.

EU agreements allow for patent protection in order to empower the patent holder to obtain a restriction in the commercialisation of goods that infringe his patent in order to protect innovation. The intention was that this protection would have a positive impact on economic growth and development.

At the same time, the most recent agreements allow, but do not mandate, the Parties to introduce certain limitations to patent protection in order to protect public interests, and human rights, namely the right to health. Notwithstanding, these provisions while discretionary are subject to criteria that it does not affect the rights and legitimate exploitation of the rightsholder or related third parties.

In several agreements, patent protection is subject to the additional duty to uphold and implement the Doha Declaration on Health. Following the Doha Declaration, the EU and its various trading partners have increasingly included the duty to respect and re-affirm the Doha Declaration and the importance of health. This was first seen relating solely to patent protection, but some later agreements, such as those with South and Central America nations, have highlighted the role of the Doha Declaration as guiding principle for the entire agreement.

From a human rights perspective, the importance of the obligation to respect the

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<sup>183</sup> See *supra* Chapter Three Section 4.2.

Doha Declaration cannot be overstated. It allows the creation of generic equivalents of medical and pharmaceutical goods, without infringing the patents of the rightsholders. The creation of the generic equivalents makes efforts to address the ‘global drug gaps’ and the health-related concerns it creates. From a legal perspective, it is visible that the EU (and the other Parties to the agreements) have sought to prioritize human rights concerns over trade concerns. Overall, the explicit mentioning of the Doha Declaration within the various trade-focused agreements is a visible marker of the need to achieve a better balance between trade concerns and human rights concerns.

#### ***5.4. Traditional Knowledge***

The inclusion of traditional knowledge is a relatively recent innovation as a result of the expansion of IP and the emergence of the protection of biological diversity and the rights of indigenous peoples and, namely, their right to cultural integrity.<sup>184</sup> However, traditional knowledge as an element of IP is fraught with contradiction. This stems from the uncertainty regarding ownership, i.e. who is the rightsholder of traditional knowledge. The agreements under examination do not sufficiently address this concern. Further, the provisions relating to the protection of traditional knowledge are not present in all agreements. Rather, only those agreements with Korea, and the South and Central American nations include explicit reference to traditional knowledge, suggesting a low level of prioritization for the EU. A further contradiction arises from the commodification of various elements of traditional knowledge, which might endanger (instead of protecting) them. As with the other elements of IP, the EU agreements examined allow for trade to be (partially) restricted to protect the IP in question (i.e. traditional knowledge), but this is only based on the economic value of the IP. This economic value then informs the

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<sup>184</sup> For a further discussion of cultural integrity through a human rights perspective, see generally Jérémie Gilbert, *Indigenous Peoples, Human Rights, and Cultural Heritage: Towards a Right to Cultural Integrity*, in Alexandra Xanthaki, Sanna Valkonen, Leena Heinämäki, and Piia Kristiina Nuorgam (eds), *Indigenous Peoples' Cultural Heritage: Rights, Debates, Challenges* (Niihoff 2017); Jérémie Gilbert ‘Custodians of the Land: Indigenous Peoples, Human Rights and Cultural Integrity’ in Michele Langfield, William Logan, and Mairead Nic Craith (eds), *Cultural Diversity, Heritage and Human Rights Intersections in Theory and Practice* (Routledge 2009); Cherie Metcalf, ‘Indigenous Rights and the Environment: Evolving International Law’ (2003) 35 *Ottawa Law Review* 101; James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 1996) 98-104.

proportionality test which is at the basis of the trade restriction. The economic value of traditional knowledge hence is the only reason for which trade can be restricted. However, when it comes to traditional knowledge, the extremely high cultural value or value to society should be deemed important and set a threshold to restrict trade.

The EU agreements in their current formulation may help prevent the unlawful exploitation of traditional resources at the expense of legitimate holders of this right but leave the question whether the formulation is sufficient to protect all the facets of traditional knowledge. The trade-based provisions of those agreements, in the end, seem to ‘have exacerbated this imbalance in the protection of knowledge assets’.<sup>185</sup>

### ***5.5. Geographical Indication***

The protection and expansion of recognised GIs are long-standing goals of the EU trade policy. The increased level of protection and recognition is something which often places them at odds with other developed nations, the US in particular. Previous efforts to harmonise and create a standardised body of mutual recognition for GIs have been a noted point of contention in relation to TRIPS and its subsequent revisions.

GIs protection as a mechanism to restrict trade but also for trade enhancement has been already mentioned above. It seems worth to point out that the majority of products protected by as GIs are food and drink trade by the EU and its Member States. Hence the inclusion of GIs in agreements is mostly (if not exclusively) the result of EU’s views. There are also continuous attempts to include more products to the classification of GIs by the EU (and pushed by certain Member States). South and Central America trading partners who would similarly seek the protection of their exported GIs facilitated this development of GIs protection in EU agreements. In fact, those agreements include tables of mutually recognised GIs between the EU and its trading partners.

However, while this might arguably provide for a better protection of certain agri-food goods allowing for trade restriction, it raises the question of the

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<sup>185</sup> Susy Frankel, ‘The Mismatch of Geographical Indications and Innovative Traditional Knowledge’ (2011) 29(3) *Prometheus Critical Studies in Innovation* 253, 255.

commodification of these goods. This is problematic as the goods classified covered by GIs must show a tangible geological and cultural association with a specific region.<sup>186</sup> As such, the expansion of GIs protection in EU agreements runs the risk of the further commodification of a good which has a cultural value, at the expense of cultural rights associated with GIs.

## **6. Concluding Remarks**

This chapter has systematically and for the first time, traced the development of TRIPS-plus provisions within the various agreements developed and negotiated by the EU. It has located this development within the context of the ‘multifaceted and ambiguous’ relationship between international trade and IP protection.<sup>187</sup>

This chapter has identified three eras. Within the first era, the main focus for the EU and its trading partners was to ensure the minimum standards of TRIPS were given ‘adequate and effective’ implementation. However, the Parties were still able to include higher standards domestically (a feature the EU would be keen to ‘encourage’ in exchange for tariffs and other trade concessions).

However, it did not take long until the flaws under TRIPS began to emerge, and the ambition of the EU began to expand IP protection. The expansion can be seen in the second era of agreements and the rise of TRIPS-plus provisions. These agreements are also the result of increased EU powers in the field of IP, both internally and externally. During the second era, the agreements were primarily focused on ensuring strong IP protection and enforcement. However, in this second era, the idea of a balanced IP protection and human rights concerns started to creep into the agreements. This was first seen in the EU-Chile agreement and the inclusion of stronger considerations on the public interests and benefits when IP protection provisions are implemented. This consideration for the public benefit can be seen to stem from the gradual expansion of broader considerations within the EU as a result of the Treaty changes, but also with the Doha Declaration in 2001.

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<sup>186</sup> Steven A Bowers, ‘Location, Location, Location: The Case against Extending Geographical Indications Protection under the TRIPS Agreement’ (2003) 31(2) American Intellectual Property Law Association Quarterly Journal 129, 134.

<sup>187</sup> Henning Gross Ruse-Khan, *The Protection of Intellectual Property in International Law*, (Oxford University Press 2012) 69.

The third era of agreements not only signals a significant development at the international level, but it has followed the Treaty of Lisbon. As a result of the expanded competence to address IP under the CCP and the implicitly derived competence derived under the ERTA doctrine,<sup>188</sup> the EU sought to bring about significant IP provisions in its own agreements. As a result of this increased competence, and also mirroring the EU objective to protect trade (including IP), the agreements negotiated during the third era were considerably more comprehensive in their scope and how they addressed the various elements of IP. The expanded scope was further guided by the internal developments of the past two decades within the EU and what is considered to be IP and how each individual element should be protected.<sup>189</sup> As such, the agreements in this era address various IP elements individually and give considerable attention to their implementation. This has marked a significant departure from the vague and sweeping ‘highest international standards’ previously seen.

The EU has sought to export its understanding and development of IP protection as a global standard. While for certain agreements such as the Stabilisation and Association Agreement, concluded as part of potential EU membership, the attempt of harmonising standards is linked to the future entry of those countries in the Internal market, when applied to other agreements, the appropriateness of this approach is somewhat suspect.<sup>190</sup>

The focus of the chapter has then turned to the rationale of IP protection in EU agreements. While IP protection might justify a restriction of trade, the agreements also suggest that stronger IP provisions will lead to a direct and quantifiable positive effect on trade and are phrased to mirror the understanding that stronger or ‘adequate and effective’ IP protection provisions will lead to innovation and that this innovation will lead to an enhancement of trade.<sup>191</sup>

On the whole, the expansion of the EU external competences not only have determined increased levels of IP protection within the EU agreements, but also a better balance (or the search for such a balance) with competing interests and rights

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<sup>188</sup> See *supra* Chapter Four Section 4.

<sup>189</sup> See *supra* Chapter Two Section 3.

<sup>190</sup> This is discussed *infra* Chapter Six

<sup>191</sup> David M. Gould and William C. Gruben, 'The role of intellectual property rights in economic growth' (1996) 48 *Journal of Development Economics* 323, 323-324.

(which will be further discussed in Chapter Six. This expansion of the EU competence on IP matters, as discussed in Chapter Four, is extremely evident in the third era of agreements where IP began to be discussed in a more comprehensive manner. However, while IP has been mostly related to commercial aspects, the EU has still a quite ambivalent attitude as regards to the non-commercial aspect of IP and to the balance between IP and competing human rights-related obligations, which will be discussed below in Chapter Six.

# -Chapter Six-

## TRIPS-Plus Obligations and Human Rights Clauses

### 1. Introduction

Concurrent to the issue of how IP protection relates to trade,<sup>1</sup> TRIPS-Plus obligations in the agreements the EU has negotiated raise the question of what is their impact on human rights, and more specifically how they relate to the EU obligation to protect human rights.<sup>2</sup> Hence, it is important to examine how the TRIPS-Plus provisions operate in relation to the human rights clauses of the agreements. Such human rights clauses are primarily advanced and mandated by the EU. In order to address this question, it is important to address what these human rights clauses actually entail and obligate for the various Parties.

Following this introduction, this chapter is divided into seven sections. Section 2 provides a critical overview of the development of human rights clauses in EU trade policy. This framework builds upon the development of human rights from the perspective of the EU with its African, Caribbean, and Pacific (ACP) trading partners from the early 1970s through to the agreements discussed in Chapter Five. In doing so, the extended time frame provides the context and basis for the inclusion of human rights clauses as they are currently formulated within agreements.<sup>3</sup> Additionally, this section examines the expansion of these clauses to include the principle of sustainable development. Section 3 addresses the criticism of such human rights clauses within the EU trade policy. Sections 2 and 3 do not duplicate

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<sup>1</sup> See *supra* Chapter Five Sections 3 and 4.

<sup>2</sup> Ian Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235, 239. Manners notes how the EU has used its ability to shape what are the norms of international relations. See also Jeffery T. Checkel, 'International Institutions and Socialization in Europe: Introduction and Framework' (2005) 59(4) *International Organization* 801; Mark Leonard, *Why Europe Will Run the 21st Century* (Fourth Estate, 2005).

<sup>3</sup> See *supra* Chapter Four Section 5.

the extensive scholarship on human rights clauses. Rather, they highlight their essential features (and their weaknesses) in order to analyse how those can relate to IP provisions.

Section 4 then addresses the intersection and the conflict between the obligations stemming from the TRIPS-Plus provisions and human rights clauses. While this issue has been touched upon in previous chapters, this section focuses on whether a balance can be achieved. This is tested through an analysis of the obligations to respect TRIPS-Plus provisions and the EU's commitment to protect and promote human rights.

Section 5 examines the intersection of IP protection and human rights clauses in the first two eras. This section first examines the dynamics of IP protection and human rights clauses the agreements negotiated and concluded in the years following the implementation of TRIPS. This Section continues this line of examination from the dawn of the TRIPS-plus agenda to the mid-2000s and the developments it brought to the discussions. Sections 6 and 7 look at the 'third era', and reflecting on the influence of the South American nations, as well as the framework of the ENP. Section 8 examines the most recent agreements conclude and asked the question if they are the beginning of a new generation of agreements that are strongly anchored by human rights.

The chapter, then, concludes with some remarks on the overall development and the future extension of the examination for agreements currently in various stages of development and negotiation.

## **2. A Critical Overview of the Development of Human Rights Clauses within the European Union Trade Policy**

### ***2.1 From Lomé and its Lessons to Cotonou***

Through the Lomé Conventions and later in its successor, the Cotonou Agreement, the EU has engaged in a developmental framework with its African, Caribbean, and Pacific (ACP) trading partners. The purpose of Lomé I was to the creation of a trade and aid agreement between the EU and over 70 of its ACP partners.<sup>4</sup> The primary

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<sup>4</sup> ACP-EEC Convention of Lomé, 28 February 1975, [1976] O.J. (L25) 2, 14 I.L.M. 327.

objectives of Lomé were to remove trade tariffs for agriculture and mining exports from the ACP nations as well as the provision of aid to many of the developing nations by the EU. The motivation for such aid can be traced back to the early development of the EU and the goal of global development. However, such motivation, when considered from the original signatories of the Treaty of Rome presents an undeniable bias as it is linked to the colonial history of some Member States. This influence was known by the Parties, to the point that the ACP nations strongly rejected the inclusion of clauses which allow the EU to terminate the agreement in breach human right standards. The rejection was possible at the time, as Lomé I was considered as ‘something applying a position of equality’ between the Parties.<sup>5</sup>

Following this rejection, Lomé I was noted as achieving very little of its objectives.<sup>6</sup> For example, the provisions could not account for the human rights crisis seen in Uganda during the late 1970s.<sup>7</sup> The Ugandan crisis would in no small part, lead to the revision of Lomé and the rejection of terms in the human rights clauses under Lomé II.<sup>8</sup> The APC nations claimed that the rejection stemmed in part from their inability to implement such clauses due to a lack of resources. As a result, the inclusion of human rights clauses was minimal rather than reaching the desired level to address the core obligations.<sup>9</sup> These revisions continued with Lomé III.<sup>10</sup> The latter included a change in priorities to encompass the now political scope and nature to the Conventions. Under Lomé IV,<sup>11</sup> the ACP nations acknowledged and affirmed this transition to human rights as a core objective of the agreement.<sup>12</sup>

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Hereafter Lomé I.

<sup>5</sup> Christopher Clapham, *Africa and the International System: The Politics of State Survival* (Cambridge University Press, 1996) 99.

<sup>6</sup> Stephen R. Hurt, 'Co-operation and Coercion? The Cotonou Agreement Between the European Union and ACP States and the End of the Lomé Convention' (2003) 24(1) *Third World Quarterly* 161,162.

<sup>7</sup> Peter Hilpold, 'EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance' (2002) 7(1) *European Foreign Affairs Review*, 53, 57.

<sup>8</sup> Second ACP-EEC Convention of Lomé, 31 October 1979, [1980] O.J. (L347) 2, 19 I.L.M. 327. Hereafter Lomé II.

<sup>9</sup> Brigitte I. Hamm, 'A Human Rights Approach to Development' (2001) *Human Rights Quarterly* 4: 1005, 1009. Hamm notes that 'the relationship between development, democracy, and human rights had not yet been explored'.

<sup>10</sup> Third ACP-EEC Convention of Lomé, 8 December 1984, 24 I.L.M. 588. Hereafter Lomé III

<sup>11</sup> Fourth ACP-EEC Convention of Lomé, 15 December 1989, 29 I.L.M. 783. Hereafter Lomé IV.

<sup>12</sup> Article 5(1) Lomé IV

Amongst these changes was the suspension clause for the Convention. The suspension clause was included under Article 5(1) and would apply to the ‘essential elements’ of human rights, good governance, and democracy. However, the mechanism to monitor these elements under Article 366(a)(3),<sup>13</sup> would allow the termination or restriction of the benefits if a breach of the ‘essential elements’ was found. The selection of termination or restriction would then depend on the level of severity of the breach.<sup>14</sup> However, the situation was not matched in practice.<sup>15</sup>

There was a significant level of development of trade relationship within Lomé IV in comparison to Lomé I.<sup>16</sup> This was supplemented with a shift from purely economic elements to the inclusion of non-political elements.<sup>17</sup> However, the overall development was still restricted by the legacy of Lomé I-III. Unsatisfied, the EU sought a somewhat fresh start with the Cotonou Agreement in 2000.<sup>18</sup> Unlike the Lomé Conventions, the Cotonou Agreement contains provisions to allow a re-negotiation on a periodic basis of five years from its introduction in 2000. With the upcoming review in 2020, the EU can bring its economic weight to bear in a more significant and advantageous manner.<sup>19</sup>

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<sup>13</sup> Article 366(a)(3) Lomé IV states ‘At the end of the period referred to in the third subparagraph of paragraph 2 if in spite of all efforts no solution has been found, or immediately in the case of urgency or refusal of consultations, the Party which invoked the failure to fulfil an obligation may take appropriate steps, including, where necessary, the partial or full suspension of application of this Convention to the Party concerned. It is understood that suspension would be a measure of last resort. The Party concerned shall receive prior notification of any such measure which shall be revoked as soon as the reasons for taking it have disappeared’.

<sup>14</sup> Karin Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention* (Kluwer Law International 2000) 19.

<sup>15</sup> Lorand Bartels, *Human Rights Conditionality in the EU’s International Agreements* (Oxford University Press, 2005), 8-15.

<sup>16</sup> Stephen R. Hurt, ‘Co-operation and Coercion? The Cotonou Agreement Between the European Union and ACP States and the End of the Lomé Convention’ (2003) 24(1) *Third World Quarterly* 161,162. Hurt notes that ‘[t]his is unsurprising given the context of the dominance of neoliberalism idea during this early post-Cold War period’.

<sup>17</sup> Stephen R. Hurt, ‘Co-operation and Coercion? The Cotonou Agreement Between the European Union and ACP States and the End of the Lomé Convention’ (2003) 24(1) *Third World Quarterly* 161,162. However, Hurt argues that ‘Despite the claims of this official view,...I argue that it is clear that the EU-ACP relationship has always been political and that to argue otherwise is a fallacy’.

<sup>18</sup> *Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the Other Part*, 23 June 2000, [2000] O.J. (L/317) 3 (entered into force 1 April 2003)

<sup>19</sup> Andris Zimelis, ‘Conditionality and the EU-ACP Partnership: A Misguided Approach to Development?’ (2011) 46(3) *Australian Journal of Political Science*, 389, 390. Zimelis argues that ‘this goal has shifted continuously and is subject to ongoing redefinition’. See also Peter Hilpold, ‘EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance’ (2002) 7(1) *European Foreign Affairs Review*, 53,54. Hilpold notes that ‘[h]uman rights, democracy, the rule of law etc. are all fields and principles continuously undergoing basic changes. If we consider the aforementioned changes

## *2.2. Human Rights Clauses in Other Agreements*

The question of the mandatory nature of human rights clauses within agreements was not restricted to the negotiations with the ACP nations. The Preferential Trade Agreement between the EU and Australia concluded in 1996,<sup>20</sup> did not include a human rights clause. Furthermore, the question over the ‘essential element’ of human rights proved fatal to the negotiations.<sup>21</sup> With a new agreement currently in negotiation between the EU and Australia, this spectre of failure will be a lingering point of contention between the Parties. One that will be required to be quickly addressed.<sup>22</sup> Similarly, the inclusion of human rights clauses and the ‘essential elements’ was a point of conflict in the negotiations between the EU and Mexico. However, unlike Australia, Mexico was not in the position to negate or rebuff the economic weight of the EU at the international level. This ultimately led Mexico to adopt the terms of the EU-Mexico Agreement, which included the human rights clauses as ‘essential elements’.<sup>23</sup>

The question of the nature of human rights clauses and the subsequent conflicts arose again in relation to CETA. During the CETA negotiation process, Canada strongly opposed the inclusion and the linkage of the agreement to human rights clauses.<sup>24</sup> Despite the efforts made by Canada during the negotiation, this was an unsuccessful endeavour. This inclusion of human rights clauses was said to stem from the involvement of the European Parliament on the matter. This involvement is interesting development due to the European Parliament’s self-positioning as an advocate of human rights during the negotiation process.<sup>25</sup> This was a course of

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in the concept of development, it is hard to find any yardstick by which the quality of a certain development policy can be assessed over a long time period. On the contrary, these yardsticks have to be readapted to the changing priorities of the relevant policies’.

<sup>20</sup> European Commission. 1995. Communication “On the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries.” COM (95)216 of 23 May 1995.

<sup>21</sup> Karen E. Smith, ‘The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective?’ (1998) 3(2) *European Foreign Affairs Review* 254, 264.

<sup>22</sup> Philomena Murray and Andrea Benvenuti, ‘EU–Australia Relations at Fifty: Reassessing a Troubled Relationship’ (2014) 60(4) *Australian Journal of Politics and History* 431,444 noting the previously conflict centred around the possibility that Australia could be subject to legal actions beyond that of the Australia legal system.

<sup>23</sup> Article 2 of EU-Mexico agreement.

<sup>24</sup> Duggal, S. (2014) ‘EU, Canada differ on political deal rollout’, available at <http://www.embassynews.ca/news/2014/04/01/eu-canada-differ-on-political-deal-rollout/45360> (accessed January 2018) noting the near collapse of the negotiations

<sup>25</sup> Jan Orbie, Lore Van den Putte, and Ferdi De Ville, ‘The European Parliament as an International Actor in Trade. From Power to Impact’, in Stelios Stavridis and Daniela Irrera

action that had not been previously undertaken, and might serve to set a future standard for the EU's engagement with North America as a whole.

### ***2.3. Human Rights as Essential Elements of the European Union Agreement.***

With regard to the human rights clauses included in the Cotonou Agreement, Horng suggests that the:

‘EU has successfully extended its European idea of human rights to international systems and has developed its external relations based on human rights’.<sup>26</sup>

The nature of these human rights clauses relates to:

‘a mutual arrangement by which a government takes, or promises to take, certain policy actions in support of which an international financial institution or other agency will provide specific amounts of financial assistance’.<sup>27</sup>

Thus, human rights clauses aim to serve as an aspiration guide for cooperation, as a mechanism for coercion, or, in some cases, some combination of both. Hurt then argues that the development with the Cotonou Agreement and the subsequent Regional Economic Partnership Agreements:

‘are essentially FTAs in all but name, and some of the issues surrounding their negotiation bear close resemblance to those encountered in the EU's negotiations with post-apartheid South Africa to create an FTA’.<sup>28</sup>

Humanitarian aid granted to the ACP nations by the EU during Lomé IV created further links to matters of human rights, good governance, and democratic process. As seen with Lomé IV and the early negotiations of the Cotonou Agreement, this approach facilitated new forms of ‘political clauses and conditions’ to develop. These clauses permitted sanctions or restrictions to be placed on the aid given for

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(eds), *The European Parliament and its International Relations* (Routledge 2014) 64.

<sup>26</sup> Der-Chin Horng, 'The Human Rights Clause in the Europeans Union's External Trade and Development Agreements' (2003) 9 *European Law Journal* 677, 695.

<sup>27</sup> Tony Killick, *Aid and the Political Economy of Policy Change*. (Overseas Development Institute, 1998) 6.

<sup>28</sup> Stephen R. Hurt, 'Co-operation and Coercion? The Cotonou Agreement between the European Union and ACP States and the End of the Lomé Convention' (2003) 24(1) *Third World Quarterly* 161, 168.

failure to maintain these externally imposed standards.<sup>29</sup> Despite sharper clauses being inserted in agreements, Zimelis notes that they:

‘will only be effective if applied consistently and objectively by the EU. The question is whether the EU has applied the human right clause consistently’.<sup>30</sup>

However, this was not the case. The EU has selectively applied sanctions in case of human rights violations. This selective use is often related to a broader political or trade agenda.

#### ***2.4. Human Rights Clauses in Practice Post-TRIPS***

This Section addresses the actual enforcement mechanism of human rights clauses and discusses how trade policy can be used to promote human rights.

Usually, a breach of the ‘agreed’ human rights standards is subject to an observation or consultation clause.<sup>31</sup> After the exchange of information, there is an option of suspension or even termination of the agreement depending on the severity of the breach.<sup>32</sup> The introduction of the human rights clauses within the

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<sup>29</sup> Gordon Crawford, 'Foreign Aid and Political Conditionality: Issues of Effectiveness and Consistency' (1997) *Democratization* 4(3) 69, 70. On this, there has been substantive criticism weighted against this concept of political conditionality, suggesting a ‘low intensity’ democracy. Barry Gills, Joel Rocamora, and Richard Wilson (eds), *Low Intensity Democracy: Political Power in the New World Order* (Transnational Institute Series, 1994).

<sup>30</sup> Andris Zimelis, ‘Conditionality and the EU–ACP Partnership: A Misguided Approach to Development?’ (2011) 46(3) *Australian Journal of Political Science*, 389, 390.

<sup>31</sup> Article 96(2)(a) of the Cotonou Agreement states that ‘[i]f, despite the political dialogue on the essential elements as provided for under Article 8 and paragraph 1a of this Article, a Party considers that the other Party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in Article 9(2), it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the Party concerned to remedy the situation in accordance with Annex VII. The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution. The consultations shall begin no later than 30 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In no case shall the dialogue under the consultations procedure last longer than 120 days. If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them no longer prevail’.

<sup>32</sup> The actual operation of these clauses is itself subject to large degrees of criticism in relation to the power dynamics between the Parties. This is discussed in detail below.

agreements is itself dependent on the power dynamics between the Parties, and so is its actual enforcement. In this regard, Crawley and Blitz note that:

‘the inclusion of a ‘human rights clause’ in the Cotonou Agreement is illustrative of the primary tool that the EU already has at its disposal to leverage improvements in access to international protection and human rights’.<sup>33</sup>

Most recently, in the negotiation between the EU and Singapore, the introduction of a human rights clause was linked to the promotion of sustainable development.

An important aspect which must be considered is the suspension or termination of specific provisions within the agreements in the event of a breach of human rights.<sup>34</sup>

The suspension or termination is in fact linked to the broader system, of General System of Preferences (GSP) (used with the WTO). The GSP is applicable to all WTO members by virtue of their membership but is often re-affirmed under the various agreements in which they engage. This mechanism allows the Parties, primarily the EU, to withdraw or suspend the benefits derived from the GSP for serious and systemic violations of both U.N human rights standards and International Labour Organisation (ILO) conventions related to labour rights. One specific benefit of this approach, it that it allows the suspending or withdrawing party to specifically target key areas of economic development and trade and maximise the punitive aspect of this option.

### ***2.5. Upholding the Human Rights Clauses, Trade Policy and Sustainable Development Principles***

After the entry into force of the Treaty of Lisbon, in what we have termed ‘third era’ agreements, the inclusion of human rights clauses is often supported or enhanced by a link to the concept of sustainable development. This link serves to facilitate and incentivise the acceptance of the ‘essential elements’ by the EU’s

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<sup>33</sup> Heaven Crawley and Brad K. Blitz, 'Common Agenda or Europe's Agenda? International Protection, Human Rights and Migration from the Horn of Africa' (2018) *Journal of Ethnic and Migration Studies*, 15.

<sup>34</sup> The selection between suspension or termination of the agreements is dependant on the severity of the alleged infringement. This section is not examining the process of how this is determined. Rather, this section is examining the overall inclusion of the mechanism.

trading partners. The explicit mention of sustainable development commits the Parties to prevent social dumping and the ‘race to the bottom’.

Sustainable development commitments were already included in agreements concluded in the pre-Lisbon era. These obligations were first linked to Brundtland Report,<sup>35</sup> and later the Commission’s work in the 2001 Communication ‘A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development’.<sup>36</sup> The principle of sustainable development was given further power and standing following the Treaty of Lisbon,<sup>37</sup> and became a core part of the external policy of the EU.<sup>38</sup> Bartels notes that references to sustainable development ‘in theory, enable the EU to comply with its obligations under the EU Treaty’.<sup>39</sup> The EU has had an active and significant hand in shaping international standards and also in imposing a particular meaning of sustainable development.

There is no question that the EU exists with the power to regulate whatever arena it enters.<sup>40</sup> There is, however, a question over the precise level of this power and influence. In recent years the EU has gone from a leading figure,<sup>41</sup> to ‘emerging as a global rule-maker’.<sup>42</sup> Nonetheless, the ability to successfully and strongly shape international matters is seen as a central aspect of the EU’s presence.<sup>43</sup> This ability

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<sup>35</sup> Brundtland Commission, *Our Common Future: The World Commission on Environment and Development* (Oxford University Press, 1987)

<sup>36</sup> Commission Communication ‘A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development’ COM (2001) 264 final.

<sup>37</sup> Article 3 TEU.

<sup>38</sup> Article 21(2)(d) TEU includes the competence to ‘foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’ within the general provisions of the EU’s external action.

<sup>39</sup> Lorand Bartels, *Human Rights and Sustainable Development Obligations in EU Free Trade Agreements* (September 1, 2012). University of Cambridge Faculty of Law Research Paper No. 24/2012. Available at SSRN: <https://ssrn.com/abstract=2140033>, 17.

<sup>40</sup> Daniel W. Drezner, *All Politics is Global: Explaining International Regulatory Regimes* (Princeton University Press 2007) 36; Sandra Lavenex (2014) *The Power of Functionalist Extension: How EU Rules Travel*, *Journal of European Public Policy*, 21:6, 885, 885.

<sup>41</sup> Anu Bradford, ‘The Brussels Effect’ (2012) 107(1) *Northwestern University Law Review* 2,5 stating the EU is ‘the predominant regulator of global commerce’; Wade Jacoby and Sophie Meunier, ‘Europe and the management of globalization’ (2010) 17(3) *Journal of European Public Policy* 299, 305.

<sup>42</sup> Commission (2007), ‘The External Dimension of the Single Market Review,’ SEC (2007) 1519, 20 November. Further noting that ‘single market framework and the wider EU economic and social model increasingly serving as a reference point in third countries as well as in global and regional fora. This is driven by a unique combination of factors intrinsically linked to the setting up of the single market’.

<sup>43</sup> Charlotte Bretherton and John Volger, *The European Union as a Global Actor* (2nd ed, Routledge, 2006) 27. Bretherton and Volger note ‘the ability to exert influence externally to shape the perceptions, exceptions and behaviour of others. Presence does not denote purposive external action, rather is a consequence of being. In particular, presence reflects two intimately

is often linked to the EU's 'goal achievement' in the international sphere.<sup>44</sup> However, this itself is problematic in its use as this puts forward the claim that the EU is abusing its position by exporting its own values.

### **3. The Criticism of Human Rights Clauses within the European Union Trade Policy**

#### ***3.1. Neo-Colonialism***

As touched on above, there is significant criticism relating to human rights clauses. One of, if not the most, levied grounds of criticisms is that such clauses operate as an extension of neo-colonialism<sup>45</sup>. Such criticism was present from the early days of the Lomé I agreement, stemming from the economic and political histories of the ACP nations and continued through to the Cotonou Agreement. The criticism of neo-colonialism is centred on the role of the EU as an international actor, but also as an (arguably self-appointed) international mediator. The claim of neo-colonialism is further seen with the long-held criticism that the EU is seeking to export its rules concerning human rights.<sup>46</sup> This criticism connects well with the critical approach on the inclusion of IP protection as the imposition of 'Western standards', mentioned in Chapter One and in Chapter Five of this thesis.

Under the ENP from 2014 onwards, the EU, in view of rejecting the criticism of

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interconnected sets of factors that determine the reputation and status accorded to the EU by external audiences'.

<sup>44</sup> Knud Erik Jørgensen, Sebastian Oberthür and Jamal Shahin, 'Introduction: Assessing the EU's Performance in International Institutions – Conceptual Framework and Core Findings' (2011) 33(6) *Journal of European Integration* 599, 599. For an overview of this within the framework of the EU see Sebastian Oberthür and Lisanne Groen, 'The Effectiveness Dimension of the EU's Performance in International Institutions: Toward a More Comprehensive Assessment Framework' (2015) 53(6) *Journal of Common Market Studies* 1319.

<sup>45</sup> Neo-colonialism can be broadly defined as the practice of using globalisation and cultural imperialism through a capitalistic filter to directly, or indirectly influence a developing country. For a further discussion of the origin and development of neo-colonialism see generally, Jean-Paul Sartre, *Colonialism and Neocolonialism*, (Routledge 2001) translated by Steve Brewer, Azzedine Haddour, Terry McWilliams; William Brown, *The European Union and Africa: The Restructuring of North-South Relations* (I.B Tauris, 2001); Mark Langan, *Neo-Colonialism and the Poverty of 'Development' in Africa* (Springer 2017) 119-148;

<sup>46</sup> R. Daniel Kelemen, 'Globalizing European Union Environmental Policy' (2010) 17(3) *Journal of European Public Policy* 335, 341. While Kelemen discusses the issue in relation to the exportation of environmental standards, lessons may still be drawn by this approach; Mitchell P. Smith, 'Single Market, Global Competition: Regulating the European Market in a Global Economy' (2010) 17(7) *Journal of European Public Policy* 936, 937. Smith notes how the EU seeks place EU standards as the new global norm.

neo-colonialism, has highlighted the shared languages and histories of the region with the EU as part of its eastward enlargement.<sup>47</sup>

The claim of neo-colonialism, or at least the strong colonial undertones within the human rights clauses, is then linked to the question of the implementation and actual use of the clause.<sup>48</sup> This criticism focuses on the impact of the agreements on the receiving Parties,<sup>49</sup> primarily centring on the claim that the scope of protection and enforcement sought was ‘broad and asymmetrical’.<sup>50</sup> These agreements only increased the EU’s position as a regulatory power and were further seen in the attempts by the EU to shape dictate these preferences to its trading partners. Within the context of the EU and its exportation of human rights,<sup>51</sup> one must also consider why specific Member States would seek to trigger, or equally prevent the triggering, of the human rights clauses due to political or economic interests.<sup>52</sup> Once more, this ties to the question of the colonial legacies at play within the human rights clauses.

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<sup>47</sup> Peter Van Elsuwege and Roman Petrov, ‘Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?’ (2011) 36(5) *European Law Review*, 688, 693; Päivi Leino, ‘The Journey towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law’ in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Hart, 2008) 263.

<sup>48</sup> This primarily relates to the asymmetrical application or assumed acceptance of rights. See generally, David P. Forsythe, *Human Rights in International Relations* (Cambridge 2000); Julie A. Mentus, *Bait and Switch: Human Rights and U.S. Foreign Policy* (Routledge, 2004); Kathryn Sikkink, *Mixed Signals: U.S. Human Rights Policy and Latin America* (Cornell University Press, 2004).

<sup>49</sup> Todd Allee and Clint Peinhardt, ‘Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment’ (2011) 65(3) *International Organization* 401; Tim Büthe and Helen V. Milner, ‘Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis’ in Karl P. Sauvant and Lisa E. Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009); Yoram Z. Haftel, ‘Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries’ (2010) 17(2) *Review of International Political Economy* 348; Andrew Kerner, ‘Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties’ (2009) 54(1) *The International Studies Association* 73; Emilie M. Hafner-Burton, *Forced to Be Good Why Trade Agreements Boost Human Rights* (Cornell University Press, 2009) 50. Hafner-Burton notes how ‘lawmakers argued that bilateral market agreements were not the place to combat repression because other policies were available to do the job’.

<sup>50</sup> Beth A. Simmons, ‘Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment’ (2014) 66(1) *World Politics* 12, 14.

<sup>51</sup> Emilie M. Hafner-Burton, *Forced to Be Good Why Trade Agreements Boost Human Rights* (Cornell University Press, 2009) 12 arguing the EU exportation is ‘increasingly defined as much by the principled idea of human rights as by trade liberalisation’. Also see generally Derek Jinks and Ryan Goodman, ‘Measuring the Effects of Human Rights Treaties’ (3 April 2003) Harvard Law School, Public Law Working Paper No. 56. Available at SSRN [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=391643](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=391643).

<sup>52</sup> Karen E. Smith, ‘The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective?’ (1998) 3(2) *European Foreign Affairs Review* 254, 272-273; Emilie M. Hafner-Burton, *Forced to Be Good Why Trade Agreements Boost Human Rights* (Cornell

While this criticism remains a valid, this thesis embraces the view that the EU's role as regulatory power and the coercive promotion of its norms against its trading partners,<sup>53</sup> has in fact attempted to achieve a better promotion of human rights and ILO labour standards.<sup>54</sup> The EU has seen success in regulating the areas of human rights and labour standards.<sup>55</sup>

### ***3.2. Effectiveness of the Human Rights Clauses***

Another critical issue, already mentioned above, relate to whether the 'essential elements' clauses are actually implemented. This, in turn, relates to the EU's ability, or more accurately, the willingness of the EU to trigger the suspension or termination of the agreement for the potential breach.

Previous research shows that while the inclusion of the 'essential elements' has led to improvements in the promotion of rights, this was 'only in states at higher levels of dependence on [EU] aid. Trade dependence does not exert such a conditioning effect'.<sup>56</sup> There is a reluctance by the EU to actually trigger the sanctions for failure to prevent breaches of human rights clauses unless the breach related to restrictions

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University Press, 2009) 4 'By making trade conditional on respect for human beings' rights to dignity, a few economically powerful countries are changing the politics of trade and also the politics of repression'.

<sup>53</sup> There is significant debate on the level of the promotion of these regulations from the perspective of the colonial history. Jan Zielonka, 'Europe as a Global Actor: Empire by Example?' (2008) 84(3) *International Affairs* 471, 475. In this regard, Zielonka notes the process of the EU acting as an empire. See also Jan Zielonka, *Europe as Empire: The Nature of the Enlarged EU* (Oxford University Press, 2006).

<sup>54</sup> Jan Orbie and Lisa Tortell, 'The New GSP+ Beneficiaries: Ticking the Box or Truly Consistent with ILO Findings?' (2009) 14 *European Foreign Affairs Review* 663, 679.

<sup>55</sup> Robert Kissack, 'The Performance of the European Union in the International Labour Organization' (2011) 33(6) *Journal of European Integration* 651; Lisa Tortell, Rudi Delarue and Jeffrey Kenner, 'The EU and the ILO Maritime Labour Convention', in Jan Orbie and Lisa Tortell (eds), *The European Union and the Social Dimension of Globalization: How the EU influences the World* (Routledge 2009) 125

<sup>56</sup> Daniela Donno and Michael Neureiter, 'Can Human Rights Conditionality Reduce Repression? Examining the European Union's Economic Agreements?' (2018) 13(3) *The Review of International Organizations* 335, 336-337. See also Sophie Meunier and Milada Anna Vachudova, 'Liberal Intergovernmentalism, Illiberalism and the Potential Superpower of the European Union' (2018) *Journal of Common Market Studies* 1,7. The EU has also sought to shape the preferences of its trade partners by fostering regional trade blocs in its own image through Economic Partnership Agreements (EPAs), organized on a regional basis. How influential the EU has been in fostering change and facilitating regional integration among these countries using the EPAs is debatable, with little progress outside of the Caribbean, the East African Community and West Africa. See generally, Tony Heron and Peg Murray-Evans, 'Limits to market power: Strategic discourse and institutional path dependence in the European Union-African, Caribbean and Pacific Economic Partnership Agreements' (2016) 23(2) *European Journal of International Relations* 341

on political rights, closely linked to democratic norms.<sup>57</sup> The eventual triggering and suspension or termination can then be seen to stem more from the pressure exerted by civil society, rather than strictly for the breach itself.<sup>58</sup>

With regards to Third Parties, human rights clauses as ‘essential elements’ of the agreement only in some instances operate as an effective system of coercion. This is so when the cost of non-compliance is weighed against the benefits of compliance.<sup>59</sup>

#### **4. TRIPS-Plus Provisions and of Human Rights Clauses: An Overview**

After having briefly critically discussed the main features of human rights clauses, this section addresses the intersection and the conflict between the obligations stemming from TRIPS-Plus provisions and human rights clauses included in EU agreements with Third Countries. While this issue has been touched upon in previous chapters,<sup>60</sup> this section focuses on whether, and to what extent balance can be achieved between the need to enhance IPRs and respecting TRIPS-Plus standards and the EU commitment to protect and promote human rights globally. In doing so, this section considers the broader influence of the human rights agenda of the EU following the constitutional expansion in the field in the Treaty of Lisbon. Scholars have noted that the:

‘growth in importance of human rights goes hand in hand with a rising consensus that the global economy needs to be regulated in a more balanced way in order to secure basic ethical principles and the most fundamental

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<sup>57</sup> Emilie M. Hafner-Burton, *Forced to Be Good Why Trade Agreements Boost Human Rights* (Cornell University Press, 2009) 35. Hafner-Burton argues that ‘trade regulations that protect human rights are not a cure all for repression even when they are enforceable’

<sup>58</sup> Richard Youngs, ‘Normative dynamics and strategic interests in the EU’s external identity.’ (2004) 43(2) *Journal of Common Market Studies* 415,426.

<sup>59</sup> Emilie M. Hafner-Burton and Kiyoteru Tsutsui, ‘Human Rights in a Globalized World: The Paradox of Empty Promises’ (2005) 110(5) *American Journal of Sociology* 1373,1405. This is further explained by a ‘very low level of enforcement mechanism for most human rights treaties’. Emilie M. Hafner-Burton, Kiyoteru Tsutsui, and John H. Meyer, ‘International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties’ (2008) 23(1) *International Sociology* 115, 121; Eric Neumayer, ‘Do International Human Rights Treaties Improve Respect for Human Rights?’ (2005) 49(6) *The Journal of Conflict Resolution* 925, 926. Neumayer notes that ‘monitoring, compliance, and enforcement provisions are nonexistent, voluntary, or weak and deficient, repressive countries can join them with relative impunity’.

<sup>60</sup> See *supra* Chapter Five Sections 3-4.

values of society'.<sup>61</sup>

However, there remains a lingering question of how this balance is achieved.

As discussed in Chapter One, over the last twenty-five years the EU, with other developed nations have pushed IP 'harmonisation forward at a pace that is greater than is apparently possible within the framework of the WTO'.<sup>62</sup> As a consequence, tensions between human rights and the imposed IPRs have emerged.

In the 'first era agreements, human rights clauses and IP protection and enforcement measures were clearly separated. The human right clauses were far removed from trade terms. However, as the concept of human rights began to develop over the subsequent decades, its place within the discussions became more prominent, and explicit linkages with trade and IP obligations became evident. As discussed in Chapter Five, in all the eras identified the various IP provisions were underpinned by the (economically motivated) political will to develop and expand IP protection within the trade relationship between the EU and Third Countries. As mentioned in previous chapters,<sup>63</sup> the scale of IP protection quickly expanded from the position found in the early agreements, to now encompass whole chapters of agreements. Roffe reflected on this expansion and suggested that 'the evolution has been incremental in terms of upward harmonisation of IP minimum standards'.<sup>64</sup> However, in third era agreements chapters on IP show explicit links with human rights and sustainable development, and link to human rights clauses either implicitly or explicitly. These trends will be explored in detail in the subsequent section to better identify the balance achieved.

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<sup>61</sup> Christophe Geiger and Elena Izyumenko, 'Intellectual Property Before the European Court of Human Rights' Centre for International Intellectual Property Studies Research Paper 1/2018 <[ssrn.com/sol3/Papers.cfm?abstract\\_id=3116752](https://ssrn.com/sol3/Papers.cfm?abstract_id=3116752)>, 6.

<sup>62</sup> Douglas Lippoldt, Intellectual Property Rights in Organisation for Economic Co-Operation and Development (eds), *Regionalism and The Multilateral Trading System* (OCED, 2003) 112

<sup>63</sup> See *supra* Chapter One and Chapter Five Section 2.

<sup>64</sup> Pedro Roffe, Intellectual Property Chapters in Free Trade Agreements: Their Significance and Systemic Implications, in Josef Drexl Henning Grosse Ruse-Khan, and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Springer, 2014) 21.

## **5. The Shifting Intersection of Intellectual Property Protection and Human Rights Clauses in European Union Agreements**

### ***5.1. The First Era***

The EU-Palestine Authority agreement was the first post-TRISPs agreement to contain direct references to IP provisions. However, these references were vague and generalised IP as a part of broader commercial concerns under Article 33. At the same time, human rights are mentioned solely under Article 2. Article 2 explicitly obligates that the EU-Palestine agreement:

‘shall be based on respect of democratic principles and fundamental human rights as set out in the universal declaration on human rights, which guides their internal and international policy and constitutes an essential element of this Agreement’.

Additionally, Article 2 requires that the entire agreement is to be read in light of these human rights considerations. In doing so, it entails (at least implicitly) a balancing of interests between the IP protection provisions and human rights obligations. However, the balancing of interests must be in line with the language of the revision mechanism of Article 33(2).<sup>65</sup> Article 33(2) does not contain an explicit requirement to consider the human rights concerns beyond the general obligation of Article 2. As such, this explicit reference to protecting the function of trade would take a priority if a conflict arose.

A similar approach is taken in the EU-Tunisia agreement. Article 2 of the EU-Tunisia agreement, in mirroring the goals of the preamble, requires the remainder of the agreement to be read in light of the ‘respect for human rights and democratic principles’. As with the EU-Palestine Authority agreement, IP protection is collectively referenced with commercial and industrial property, with the requirement of Parties to adhere to the ‘highest international standards’. However, in adhering to these standards, the Parties must do so with ‘respect for human rights’. Similarly to the agreement with Palestine, human rights concerns take a

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<sup>65</sup> Article 33(2) states that ‘[t]he implementation of this Article shall be regularly reviewed by the Parties. If problems in the area of intellectual, industrial and commercial property affecting trading conditions occur, urgent consultations shall be undertaken within the framework of the Joint Committee, at the request of either Party, with a view to reaching mutually satisfactory solutions’.

lower priority, and IP enforcement seems to be achieved even if at the expense of rights.

In the first era, as noted above, the EU negotiated a number of agreements with Israel, Morocco, and South Africa. As previously discussed,<sup>66</sup> there are slight but significant changes in the terminology, phrasing, and recognition of international standards within the obligations towards human rights. The preamble of the EU-Israel agreement mirrors the previous agreements' preambles, stressing the 'observance of human rights and democracy' as a foundation of the agreement. Subsequently, in the EU-Morocco agreement, the preamble requires the agreement to be read in light of the 'observance of human rights and political and economic freedom'. The EU-South African agreement explicitly required the Parties to commit to the respect for human rights in the Universal Declaration of Human Rights (UDHR). The inclusion of the explicit reference to the UDHR is itself noteworthy, as it serves as an indication of a more substantive standard of human rights considerations to guide and interpret the agreement. Furthermore, this inclusion has special significance in relation to IP. As discussed in Chapter One, the protection of culture under Article 27 and the protection of property (which includes IP) under Article 17 of the UDHR<sup>67</sup> are relevant to IP protection. Thus, this inclusion suggests that the agreement should take into account the human right nature of IPRs and the importance of balance IP with other competing rights, such as the right to culture, protected by the UDHR. All these agreements state that respect for human rights is 'an essential element of this Agreement'.<sup>68</sup>

IP provisions in these agreements mirror each other in their obligations to provide 'suitable and effective protection' in line with the prevailing international standards.<sup>69</sup> Under the EU-Israel agreement, the Parties did not define what IP was. Rather they accepted the meaning as laid out in a number of IP treaties which were required to be ratified under Annex VII. In doing so, this agreement disjoint IP from any human rights concerns related to the right of authors and creators. Similarly, in

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<sup>66</sup> See *supra* Chapter Five Section 2.3.

<sup>67</sup> For the inclusion of IP within the UDHR and as a human right, see *supra* Chapter Three Section 5.

<sup>68</sup> Article 2 of the EU-Israel agreement, Article 2 of the EU-Morocco agreements, Article 2 of the EU-South Africa agreement

<sup>69</sup> Article 27 of the EU-Israel agreements, Article 30 of the EU-Morocco agreement, Article 46 of the EU-South Africa agreement.

the EU-Morocco agreement, Article 39 nearly mirrored that of Article 39 of the EU-Israel agreement. As Morocco was a member of the WTO at the time of the agreement, it did not need the inclusion of Annex VII, as it had already affirmed the international IP treaties under its implementation of TRIPS. However, the provisions were still drafted from the perspective of protecting IP and did not address human rights obligations at this point.

Article 46 of the EU-South African agreement provided for ‘adequate and effective protection’ weighted against the ‘highest international standards’. Article 46 did not explicitly require human rights obligations to be considered. However, as mentioned above, the reference to the UDHR in the preamble seems to inject (or at least has the potential to inject) human rights considerations in the implementation of IP protection.

During this period, the EU-Mexico agreement was concluded and brought about some change to the format of the agreements. In the EU-Mexico agreement, the preamble contains an expansion of the previous reference to human rights as well as a direct reference to respect the human rights provisions of the UDHR. Under Article 12 of the EU-Mexico agreement, the elements of IP are expressly laid out illustrating the importance and the differences of each.<sup>70</sup> This would allow the implementation of each of the element with a degree of flexibility to suit their function. At the same time, this (combined with reference to the UDHR) would also allow the human right aspects of each to be considered, without being overridden by the commercial aspects of other elements. However, the emphasis on ‘adequate and effective’ protection to the ‘highest international standards’<sup>71</sup> still places human rights obligations at a far lower level of priority compared to IP enforcement.

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<sup>70</sup> Article 12(1) requires the Parties to reaffirm ‘the great importance they attach to the protection of intellectual property rights (copyright, including the copyright in computer programmes and databases, and neighbouring rights, the rights relating to patents, industrial designs, geographical indications including designation of origins, trade marks, topographies of integrated circuits, as well as protection against unfair competition as referred to in Article 10 bis of the Paris Convention for the Protection of Industrial Property and protection of undisclosed information)’.

<sup>71</sup> Article 12(1) of the EU-Mexico agreement.

## ***5.2. The Second Era: Dawn of the TRIPS-Plus Obligations and Human Rights***

As discussed above,<sup>72</sup> the early 2000s saw calls for revisions and the re-evaluation of the protections afforded to IP under TRIPS and the ‘highest international standards’. The period also saw a significant development of human rights concerns within the international arena. Spurred in part due to an increased global emphasis on human rights, but also in response to numerous health-related crises, the question of human rights and exemptions to IP protection began to enter into trade discussions. While this period saw development of the human rights clauses within the EU agreements, there was a minimal intersection between IP provisions and human rights.

Since these second era agreements are quite similar in their approach, they are discussed together to avoid repetition. The EU-Jordan, EU-Lebanon, and EU-Egypt agreements have near-identical IP protection provisions, but also near-identical considerations for human rights clauses. Additionally, the geographical area within the EU’s Mediterranean and Middle East development policy further facilitates the combined analysis.

The preambles of the agreements stress the importance of the ‘observation of human rights’ as an aspirational goal of the respective agreements. The respective preambles were then given an enforceable emphasis under Article 2, which obligates that within the respective agreements:

‘[r]elations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the Universal Declaration on Human Rights, which guides their internal and international policy and constitutes an essential element of this Agreement’.

This provision is significant as it explicitly links the entire Agreement to the principles of the UDHR and the standard it promotes. As noted above, this is also significant from an IP perspective considering the link between IP and the rights to culture and property provided for in Articles 27 and 17 respectively. However, Article 2 only requires the UDHR to operate as a guiding principle. In doing so, as already noted above, while potentially injecting human rights considerations, it does

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<sup>72</sup> See *supra* Chapter Five Section 2.

not address the potential conflict between IP and competing human rights. As such, IP terms under the justification of ‘the highest international standards’ and the standardisation of protection terms between the Parties would take priority over human rights concerns.<sup>73</sup> This would suggest that human right concerns were a low priority focus at this point in time (with little change from the first era). Furthermore, those agreements only focus on the commercial aspect of IP protection and would not consider IP as a human right.<sup>74</sup>

The EU-Macedonia agreement places itself in line with previous agreements but offers additional interesting insights. The preamble of the agreement follows the above trends, recognising the Parties’ ‘commitment to respect human rights and the rule of law’. There is an interesting addition in the preamble as it includes the explicit reference to the ‘rights of persons belonging to national minorities’, which is clearly reflective of specific geographical concerns. However, while its inclusion is most likely in reference to broader human rights concerns in the region for the treatment of minorities, the provision could be applied to the traditional knowledge and folklore aspects of IP associated with a minority group. Article 2 requires the Parties to interpret the agreement in light of the UDHR, but as seen with agreements related and contributing to EU membership, the Parties must also implement the Helsinki Act.<sup>75</sup> Both of which ‘constitute essential elements of this Agreement’.

With regard to IP provisions, Article 71 requires the Parties to provide ‘adequate and effective protection and enforcement’ for ‘industrial, intellectual, and commercial property’. The reversion to the previous formulation presents an interesting issue. The international discussion of IP has developed and expanded to the point such a broad and generalising formulation is no longer suitable. This provision, even if read in light of Article 2, does not provide any real scope for the inclusion of human rights concerns in the implementation of IP measures.

The EU-Algeria agreement is in continuity with previous agreements. Article 2 explicitly requires Parties to consider the terms of the UDHR as an ‘essential element of this Agreement’. In relation to IP provisions, Article 44(1) requires the

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<sup>73</sup> Article 56(1) of the EU-Jordan agreement, Article 38(1) of the EU-Lebanon agreement, and Article 37(1) of the EU-Egypt agreement.

<sup>74</sup> See *supra* Chapter Three Section 5.

<sup>75</sup> Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki, 1 August 1975.

Parties to ‘provide suitable and effective protection’. The variation of terms is minor, changing from ‘adequate’ to ‘suitable’, and needs to be read in conjunction with the need for measures ‘in line with the highest international standards’, most of them were established without consideration of human rights concerns.

The EU-Albania agreement does not present a radical departure from the other treaties in terms of the relationship between IP and human rights. Furthermore, it presents similarities with the EU-Macedonia agreement. The preamble opens with a broad and aspirational reference for the ‘commitment to respect human rights’. Article 2 then requires the Parties to respect the human rights as defined under the UDHR, the ECHR, and the Helsinki Act, each of which ‘constitutes essential elements of this Agreement’. Further, this agreement substantially promotes the alignment of Albania to EU IP norms and standards. The inclusion of the recognition of the GIs by the EU reflected the economic value associated with GIs protection. Similar to the EU-Macedonia agreement and the EU-Albania, the Stabilisation and Association Agreement between the EU and Bosnia and Herzegovina requires the adoption of the standards of the EU. The EU-Bosnia and Herzegovina agreement first highlights the importance of human rights within the preamble. Again, this aspirational goal is given strength and enforceability under Article 2 requiring the Parties to respect human right principles under the UDHR and the Helsinki Act. Both of which are ‘essential elements’ of the agreement. With regards to IP, the broad objective of the EU-Bosnia and Herzegovina agreement is to ensure TRIPS-plus obligations in Bosnia and Herzegovina are in line with those of the EU following the conclusion of a 5-year implementation period. Article 73 then includes the requirement of providing ‘adequate and effective protection and enforcement’ of IP, as well as the adoption of international IP treaties as specified under Annex VII. Both the EU-Albania and the EU-Bosnia-Herzegovina agreements, while including relatively strong human rights clauses, provide for IP measures which are detached from human rights concerns. Albeit, IP provisions should be interpreted in light of Article 2; the trade-related aspects of IP seems to acquire priority. However, there is little room for manoeuvre in the text for achieving balance between IP protection and the promotion of other competing rights.

## **6. Paving the Way Towards the Third Era Agreements: Balancing Intellectual Property Provisions with Human Rights**

### ***6.1. The EU-Chile Agreement***

The EU-Chile agreement marks an important stepping stone in the development in the search for a balance between human rights obligations and IP protection. The preamble of the EU-Chile agreement states the Parties acknowledge ‘their full commitment to the respect for democratic principles and fundamental human rights as set out in the Universal Declaration of Human Rights’. Article 1(1) of the agreement then recognises and obligates the Parties to respect the principles of the UDHR, which then ‘constitutes an essential element of this agreement’. The inclusion of the human rights aspects in the agreement are quickly followed up on under Article 1(2) which obligates the Parties to promote both social and economic development. More importantly, the provision also explicitly requires the Parties to interpret the ‘equitable distributions of the benefits’ of the agreement as guiding principles.

As such, the opening Article firmly places the human rights considerations as a core aspect of the agreement. This is a significant step forward compared to previous agreements in relation to the inclusion of human rights within agreements. The level of recognition and actual engagement is then further supported under Article 16(1)(a) which places a duty of close cooperation on the Parties to uphold the essential elements and explicitly requires the ‘respect for human rights and fundamental freedoms’. Additionally, this duty to cooperate requires a balance of competition goals of social and economic development. Again, the explicit inclusion places the obligation at a higher threshold than previous agreements with regard to human rights protection.

When it comes to IP protection, the EU-Chile agreement, as noted above in Chapter Five, requires the Parties to enforce and protect IP in a manner which prevents abuse of these protections. This is the first EU agreement to introduce such a requirement. While it does not explicitly refer to human rights concerns, when interpreted read in light of the preceding provisions, it would suggest this is to protect from primarily economic abuses by the rightsholder and might lead to a balance between IP protection and competing rights.

The agreement is still subject to the obligations of TRIPS and per Article 55(g) the provision of ‘adequate and effective protection of intellectual property rights, in accordance with the highest international standards’. These standards will, however, be subjected to a stricter interpretation and balance against the human rights obligations as discussed above. This requirement of balance then is supported by Article 91(c), which allows the Parties to introduce exemptions to the IP protection measures, provided they do not conflict with the agreement nor obligations under TRIPS. This was a significant inclusion as it shows the beginning of development and recognition of broader human rights concerns in relation to IP. However, while these exemptions are subject to the obligations and levels of TRIPS, this does not exclude the significance of its inclusion.

## ***6.2. The EU-Cariforum Agreement***

The balance between TRIPS-plus protection and human rights was further developed within the EU-Cariforum agreement. The unique nature of this agreement must be briefly addressed for a number of reasons. Firstly, this agreement placed the EU in negotiation with a number of trading Parties in geographic proximity. Secondly, the specific nations involved present an interesting dynamic to the negotiations by placing a strong focus on human rights concerns. This arose as a result of the social and cultural traditions of the Central American nations, as well as the expansion of human rights with the EU constitutional framework.

As with the previous agreements, the preamble contains a reference to the ‘commitment to the respect for human rights, democratic principles and the rule of law, which constitute the essential elements’ of this agreement. Furthermore, the preamble contains a reference to the Cotonou Agreement, both of which shape the interpretation of the agreement. Interestingly omitted from the preamble is the reference to the UN Charter and the UDHR. Article 1 states the economic development of the Parties as a core objective. However, in doing so, this development is predicated on ensuring it is done ‘in accordance with [the Parties’] political choices and development priorities’ but taking into ‘account their respective levels of development and consistent with WTO obligations’. Article

3(2)(a) requires that the Parties ‘shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations’.

IP is subsequently given consideration under Chapter 2 of the EU-Cariforum agreement under the title of ‘innovation and intellectual property’. The title itself is significant as it places innovation before IP in the title of the chapter, as it indicates the intention of how Chapter 2 is to be interpreted. Furthermore, while neither are defined at this point, the use of innovation suggests a general development, as opposed to exclusively commercially exploitable innovation. When read in line with the obligations of Article 3, this suggests innovation for the whole of society and for the sake of development itself.<sup>76</sup> Moreover, Article 131 defines innovation as ‘a crucial element’ of the economic partnerships between the Parties. While this may suggest a bias towards the provisions IP protection and the TRIPS-plus standards, this is subject to the provisions of Article 131(2) which states that the Parties:

‘also recognise that the protection and enforcement of intellectual property plays a key role in fostering creativity, innovation and competitiveness, and are determined to ensure increasing levels of protection appropriate to their levels of development’.

Article 131(2) addresses both the economic need and justification for the protection of IP, but it also imposes restrictions on the scope and scale. An interesting development in this regard is that this limitation is not subject to external factors such as the ‘highest international standards’ previously seen. Rather Article 131(2) requires Parties to provide ‘levels of protection appropriate to their levels of

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<sup>76</sup> Article 3 of the EU-Cariforum agreement states that ‘[t]he Parties reaffirm that the objective of sustainable development is to be applied and integrated at every level of their economic partnership, in fulfilment of the overarching commitments set out in Articles 1, 2 and 9 of the Cotonou Agreement, and especially the general commitment to reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development. 2. The Parties understand this objective to apply in the case of the present Economic Partnership Agreement as a commitment that: (a) the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations; (b) decision-taking methods shall embrace the fundamental principles of ownership, participation and dialogue. 3. As a result the Parties agree to work cooperatively towards the realisation of a sustainable development centred on the human person, who is the main beneficiary of development’.

development'. The provision strikes a balance between the TRIPS-plus obligations and human rights concerns.

The requirement of a balanced implementation of IP provisions emerges also in Article 132. Article 132(d) requires the Parties to 'achieve an adequate and effective level of protection and enforcement of intellectual property rights'. However, it does not require the 'highest international standards' as previous agreements have included. Article 139(1) requires the 'adequate and effective' implementation of various international IP treaties which explicitly include TRIPS. Through the adoption of TRIPS, the Parties would be entitled to the flexibilities afforded under TRIPS, and the WTO system as a whole, in the implementation of these provisions. This underlying search for a balance emerges from Article 139(2) explicitly requiring the economic and development needs of the Cariforum nations to be considered when determining what amounts to the 'adequate and effective' measures. Moreover, this includes a direct reference to 'users' of the IP when determining the correct measures. Article 139(5) permits, but does not require, higher levels of protection. However, this higher level of protection must not be contrary to overall objectives of the agreement. This is significant, as the agreement emphasises the strong and visible human rights aspect of the agreement. This then feeds into Article 141, which requires the Parties to undertake and:

'consider further steps towards deeper integration in their respective regions in the field of intellectual property rights. This process shall cover further harmonisation of intellectual property laws and regulations, further progress towards regional management and enforcement of national intellectual property rights, as well as the creation and management of regional intellectual property rights, as appropriate'.

The inclusion of such a provision addresses the inequalities between the Parties. Furthermore, the inclusion should strongly prohibit a disproportionate increase in enforcement and protective measures.

The EU-Cariforum agreement ends with two interesting additions to the interaction between TRIPS-plus obligations and human rights concerns. Article 150 extends the protections to genetic resources, traditional knowledge, and folklore. The inclusion is significant as these elements of IP had previously been ignored or

relegated to the passing recognition by previous agreements due to the low economic viability. However, Article 150 requires the Parties to ‘respect, preserve and maintain knowledge, innovations and practices’ as well as ‘promote their wider application with the involvement and approval’. This provision deals with IP protection, but the protection is focused on the human rights concerns of the holders, and the sustainable development associated with the genetic resources, traditional knowledge, or folklore, rather than the commercial exploitation previous protective measures have stemmed from.

Article 151(1) then goes to expand the enforcement of the IP measures, requiring the Parties to ‘provide for the measures, procedures and remedies necessary’. Thus, Article 151(1) is in line with the trend of expanded IP protection. Article 151(1) does, however, highlight an interesting balance between human rights and economic concerns in relation to IP. In fact, these enforcement measures are required to be ‘fair and equitable’.

On the whole, this agreement (while belonging chronologically to the third era) paves the way to a more balanced approach to IP which characterises the third era, which will be discussed below.

## **7. The Third Era: Further Expansions of TRIPS-Plus and Human Rights**

### ***7.1. TRIPS-Plus, Human Rights in the EU-South Korea Agreement: A Step Back?***

The EU-Korea agreement represents the further development in search of a more balanced approach between IP and human rights, but in many respects it seems less advanced than other agreements within the era, such as the EU-Cariforum agreement. In that connection, it must be taken into account that this agreement was negotiated between developed nations with similar understandings and positions regarding the economic importance of IP. Furthermore, both the EU and South Korea were negotiating this agreement against the backdrop of their involvement in ACTA. This negotiation framework displayed a considerable influence on the development of IP provisions. As such, the increase in IP protection and enforcement levels sought in ACTA and reflective of the broader global concerns of the era, are present in the EU-Korea agreement. At the same time, the stronger

emphasis and the mainstreaming of human rights concerns play an important aspect within the agreement. Both of which further reflect the era of the agreement.

The preamble of the EU-Korea agreement directly addresses the Parties' commitment to both the UN Charter and the UDHR. This is followed with the affirmation of the Parties' commitment towards both sustainable development in 'economic, social and environmental dimensions' but also 'legitimate public policy objectives'. This dual and often competing goal serves as an introduction to the balancing of duties and obligations that shape the rest of the agreement. These aspirational principles are then given enforceability under Article 1(1)(e) requiring the Parties to 'adequately and effectively protect intellectual property rights'. However, this must be then balanced against the requirement of Article 1(1)(g) to commit to the recognition and engagement of sustainable development an objective of the agreement.

Article 10(1) focuses on the economic aspects of IP. It stresses the 'facilitation of production and commercialisation' as well as the 'adequate and effective levels of protection and enforcement of intellectual property rights'. While the Parties are required to interpret and implement these provisions in light of their obligations under Article 1(1)(g), the lack of explicit requirements suggests that the human rights concerns are placed at a lower priority in comparison to the economic aspects of the agreement. This might entail a step back compared to the EU-Cariforum agreement.

Article 10(4) states that Parties 'shall be free to establish their own regime for the exhaustion of intellectual property rights'. Articles 10(5)-10(10) then requires the introduction of protective measures in relation to copyright across a wide range of media. This is an explicit and deliberate expansion of what has been previously seen and again serves to show the positions of copyright and the importance attached to its protection by the Parties. It is not until Article 10(11) that the matter of limitations or exceptions on these protective requirements is addressed. This notable for a number of reasons. Firstly, while the provision addresses the allowance to create limitations and exceptions to copyright, it does not specify that such limitations or exceptions are to address the human rights concerns in relation to copyright. Secondly, the second sentence requires the restriction of limitations and exceptions if they were to come into conflict with the legitimate interests of the

rightsholders or place an unjust burden on the rightsholders.

Despite what seems to be a step back in relation to the search for a balance between IP and human rights, there is significant development regarding human rights concern in relation to patents within the EU-Korea agreement. Article 10(34) explicitly requires the Parties to ‘recognise the importance of the Declaration on the TRIPS Agreement and Public Health’. Furthermore, this provision requires that the Parties must implement the provisions on health matters in light of the Doha Declaration. The inclusion here is significant as it is the first agreement within this study to address and explicitly obligate the Parties to incorporate the Doha Declaration in the implementation of IP provisions. The inclusion of obligations to respect and incorporate the Doha Declaration places the human rights concerns (namely the protection of the right to health) at the forefront of the implementation of the provisions of patent of medical and pharmaceutical goods.

Article 10(40) furthermore refers to genetic resources, traditional knowledge, and folklore. Article 10(40)(1) obligates the Parties to:

‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity’.

Additionally, the Parties are required to:

‘promote their wider application with the involvement and approval of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices’.

While the language of Article 10(40)(1) focuses on the protection of IP, it is evidently the result of human rights concerns of indigenous groups.

Overall, the EU-Korea agreement brought interesting changes to the understanding of TRIPS-plus obligations. These changes mirror broader developmental trends in the international sphere. However, the EU-Korea agreement placed in a prominent position human rights concern. While the EU-Korea agreement seems to be a step back compared to the Cariforum, it has in fact significantly pushed this forward the protection of human rights and has sought for a balance between IP protection and competing human rights.

## ***7.2. TRIPS-Plus, Human Rights, and European Union Agreements in the Context of European Union Neighbourhood Policy***

As highlighted above, the EU also engaged in two Stabilization and Association Agreements, one with Serbia and the other with Montenegro. Both the EU-Serbia agreement and EU-Montenegro agreement were negotiated and developed as part of Serbia and Montenegro's application to EU membership. As with previous agreements with neighbour countries (seeking EU membership), these agreements are geared towards the adoption of EU standards and norms. Due to the identical nature of the agreements, including the objectives and the broader context of negotiation, they will be discussed together to avoid repetition but also to illustrate the EU's approach to their negotiation process, as well as a reflection of the EU's stance on IP and human rights during the era.

The preamble of both agreements mirrors the preambles of previous agreements in respect of their commitment to 'respect human rights'. However, these agreements also include a commitment for the Parties to comply with the 'rights and obligations arising out of membership of the WTO'. This inclusion would suggest a leaning towards the TRIPS-related provisions, which seems to be placed on par with human rights concerns. Article 2 gives a bite to the preamble by explicitly requiring respect for the UDHR and the ECHR which 'constitute essential elements of this Agreement'. Article 75(1) requires the Parties to confirm the importance of adequate and effective protection and enforcement' of rights, which is a standard and accepted provision, making reference to the development of IP to 'intellectual, industrial and commercial property'. Within the provision, there is no express reference to human rights concerns. The Parties are required to be read and implemented into Article 75 in light of Article 2. Article 75(3) requires both Serbia and Montenegro to adopt 'a level of intellectual, industrial, and commercial property rights similar to that existing in the [EU]'. Such provision does not include an express reference to the human rights concerns. However, as discussed above, on the one hand, the EU already places IP within the bulk of human rights by virtue of the EU Charter, and on the other hand, requires respect for human rights. Both agreements hence would also require Serbia and Montenegro to accept and implement EU human rights obligations and balance human rights with IP protection.

Around 2014, the EU completed a number of Association Agreements with Georgia, Moldova, and the Ukraine. Each agreement is intended to serve and prepare Georgia, Moldova, and the Ukraine for EU membership. This would require the adoption of EU standards and norms. Those agreements follow the trend of the other agreements with South-Eastern European countries. In that, those agreements focus on a high level of protection of IP, which is, however, to be implemented taking into account EU human rights standard.

### ***7.3. TRIPS-Plus and Human Rights in the South and Central America Agreements: A Better Balance?***

The EU-Central American agreement more than other contemporaneous agreements during the third era, represent the search for a better balance between IP protection and human rights concerns. Further, it places itself in continuity with other trade-based agreements between the EU and South and Central American nations.

From the preamble, the importance given to human rights concerns is clearly seen with the requirement for the Parties ‘reaffirming their respect for democratic principles and fundamental human rights as set out in the Universal Declaration of Human Rights’. The aspirational goal of the preamble, which echoes previous agreements discussed above, is then given enforceability under Article 1(1). The latter provision requires Parties to respect:

‘democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement’.

The human rights clause is reinforced by a commitment to enhancing sustainable development under Article 1(2), which also requires Parties to ‘ensure that an appropriate balance is struck between the economic, social and environmental components of sustainable development’.

Since the agreement must be read in light and in compliance with Article 2, the human rights concerns are placed on a stronger footing and should inform the implementation of the TRIPS-plus obligations. The requirement of appropriate

balance is then further illustrated in Article 78(g). While Article 78(g) requires Parties to adopt the standard of ‘adequate and effective protection’, this protection is subject to balancing the interests between the rightsholders and the public interests. Additionally, this is then further assessed against the Parties’ economic positions and their ability to transfers technological developments and innovations.

Article 78(g) is then expanded under Title VI, which specifically addresses IP within the EU-Central America agreement. This (while echoing previous agreements with South and Central American countries and the EU-Cariforum agreement) is a significant departure from the obligation included in previous agreements such as Article 39(1) of both the EU-Morocco agreement and the EU-Israel agreement of providing ‘adequate and effective protection’. Furthermore, Article 78(g) must be read in conjunction with the requirement to account for economic, social and cultural requirements of the Parties under Article 228(a). Moreover, Articles 228(b) and 228(c) include the obligations to foster sustainable development in the promotion of and cooperation on innovation and technology between the Parties.

The search for a balance between the TRIPS-plus obligations and competing human rights concerns can also be further seen in Article 229. Article 229 first requires that the Parties ‘shall ensure an adequate and effective implementation of the international treaties dealing with intellectual property’. While the provision would suggest a TRIPS-plus perspective of the agreement, this is immediately followed by Article 229(2). Article 229(2) requires the Parties to implement the IP provisions in compliance with the Doha Declaration. Articles 229(3) then defines what IP is and is in line with previous commitments and obligations of the Parties. Article 229(3) is further subject to the qualifying and restricting provisions of Article 229(4). Article 229(4) requires the Parties to recognise and protect genetic resources under the Convention of Biological Diversity. The explicit inclusion is significant as it further shapes the interpretation of the agreement and creates strong and clear protection for those human rights broadly associated with biological diversity. Article 229(5) explicitly state the duty to preserve and maintain:

‘the indigenous and local communities’ knowledge, innovations and practices that involve traditional practices related to the preservation and the sustainable use of biological diversity’.

The protection offered to the rights of indigenous communities is however limited. Article 231(3) requires the Parties to:

‘prevent or control licensing practices or conditions pertaining to intellectual property rights which may adversely affect the international transfer of technology and that constitute an abuse of intellectual property rights by rightsholders or an abuse of obvious asymmetries of information in the negotiation of licences’.

In this provision, IP protection cannot be used as a sword to prevent the transfer of technologies.

The EU-Central America agreement then moves to discuss the traditional elements of IP. In relation to copyright, the EU-Central America agreement requires the Parties to apply its protection across a comprehensive scope of media and technological expressions. The protection of the human right of the author remains in the background, while the expansion of copyright protection seems to potentially endanger (at least to some extent) freedom of expression. Article 237(2) and 237(3) aims to protect the rightsholders and their exclusive control of broadcasting in respect for licensing and fees. Article 237(5) then permits the Parties to create limitations or exceptions to the above provisions. However, this is still conditional on such limitations or exceptions not conflicting with the normal exploitation of the material. Further, it must not create barriers which unreasonably ‘prejudice the legitimate interest of the rights holders’. The EU-Central America agreement does not suggest or offer guidance on what could be classified as ‘legitimate interest’ to prevent an unduly restrictive provision for the purpose of the agreement, leaving open to parties to look at EU and international practice to understand what constitutes a legitimate interest’.

A similar approach (i.e. a strong focus on the economic rights of the rightsholder) is adopted in relation to trademarks. By contrast, more attention to human rights concerns emerges in relation to other IPRs. For example, Article 259(3) allows the exceptions to protective measures for plant varieties, in order to allow future use and preservation by the farmers. While this is protecting the right to food, this is still an optional provision, whose implementation is discretionary between Parties.

Article 260 obligates the Parties to provide enforcement methods for the protection

of IP, and such measures are required to be:

‘fair, proportionate and equitable, and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays’.

The inclusion of such provision is a departure from the language and tone seen in the previous agreements. This approach accounts for the human rights concerns related to not only the enforcement procedures but also the instances in which such enforcement can be sought.

Overall, this agreement shows a visible attempt to balance IP concerns with other competing rights, first and foremost, the rights of indigenous people. The balance is certainly imperfect, and trade-related concerns are still weighed very carefully. However, it is notable that the formulation of IP provisions incorporates varying degrees human rights concerns.

A similar approach can be found in the EU-Columbia and Peru agreement. The preamble of this agreement contains the nearly standardised commitment to the UDHR, as well mentions the commitment towards ‘harmonious development’ and sustainable development. This agreement includes a human rights clause similar to that included in the EU-Central America agreement, which ‘constitutes an essential element of this Agreement’. Interestingly, while Article 4(g) requires the Parties to provide ‘adequate and effective protection’ of IPRs, it also requires Parties to ensure ‘a balance between the rights of intellectual property rightsholders and the public interest’. This provision is in line with the trends seen in earlier agreements with South and Central American nations. This provision, by requiring a balance with the public interest, cements the human rights concerns into the implementing of the TRIPS-plus obligations the remainder of the agreement seeks. This balancing of competing interests is further seen in Title VII of the EU-Columbia and Peru agreement. While the agreement does not define ‘public interests’, when read in light of the obligations of Article 2, this certainly encompasses the protection of human rights, such as the right to education, the right to health and cultural rights of indigenous communities. This is evident in Article 196(c), which states that:

‘Parties recognise the need to maintain a balance between the rights of intellectual property holders and the interest of the public, particularly

regarding education, culture, research, public health, food security, environment, access to information and technology transfer’.

The protection of the right to health is addressed in Article 197, which affirms that:

‘each Party may, in formulating or amending its laws and regulations, make use of the exceptions and flexibilities permitted by the multilateral intellectual property agreements, particularly when adopting measures necessary to protect public health and nutrition, and to guarantee access to medicines’.

While these limitations and exceptions are not mandatory, Article 197(2) then requires the Parties to implement the rights and obligations of the EU-Colombia and Peru agreement in a manner consistent with the Doha Declaration. Moreover, Article 197(5) places restrictions on the limitations and exceptions to protect the legitimate use and trade of the rightsholders in order to protect health and access to medicine.

This agreement, interestingly also purports, a more human rights-oriented approach to copyright. Article 216 gives express protection to the non-commercial aspect of the moral rights of the author, stating that:

‘[i]ndependently of the economic rights of the author, and even after the transfer of such rights, the author shall have the right to claim, at least, authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, such work, which would be prejudicial to his/her honour or reputation’.

On the whole, while trade concerns are still at the forefront of IP provisions, those agreements do require Parties to protect human rights when implementing TRIPS-Plus obligations.

## **8. The Most Recent Developments**

In the last few years, the EU has turned its attention towards its trading partners in the Pacific Rim among other areas, and other countries such as Canada. Those agreements provide for strong levels of IP protection. While more visibility is given to human rights, the balance stricken seems to lean towards IP protection (rather

than human rights protection) Those agreements are also reflective of the increased competences acquired under the Treaty of Lisbon, and this is certainly visible in the scope of the agreements themselves but also in the length and wide-ranging scope of IP chapters.<sup>77</sup>

### ***8.1. The Comprehensive Economic and Trade Agreement (CETA) with Canada: The Return of a Pure Trade Perspective?***

In 2016, the EU concluded the Comprehensive Economic and Trade Agreement (CETA) with Canada. The preamble of CETA, while requiring the Parties to respect human rights, as the previous agreements have done, also includes a reference to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>78</sup> This mentioning of the UNESCO convention is quite notable as it suggests a strong prominence of cultural rights and the rights of both creators of cultural goods and services and users of those goods and services. However, unlike in previous agreements, this aspirational goal is not explicitly reflected in a human rights clause. Furthermore, Article 1(5) of CETA states that:

‘Parties affirm their rights and obligations with respect to each other under the WTO Agreement and other agreements to which they are party’.

IP provisions are then discussed under Chapter 20 of CETA. This encompasses high standard of IP protection reflective of the fact that both the EU and Canada have been global proponents of the introduction of higher standards of IP protection.

Article 20(1) lays out the objectives of IP protection which is aimed to ‘facilitate the production and commercialisation’ and to provide an ‘adequate and effective level of protection and enforcement of intellectual property rights’. This provision focuses on economic interests and does not explicitly obligate the Parties to ensure a balance between human rights and/or the public interests. In addition, Article 20(2)(1) defines the nature of CETA to ‘complement the rights and obligations

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<sup>77</sup> See *supra* Chapter Four.

<sup>78</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005, 2440 U.N.T.S). The Convention was developed to protect and promote the diversity of cultural expressions. In doing so, the convention provided a legal basis for the development of a framework of protection for the access and enjoyment of cultural expressions through the mediums of cultural activities, goods, and services.

between the Parties under the TRIPS Agreement'. The absence of an explicit reference to human rights in this provision is partially mitigated by the reference to the Doha Declaration in Article 20(3). The latter requires the Parties to recognise and give effect to the Doha Declaration when interpreting and implementing the rights and obligations of this Chapter, placing thus emphasis on the need to protect and promote the right to health. Interestingly, the Doha Declaration needs to be taken into account in relation to all forms of IP protection (not only patents).

Copyright exceptions and limitations are then addressed in a comprehensive manner under Articles 20(9) to 20(11). Parties are permitted to introduce exceptions or limitations to address the human rights concerns, but these must not create an undue burden or restraining the legitimate exploitation by the rightsholders. This would suggest a lower level of consideration for human rights concerns related to copyright.

With regards to IP enforcement, in line with previous agreements, Article 20(32)(1) of CETA requires enforcement to be 'fair and equitable'. On the whole, the CETA is a bittersweet agreement from the point of view of the balance between IP protection and the protection of human rights. It adopts a strong economic perspective, and human rights concerns remain in the background.

## ***8.2. The EU-Singapore Agreement: One Step Forward and Two Steps Back?***

In the EU-Singapore agreement, IP is discussed under Chapter 10 in a comprehensive manner. Article 10(1)(1) focuses on the commercialisation of IP and stresses the importance of trade. These objectives are immediately predicated by Article 10(1)(2), obligating the Parties to implement this agreement in light of Article 7<sup>79</sup> and Article 8 of TRIPS.<sup>80</sup> The reference to Article 7 TRIPS is however

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<sup>79</sup>Article 7 of TRIPS state that '[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'.

<sup>80</sup> Article 8 of TRIPS states that '[m]embers may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders

quite significant for the purpose of this analysis as it requires the balance of these objectives with social and economic welfare. The search for a balance between TRIPS-plus obligations and the protection of human rights is also evident in Article 10(11) in relation to exceptions and limitations afforded to copyright and related rights, and in Article 10(15) and Article 10(27) with regards to trademarks.

As with previous agreements, the protection of the right to health is a notable concern for the Parties. An obligation to achieve a high level of protection of the right to health is included in relation to patents of medical and pharmaceutical goods, but also in relation to test data of pharmaceutical goods under Article 10(30). Article 10(30), in line with the agreements examined above, then obligates the Parties to recognise the importance of the Doha Declaration.

On the whole, in this agreement, human rights obligations are more visible than in the CETA, but still the agreement is more trade-oriented than the agreements concluded with South-American countries.

### ***8.3. The EU-Japan Agreement***

The EU concluded the EU-Japan agreement in 2016. Similar to CETA, the EU-Japan agreement is primarily focused on trade. As such, the agreement as a whole reflects this position from the preamble, which, while acknowledging the UDHR, gives very little direct consideration to the human rights concerns.

IP is addressed under Chapter 14 of the EU-Japan agreement. Article 14(1) requires (as most of the agreements examined above) adequate and effective protection. The phrasing used (i.e. ‘adequate, effective and non-discriminatory protection’) focuses on the commercial nature of IP. Article 14(1)(4) requires the Parties to implement the terms of Articles 7 and 8 of TRIPS, injecting, in an indirect way, some economic and social concerns in the implementation of IP provisos. For the most part, the agreements evoke what already provided in the CETA. Safe for the possibility of exceptions to IP protection (in particular copyright protection), the only right which is given a standalone prominence is that of health. The EU-Japan agreement mirrors the previous agreements of third era by obligating the Parties to recognise the

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or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology’.

importance of the Doha Declaration.

The EU-Japan agreement then concludes with a section on IP enforcement, which requires measures to be ‘fair and equitable’. While the human rights concerns are again not explicitly referred, the requirement for ‘fair and equitable’ enforcement seems to have the potential to include human rights concerns in the picture.

#### ***8.4. The EU-Vietnam Agreement***

The EU-Vietnam agreement, while acknowledging the importance of human rights as provided for in the UDHR within the preamble, has strong and explicit trade emphasis.<sup>81</sup> Compared to the EU-Japan or the CETA, however, this agreement provides for a more balanced approach to IP protection, taking into account human rights concerns. In that, this agreement is certainly more similar to those agreements concluded with South America.

IP protection, however, while been geared towards technological innovation, must also produce social benefit. This clear in Article 12(1) of the agreement:

‘the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations’.

Furthermore, Article 12(2)(1) requires the ‘balance between the rights of intellectual property holders and the interest of the public’. In doing so, this creates an explicit requirement to consider the human rights concerns when implementing IP provisions. In a similar vein to the other agreements examined, Article 12(39) of the EU-Vietnam agreement obligates the Parties to recognize the Doha Declaration when ‘interpreting and implementing the rights and obligations under this Chapter’ (namely patent provisions). In that, Article 12(39) is narrower than other provisions which oblige Parties to respect the Doha Declaration also in relation to the transfer of technology and other IP matter outside the patent domain.

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<sup>81</sup> Article 12(1) of the EU-Vietnam agreement state that the purpose of the chapter on IP are to ‘(a) facilitate the creation, production and commercialization of innovative and creative products between the Parties contributing to a more sustainable and inclusive economy for the Parties; and (b) achieve an adequate and effective level of protection and enforcement of intellectual property rights’.

On the whole, this agreement follows the trend observed in the most recent agreements. Human rights concerns remain in the background, and the focus is mostly on the commercial aspects of IP.

## **9. Concluding Remarks**

The intersection between the TRIPS-plus obligations and human rights is addressed to varying degrees in the agreements examined above. Across the three eras, it is possible to observe a greater prominence of human rights in general, through the use of human rights clauses. The mainstreaming of human rights considerations within traditionally trade-based agreements is certainly visible. However, the balance between IP protection and human rights has varied greatly, not only across time, but also in relation to the Parties involved in the agreement. The variety is the result of cultural and political backgrounds of the Parties and their willingness to actively engage in the discussion on how to best balance IP and human rights concerns.

The analysis of agreements between the EU and its South and Central American trading partners show a more central position of human right obligations within these agreements. The considerations afforded to the non-commercial aspects of IP and the focus on traditional knowledge, folklore, and genetic information signal the search for a balance between the protection of IP and the protection of other tangential or competing rights. The reference to sustainable development reinforces the obligation to achieve a balanced implementation of IP protection, and further strengthen the human right related aspects of the agreement and IP.

The EU approach is different in Association Agreements and Stabilisation Agreements, where the EU focuses on the ‘exportation’ of EU standards. Third Countries are in fact required to accept IP standards identical to those found in the EU. In these agreements, respect for human rights is included in the agreement, and there is a strict conditionality.<sup>82</sup>

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<sup>82</sup> Guillaume Van der Loo, Peter Van Elsuwege and Roman Petrov, ‘The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument’ (2014) EUI Working Paper Law No 2014/09, 3.

The most recent agreements show significant development when it comes to the intersection between TRIPS-plus obligations and human rights concerns. While the balance achieved is quite different, and most recent agreements seem to be more focused on IP protection, i.e. on the commercial aspects of IP protection, and a room for manoeuvre is left to Parties, a greater awareness of the need to respect human rights when implementing IP is visible. References to the Doha Declaration and the subsequent prominence given to the right to health is also significant, in that it represents a step forward in a more human-right sensitive application of TRIPS-plus obligations.

On the whole, despite the numerous criticism that can be raised and the accusation of neo-colonialism, the EU is playing an important role on the international sphere ushering a new era of IP protection which is more respectful of human rights. A balance is yet to be achieved, and recent agreements are perhaps disappointing, but the attitude of the EU (supported by its constitutional self-understanding) signals that future trade agreements might purport a greater human rights awareness in IP provisions. One may be somewhat optimistic regarding the future of such IP provisions and their respect of human rights. The upcoming agreement between the EU and Australia might show a move towards a better balance between IP protection and human rights.

# Conclusion

## 1. The Core Tenets of This Thesis

This thesis has charted Trade-Related Aspects of Intellectual Property Rights (TRIPS)-Plus provisions, aimed to protect intellectual property rights, in the European Union (EU) international agreements. The analysis conducted across the three parts of this thesis has allowed one to appreciate that the EU is seeking higher levels of intellectual property (IP) protection in the global sphere, and extensively made use of TRIPS-Plus provisions in its agreements.

Chapter Five and Six have sought to examine the role of TRIPS-Plus provisions, and the evolving balance between IP and human rights protection, linking those to the EU constitutional developments but also to the international context. The thesis, in providing an original and novel contribution, has identified the application of this balance within the ‘three eras’. Within the first era, the main focus for the EU and its trading partners was to ensure the minimum standards of TRIPS were given ‘adequate and effective’ implementation. However, the Parties were still able to include higher standards domestically. In the second era, agreements commenced to include TRIPS-plus provisions and expand IP chapters. The agreements negotiated during the third era (i.e. the most recent agreements) are considerably more comprehensive in their scope and addressed the various elements of IP distinctively. The EU agreements analysed in the preceding Chapters, and the literal and systematic interpretation of the IP provisions in those agreements illustrated the complexity of the balance between IP and human rights.

This analysis conducted has aimed to answer the two key research questions:

- Does the inclusion of TRIPS-plus provisions within the various EU agreements considered within this research serve to increase IP protection?
- If IP protection has increased, to what extent does this conflict with the protection and promotion of other human rights within the EU’s external action?

This concluding chapter aims to clarify the answer to those questions, and to purport

broader considerations on the overall coherence of EU international agreements with the objectives laid down in Articles 3 and 21 of the Treaty on the European Union (TEU), firmly locating the unprecedented analysis conducted above within the theoretical framework of the EU's 'constitutional regime governing foreign affairs'. Hence, the purpose of this Conclusion is to examine the overall contribution of the thesis to the scholarship and state of the art. Rather than distilling down the findings from previous chapters, the following subsections will revisit the central research questions posed in the Introduction and develop them in light of the thesis' findings.

## **2. Does the Inclusion of TRIPS-Plus Provisions within the Various European Union Agreements Considered within this Research Serve to Increase Intellectual Property Protection?**

This thesis has argued that the inclusion of TRIPS-Plus provisions in EU agreements have, in fact, increased IP protection when it comes to EU trade with Third Countries. This increased protection is perceivable not only in the way the IP chapters are articulated, but also having regard to the systematic reading of the provisions. The increased IP protection entails the protection of the rights recognised to IP holders and the effectiveness of enforcement measures. Furthermore, EU agreements have shown a progressive increase of the actual material scope of IP protection. This thesis has anchored the expansion of IP protection in EU agreements to the expansion of EU external competence on IP matters, which is, in turn, reflective of the increased scope of the CCP and is related to the growth of EU internal IP regulation (by virtue of the ERTA doctrine).

The analysis conducted has also shown that, while IP protection might justify a restriction of trade, the agreements are premised on the idea that stronger or, to use the wording of several second and third eras agreements, 'adequate and effective' IP protection will reinforce the trade between the EU and Third Countries and lead to innovation.

The sub-sections below highlight some of the more interesting findings of the thesis in relation to this core research question and trace further avenues for research.

## ***2.1. Not Only Stronger but Broader? The Increased Material Scope of Intellectual Property Protection***

Chapter One of this thesis has shown IP in some form, or another has existed for thousands of years, but what is protected has and will change in line with changes to society. What was deemed to be appropriate IP protection such as the protection afforded under the Venetian Patent Statute of 1474, may not be appropriate for needs for IP protection. Chapter Five and Six of this thesis have shown that the various elements of IP have seen significant development in EU agreements, in line with the evolution of EU law, but also in response to wider global concerns and international obligations.

While traditionally recognised as an element of IP, copyright protection has gained prominence in several of the third era agreements, in both terms of protection for the rightsholders, but as well as (albeit less significantly) the protection of the human rights associated with copyright. EU agreements concluded in the third era, to varying degrees, have addressed (or attempted to address) the global proliferation of works through new forms of technology, such as the internet, and the new methods to circumvent existing copyright protection measures. As such, the protection that the EU has sought to achieve has expanded to protect digital copyright, digital broadcasting rights. At the same time, these new provisions have, in part, sought to include the recognition of the various human rights associated with the application of copyright protection, through the use of exceptions and limitation which are underpinned by human rights concerns. However, all the EU agreements considered, and perhaps more evidently the new generation agreements, such as the CETA, provide for narrow limitations and exceptions, as it is required that those limitation and exceptions do not infringe or restrict the legitimate exploitation of the copyrighted product by the rightsholder.

The traditionally recognised protection afforded to patents was also significantly improved in EU agreements, which adheres to high international standards. However, as seen in Chapter Six, EU agreements do not fade away from the conflict between patent protection and the right to health in relation to generic equivalents of essential medicines. All the most recent agreements do refer to the most important document in the field: the Doha Declaration on the TRIPS Agreement and Public Health. Spurred by the Aids epidemic in the early 2000s and the

restrictive application of patent protection, the Doha Declaration aims to ensure that the flexibilities created under TRIPS in relation to the implementation of patent protection measures were adequately adopted. While the direct influence of the Doha Declaration has seen some degree of variance, a stronger emphasis on its implementation was placed in agreements with South and Central American nations and since then in all more recent agreements. Reference to this Declaration has, in fact, become a standardised feature in the various EU trade agreements.

While a traditionally recognised and established element of IP, trademark protection did not enjoy the same visibility in EU trade agreements as patents and copyright. However, most recent agreements show attempts to expand the enforcement of trademark in relation to border measures and address trademark infringement in a comprehensive manner.

Most recent EU agreements, and most prominently agreements concluded in the second and third era with South and Central American nations, pay great attention GIs. Unlike trademark, patent, and copyright, GIs were not traditionally recognised as an element of IP, nor was it present in the earlier agreements discussed above. Even though the EU protection of GIs met with pushback from the US, the EU succeeded in including GIs recognition within all the most recent agreement. Furthermore, the agreements address the technical and administrative aspects of GIs in a manner which mirrors the development within the EU. Concurrent to the above developments, the EU expanded or rather, more accurately, codified the protections afforded to traditional knowledge, folklore, and elements of design. In this regard, while it seems that these forms of IP have a lower economic priority, yet they are given some prominence in most recent agreements with South and Central American. However, since the philosophical notion of IP is tied to ownership and to the concept of exploitation by the rightsholder, the provisions related to traditional knowledge are arguably insufficient to protect the rights of indigenous peoples and to avoid cultural appropriation. The ‘commodification of culture’ stemming from these provisions is also an inevitable drawback.

On the whole, this thesis argues that IP provisions in EU agreements, being more and more detailed, entail a broader material scope of IP. The inclusion of traditional knowledge, folklore, GIs, which mirrors the expansion of EU law internally, aims to respond to specific concerns identified with other trade partners and has

responded (albeit in a partial manner) to the protection of non-trade concerns related to human rights.

## ***2.2. The European Union: A Global Intellectual Property Policy Driver as a Result of Constitutional Evolution***

There is no disputing that the EU is an economic and political juggernaut, with the ability to shape the various fora in which it enters. When it comes to IP protection at the global level, the analysis conducted has shown that the EU has contributed greatly to set the ‘roadmap’. It had an important role in the introduction of TRIPS, and through its bilateral agreements has contributed to the increase of standards of IP protection within the agreements. When it comes to agreement with neighbour countries, the EU has sought the extension of EU standards to those countries.

The EU role as IP policy driver is reflective of the internal developments. Following the entry into force of the Treaty of Lisbon, and in light of the most recent CJEU case law, the EU enjoys a wide competence to act to include the TRIPS-plus provisions within the various agreements as a result of the CCP and the *ERTA* doctrine. Moreover, the new agreements, with their strong linkage between IP and trade, respond to the objective laid down in Article 21(3)(e) TEU, and ‘encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade’.

## **3. To What Extent Does Increased Intellectual Property Protection Conflict with the Protection and Promotion of other Human Rights within the European Union’s External Action?**

Human rights occupy an ever-more significant position within the EU, with the Charter of Fundamental Rights having become part of the constitutional bulk of the EU. Article 3(5) and Article 21 include human rights as an integral part of the EU external policy. This EU’s engagement with human rights, both internally as well as globally, has led not only to the inclusion of human rights clauses in EU agreements, and most recently to the search of the balance between IP protection and human rights concerns. The search for this balance has also been encouraged

by international developments. From an IP perspective, one of the most prominent of such developments is the Doha Declaration on Health.

The analysis conducted in the thesis has shown that, while trade concerns remain of the forefront of IP provisions, in the second and third era agreements, human rights concerns have crept into IP chapters. Within these agreements, the position of human is significantly more visible and explicit and should inform the interpretation and implementation of the IP provisions, but also guiding the application of the agreements as a whole. The considerations afforded to the non-commercial aspects of IP and the focus on traditional knowledge, folklore, and genetic information signals the search for a balance between the protection of IP and the protection of other tangential or competing rights. Human rights concerns have been balanced more visibly and convincingly in agreements concluded with South and Central American nations. Most recent agreements also frame IP provision within a sustainable development perspective. In doing so, they fulfil the constitutional imperative of Article 3(5) TEU.

The balance achieved however raises quite a few questions related to the colonial undertones of the EU's action and the Western ideological basis of IP protection. These issues cast a shadow on the actual balance achieved, especially in those agreements concluded with the ACP nations. In that connection, while the EU has shaped the human rights discourse at the global level, it should not be the single bastion protecting a monolithic ideology of human rights. Rather these agreements should be implemented in a way to give actual voice to other countries.

On the whole, however, despite the numerous criticism that can be moved to the EU and the accusation of neo-colonialism, this thesis shows that the EU is playing an important role on the international sphere ushering a new era of IP protection which is more respectful of human rights.

#### **4. This Thesis as an Advancement of the State of Art and a Starting Point for Further Research**

This thesis has answered two key research questions. In doing so, it has highlighted that there is an undeniable increase in the level of protection afforded to the IP rightsholders, and that, while such protection is at the expense of human rights obligations, the EU has attempted (and to some degree succeeded in its efforts) to

achieve a balance between IP protection and human rights concerns with the various agreements. This thesis has also highlighted that the search for this balance is dynamic, context-dependent and ever-evolving. The EU has the ability and the competence to ensure an effective balance between the IP protection provisions and the human rights obligations within its various trade agreements.

This thesis, while conducting a systematic comprehensive and unprecedented study on the progressive inclusion of TRIPS-plus provisions with the EU agreements, does not only advances the state of art but also opens up new avenues for future research. It shows the necessity to look not only at how those agreements operate in practice but also the need to investigate whether the trends highlighted will be confirmed in the agreements under negotiation. The lingering absence of EU agreements with Russia, China, and the US will also entail further research. In particular, the exploitation of IP within China and how this sharply contrasts with the Western approach to IP present within the current agreements might open up further research.

Moreover, this thesis examines the progressive inclusion of TRIPS-plus provisions within agreements concluded with the EU and Third Countries. However, a future avenue of research would be a comparative analysis over the same time frame from the US perspective and how the US and Third Countries have approached the issue.

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