



FACULTY OF LAW Lund University

# **EU and International Treaties with Third Countries**

## **Can EU fulfil legal expectations in areas of shared competence as IP under TTIP?**

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# Summary

This thesis is based on research into the area of the complex legal situation behind EU's external affairs with the conflict between external and internal legal matters in regards to the area of shared competences within the Union. EU legislation, by its own structure, has a unique position in the hierarchy of laws. As can be seen by case law and documentation presented here it also contains its own internal contradictions between the external and internal legislation. The conclusions drawn from these sources leads to an interesting but also debatable answer to the research question – there is no guarantee of legal certainty for third countries under Free Trade Agreement's concluded with the EU in the area of shared competences. What is presented here should be able to provide a platform for further studies and a better understanding of potential legal issues facing the EU's trading partners in negotiating FTA's with the Union.

# Sammanfattning

Denna uppsats bygger på forskning inom den komplexa juridiska situationen bakom EU's externa agerande och konflikten mellan externa och interna juridiska spörsmål inom områden med delad kompetens inom Unionen. EU's lagstiftning, genom sin egen struktur, har en unik position inom hierarkin för rättskällor. Av de i uppsatsen presenterade rättsfallen och dokumentationen i övrigt kan man utläsa att den även innehåller motsägelser mellan den externa och interna lagstiftningen. Slutsatserna som dras från dessa källor leder till ett intressant men också diskutabelt svar på forskningsfrågan – det finns ingen garanti för rättsäkerhet för tredje land under ett frihandelsavtal med EU inom områden med delad kompetens. Det som presenteras här bör ge en plattform för vidare studier och en bättre förståelse för potentiella juridiska problem som kan möta EU's handelspartners i förhandlingar om frihandels avtal med Unionen.

# Foreword

This thesis builds upon and continuous upon the journey that began with my Bachelor's thesis with the conclusion that today's Intellectual Property Rights (IPRs) within the European Union (EU) for the graphical user interface (GUI) for software is fractured and contradicting between different areas of Intellectual Property (IP) protection legislation.<sup>1</sup> To this were added insights from my Masters' thesis, through an analysis of the legal framework for “*software solutions*”, and a proposal for a more harmonized EU *acquis* relating to IP and IPRs for the same.<sup>2</sup> The next step, taken in this thesis, is to look at the effects of the fractured IP and IPR legislation of EU from an international perspective. Unlike my previous academic efforts this time the viewpoint is from the “*outside-in*”. This thesis looks at potential issues with legal certainty for third country authors when dealing with EU's IP and IPR legislation as seen by this author. The goal is to provide a platform for awareness of potential legal issues in how EU fulfils its external obligations, versus its internal commitments via the Treaties, under international treaties the Union has signed and may sign in the future.

This intellectual journey done in parallel with the physical journey of moving to Australia has been fascinating. And though I cannot bring you, the reader, with me to Australia, I hope to share the intellectual journey with you as you read this. My thanks go to my supervisor Ulf Maunsbach, at Juridicum in Lund, and to my wife, Pamela Finckenberg-Broman, for insightful legal commentary and feedback during the work with this thesis.

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<sup>1</sup> Broman, Legal uncertainty under EU *acquis* for the author of Graphical User Interface design - A new sui generis protection needed?, 2014

<sup>2</sup> Broman, Harmonized Intellectual Property protection for software solutions within EU-A modest proposal, 2014

# Abbreviations

## *International (non EU)*

CIL	Customary International Law
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
EFTA	European Free Trade Association
EPC	European Patent Convention
EPOrg	European Patent Organisation
ICJ	International Court of Justice
IGO	Intergovernmental Organisation
ILC	International Law Commission
PLT	Patent Law Treaty
TTIP	Transatlantic Trade and Investment Partnership
TPP	Trans Pacific Partnership agreement
TRIPs	Trade-Related aspects of Intellectual Property rights
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
VCLT-IO	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization
WTO	World Trade Organisation

### ***The European Union (EU)***

Acquis	Acquis communautaire
Charter	Charter of Fundamental Rights of the European Union
CCP	Common Commercial Policy
EC	European Community (formerly the EEC)
ECJ	European Court of Justice
EU	European Union
CETA	Comprehensive Economic Trade Agreement
GC	General Court
OHIM	Office for Harmonization of the Internal Market
TEU	Treaty of the European Union
TFEU	Treaty for the Functioning of the European Union
UPC	Unified Patent Court

### ***General***

Art/Art(s)	Article/Articles
Ch.	Chapter
FTA	Free Trade Agreement(s)
GUI	Graphical User Interface
IP	Intellectual Property
IPR	Intellectual Property Rights
MS	Membership State(s)
p.	Page
para	Paragraph
pt.	Point



# 1. Introduction

## 1.1 Background

*“If it ain’t broke, don’t fix it!”*

This saying means *“If something is working adequately well, leave it alone.”*<sup>3</sup> This is a term used a lot among engineers but it could also be applied to European Union (EU) legislation. But what happens when things might not work adequately to fulfil its purpose?

A new legal environment is developing around EU’s trade policy with one recent example of legal uncertainty being EU’s retroactive scrutiny, by the European Court of Justice (ECJ), of older trade agreements for compatibility with EU’s international obligations under EU law. Both the recent trade agreement with Vietnam and the 2012 agriculture agreement with Morocco are being scrutinized and are under threat of being withdrawn.<sup>4</sup>

This means that all future trade agreements will have to be verified by all parties even more thoroughly than before to assure that they are in line with EU’s legislation and obligations to avoid legal uncertainty for the third country trading partner in their dealings with the Union. A third country is defined by EU as any country outside the EU, i.e. not a member of the Union.

Another indication of change that will influence the TTIP agreement is the fact that the Union recently had to back down on its position of possessing the exclusive competence to negotiate, conclude and ratify an international trade agreement. When EU tried to ratify the Comprehensive Economic and Trade Agreement (CETA) between EU and Canada a number of MSs, most notably France and Germany, protested and the Commission backed down agreeing to approach it as a *“mixed agreement”*.<sup>5</sup>

The European Union is currently looking to sign the Transatlantic Trade and Investment Partnership (TTIP) agreement, a proposed free trade agreement between the European Union and the United States during 2016. The aim of the

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<sup>3</sup> Martin, 2016, If it ain't broke, don't fix it - meaning and origin.

<sup>4</sup> EurActiv.com, 2016, Uncertain fate of trade deals in human rights limelight

<sup>5</sup> Barbière, 2016, Member states claw back control over CETA and European Commission, 2016, European Commission proposes signature and conclusion of EU-Canada trade deal

agreement is to promote bilateral economic growth.<sup>6</sup> This agreement has drawn widespread and diverse criticism on both sides of the Atlantic.<sup>7</sup> Today the EU and the US already have the world's largest and most integrated bilateral trade relationship; the USA and Europe currently has 23 trade agreements in place.<sup>8</sup> So whether there is any specific need for the TTIP as such has been questioned.<sup>9</sup> The key issue, cost of doing business, is currently not tariffs which today have a low average of less than 3%, but the issues of non-tariffs barriers such as customs procedures and technical barriers to trade.<sup>10</sup>

For a comparison and an idea on these potential issues with the TTIP we can look at the Trans-Pacific Partnership (TPP), a trade agreement among twelve Pacific Rim countries (including the USA) concerning a variety of matters of economic policy.<sup>11</sup> This agreement was signed on the 5<sup>th</sup> of October 2015, but is still awaiting ratification by the individual signatory states which may or may not happen.<sup>12</sup> Unlike the TPP, the TTIP is an agreement between partners of equal or near-equal strength. While in the TPP there is the USA on one side and a fragmented collection of smaller states negotiating and ratifying the agreement as individuals on the other. With the TTIP all of the EU Member States (MS) negotiate as one.<sup>13</sup> One of the most contentious areas of the TPP agreement, which have delayed its signing, has been issues relating to intellectual property (IP)<sup>14</sup>, particularly regarding their effects on pharmaceutical patents and digital innovation.<sup>15</sup> Looking at the similarities between the TTIP and TPP structure – both being with the US as one trading partner - why would EU not have similar issues?

IP legislation is there to protect the usage of individual's specific creation(s) but as we will see, unfortunately, there is no international consensus of the extent of this protection with variations even inside the EU. This provides for legal uncertainty in trade agreements on the extent of legal protection under the same. What makes this aspect particularly current and interesting is that IP is an

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<sup>6</sup> European Commission, Questions and answers (TTIP) - Trade - European Commission, 2016, How would TTIP work?

<sup>7</sup> EurActiv with agencies, 2015, TTIP negotiators get an earful from American critics and EurActiv.de, 2016, German judges oppose proposed TTIP courts, Williams, 2015, What is TTIP? And six reasons why the answer should scare you, Atlantic-community.org-Editorial Team, 2014, TTIP: Top 5 Concerns and Criticism

<sup>8</sup> European External Action Service, 2016, Advanced search criteria - Entered into force – United States of America -Trade

<sup>9</sup> European Commission, Documents and events - TTIP - Trade - European Commission, 2016

<sup>10</sup> United States - Trade - European Commission, 2016

<sup>11</sup> US Government, 2016, Summary of the Trans-Pacific Partnership Agreement

<sup>12</sup> Howard, 2016

<sup>13</sup> European Commission, Questions and answers (TTIP) - Trade - European Commission, 2016, Who is part of TTIP?

<sup>14</sup> Schott, Kotschwar, & Muir, 2013, Ch. 4, p. 17-18

<sup>15</sup> Electronic Frontier Foundation, 2016, Trans-Pacific Partnership Agreement

important component of the TTIP and part of the ongoing negotiations between the EU and the United States of America (USA).<sup>16</sup>

The hypothesis for this thesis is that third country IP holders cannot be guaranteed legal certainty, under an international agreement with the EU, in areas of shared competences.

## 1.2 Purpose and research question

The purpose behind this thesis is to research and try to find answers to the effect of shared competences within the EU, in this case IP & IPRs, on third country trading partners signing a FTA with the Union.

To better understand the background for this question the research first looks into a specific FTA, the TTIP, to see what it says on the subject matter of IP and IPRs.

For the purpose of understanding the legal framework for international law and treaties and what EU's obligations under these are we will look at what international agreements EU is signatory to and what the effect they may have on EU's position as a signatory.

EU's own internal legislation is still developing, and the issue of competences is still subject to change and not completely harmonized. This means that there are reasons to assume that things may still change and to look at and understand the effect of the development of EU *acquis* on international treaties is of key importance. Currently the European Court of Justice (ECJ) maintains that the Treaty of the European Union (TEU), the Treaty of the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (the Charter) are and remains Lex Superior. And as long as the EU continues on the legal path of treating international treaties according to its ruling in *KADI I*<sup>17</sup> and other similar cases the ECJ remains the one and only interpreter and arbitrator in matters related to legal conflicts involving EU legislation.

The final part of the research approaches the area of shared competence. It delves into what it is and what it means and looks at potential issues with shared competence from the perspective of legal expectations on the behalf of an external trading partner signing an FTA with EU. Here the research goes into the EU legislation itself, the EU *acquis*, with the purpose to gain a better understanding of how EU legislation places EU in relationship to international legal obligations. This includes EU *acquis* on intellectual property (IP) and intellectual property

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<sup>16</sup> European Commission, Transatlantic Trade and Investment Partnership (TTIP) - Trade - European Commission, 2016

<sup>17</sup> Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (AG), 2008

rights (IPRs) and its relationship to more specific international legislation on IP and IPRs.

In conclusion - the EU-TTIP-US relationship is affected by two key aspects related to EU legislation; EU's perspective on obligations under International Law and treaties, including IPRs and EU's primary and secondary legislation on international trade and IPRs. A question arises from EU's approach of EU law being *Lex Superior* internally<sup>18</sup> and to a certain extent externally<sup>19</sup> as the research into these legal aspects leads to a relatively clear legal research question;

***"Can EU legislation guarantee legal certainty under the TTIP in areas of shared competence?"***<sup>22</sup>

To answer the research question this thesis strives for an outside-in view of EU *acquis* on international trade relations and EU shared competences such as IP and IPR's). Thereby providing third country negotiators a platform for a better understanding of the same when encountered as part of international agreement negotiations involving EU.

### **1.3 Delimitations**

As the intended target for this thesis is; peers, practitioners and researchers within the field of International Law, particularly in the area of international contractual obligations, this thesis works on the assumption that nomenclature used as well as issues studied are familiar and mastered to a certain point by the reader. This applies inter alia to nomenclature specific to the EU as well as that specific to International Law that is being used throughout this paper.

Within the subject matter of this thesis – legal certainty in areas of shared competence – it will limit itself to a selection of international treaties and agreements related to the legal commitments by the EU. This is done to keep the focus on those clarifying how and why the EU positions itself the way it does within the international legal order.

To narrow the extent of the issue with FTA's and EU's international obligations further it limits itself to discussion and analysis of the same in relationship to the TTIP. TTIP specifically creates a situation where using smaller Free Trade Agreements (FTA's) for comparison is to a large extent not relevant, as in those agreements EU has negotiated from a position of superior economic strength. In the case of the TTIP the negotiations are between two parties on more equal footing.

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<sup>18</sup> C-6/64 Flaminio Costa v E.N.E.L., EU:C:1964:66 and C-26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, EU:C:1963:1

<sup>19</sup> Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (Kadi I), EU:C:2008:461

Shared competencies in this thesis are in general put in relationship to areas like economic policy and employment under Art 5 TFEU, foreign and security policy under Art 2(4) TFEU and of course the whole of TITLE V – General Provisions on the Union’s external action and Specific Provisions on the Common Foreign and Security Policy.<sup>20</sup> For the purpose of this thesis however, with its focus on the trade aspect of international treaties and further limited by the examination of the EU and the TTIP agreement, this relationship is only examined if seen as particularly relevant.

This thesis does not focus on legal expectations; it does however touch upon them when they are part of the third countries situation in negotiating a FTA with EU.

## 1.4 Method and materials

When working with EU legal order one must to start from EU’s primary law, the Treaties – TEU, TFEU and the Charter - and EU’s General Principles of Law, as the supreme source and zenith of available sources of law.<sup>21</sup> Complementary to this is EU secondary law, which has to be understood in the context of EU’s primary law. If there are clashes between EU’s primary law and national law the Treaties and the Charter are *Lex Superior*.<sup>22</sup> The importance of this distinction becomes clear when one looks at the shared competences within the EU structure. The same applies to clashes between EU primary and secondary legislation; i.e. any law enacted by a Union institution through the exercising of its conferred powers.<sup>23</sup>

For the work with the hypothesis I have applied European legal methodology<sup>24</sup> and doctrine, specifically focused on EU *acquis* related to EU’s external relations law, assessing relevant legislation based on EU *acquis*; primary law<sup>25</sup>, secondary law<sup>26</sup> and available jurisprudence from the EU Courts. Any EU preparatory legal acts, such as the Commission’s legislative proposals or the Council’s common positions,<sup>27</sup> will be used if having a relevant impact on the subject matter.

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<sup>20</sup> Craig & de Búrca, 2011, p. 83

<sup>21</sup> Borchardt, 2010, p. 80

<sup>22</sup> See C-6/64 Flaminio Costa v E.N.E.L., EU:C:1964:66, C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, EU:C:1970:114, C-106/77 Amministrazione delle finanze dello Stato v Simmenthal, EU:C:1978:49

<sup>23</sup> Borchardt, 2010, p. 81

<sup>24</sup> Hettne, 2011

<sup>25</sup> European Union, TEU 2012 Treaty on European Union, 2012 & European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012

<sup>26</sup> Borchardt, 2010, Legislative acts; Regulations & Directives & Decisions, Non-legislative acts;

Delegated acts & Implementing acts, Other acts; Recommendations and opinions & Interinstitutional agreements & Resolutions, declarations and action programmes

<sup>27</sup> European Union, 2016, Directory of European Union preparatory acts - EUR-Lex

There is no specific *empiri* utilized for this paper as there is a shortage of relevant experience globally of this type of legal situation for an agreement. The TPP, referred in the introduction, does not include a legally fractured, but “*one voice*”, economic negotiation partner like the EU on one side and an economic superpower as the USA on the other. By pinpointing the relevant sections of the EU *acquis* and referencing related ECJ’s rulings, this thesis tries to establish a platform for an understanding of EU’s view on fulfilment of external obligations under an international agreement, from the perspective of legal expectations of third country negotiation partners, and legal certainty for, third country nationals.

The hypothesis behind this thesis is that it is almost impossible to guarantee legal certainty for third country parties, in an international agreement, in areas of shared competence under EU law. The legal situation for inventors and creators from third countries, when guaranteed reciprocal IPR handling under an international agreement like the TTIP, has been used as an example. There is a potential EU internal conflict when the international treaty tries to adjust an area that is covered both by EU’s IP, and the MS’s own national, legislation in the same area.

The thesis establishes relevant EU *acquis* for a solid foundation of understanding of the related case law and why there is a potential conflict lurking in the depth of the TTIP. The research will study the ECJ’s case-law for the interpretation and application of relevant primary and secondary legislation affecting the subject matter. Methods of interpretation, governing EU rulings, to be used are based on *inter alia*<sup>28</sup> text (aka literal interpretation), purpose (aka teleological interpretation) and context (aka contextual interpretation).<sup>29</sup>

The analysis will consist of trying to understand and establish the legal position of the EU in guaranteeing legal certainty under the TTIP for shared competences such as IP and IPR’s of inventors/creators of third countries.

## 1.5 Outline

The disposition of this thesis is as follows;

Chapter two describes the TTIP, its background and purpose. This chapter looks particularly at its components related to IP and IPR’s.

Chapter three will look at International Law, EU’s obligations under International Law and treaties with relevant related ECJ case law, thereby defining EU’s legal position on and under International Law.

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<sup>28</sup> Latin for “*among other things*.” - A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier. Published 1856

<sup>29</sup> Maduro, 2007, p. 4

Chapter four will look at EU's *acquis communautaire (acquis)* related to its international position and obligations. This chapter aims to clarify EU's view on its own position in the international legal hierarchy and framework.

Chapter five looks at international IP and IPR legislation.

Chapter six looks at the "*mixed agreements*" and shared competences to define the area of an international agreement where the legal certainty may become an issue for third countries.

Chapter seven will strive to provide an answer the research question, on if and how to ascertain legal certainty in areas of shared competence, by presenting a summary of the chapters above. It will presents possible conclusions to prove or disprove the hypothesis related to the research question as drawn from the material used for this research.

## 2. TTIP & shared competences

### 2.1 Introduction

By applying its “*one voice*” on trade strategy through the Common Commercial Policy (CCP)<sup>30</sup>, rather than acting as 28 individuals, EU considers itself a prime player in international trade through its open trade regime and a good region to do business with.<sup>31</sup> In 2013 the European Commission stated that the TTIP agreement could create a permanent economic boost to the GDP of both sides, EU’s by 0.5% (€120 billion) and the US’s by 0.4% (€95 billion).<sup>32</sup> But if one looks at these numbers they are based on an “ambitious” deal, and are referring to a cumulative effect over 10 years of the TTIP, until 2027. Looking at this a best-case scenario works out at just 0.05% extra GDP per year.<sup>33</sup> This is no major increase or improvement and is based on an estimated “best” outcome under the most ambitious version of the agreement.

In a historical perspective it would seem like the TTIP has a very slim chance to succeed. Previous attempts to achieve similar results have failed, for instance the Multilateral Investment Agreement negotiated by the OECD in the mid-late 1990’s with the objective to create a broad and multilateral framework for international investments and dispute settlements failed.<sup>34</sup> Despite this the EU has forged ahead with extended negotiations having recently had the conclusion of the 14th TTIP Negotiation Round.<sup>35</sup>

### 2.2 TTIP and IP – What does it say?

The final text of the TTIP is not in place yet. In the document “*Inside TTIP-An overview and chapter-by-chapter guide in plain English*”<sup>36</sup> the Commission first of all sets out some basics in Part 2-Regulatory cooperation, that “*TTIP will not*

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<sup>30</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Art(s).206-207

<sup>31</sup> European Commission, EU position in world trade, 2016

<sup>32</sup> European Commission, 2013, TTIP-The Economic Analysis Explained. p 2

<sup>33</sup> CEPR-Centre for Economic Policy Research, 2013, Reducing Transatlantic Barriers to Trade and Investment - An Economic Assessment, p.vii, 1,3 and 33 and US Department Of Agriculture, 2016, TAFTA/TTIP Study: Small Gains For US, Losses For EU

<sup>34</sup> OECD-Organisation for Economic Co-operation and Development, 2016, Multilateral Agreement on Investment

<sup>35</sup> European Commission, 2016, Transatlantic Trade and Investment Partnership (TTIP) and Bercero, 2016, Conclusion of the 14th TTIP Negotiation Round - Statement

<sup>36</sup> European Commission, 2015, Inside TTIP-An overview and chapter-by-chapter guide in plain English

*change the rules set out in the EU treaties about how our regulations are made.*<sup>37</sup> Which for the purpose of this thesis would be to say that the TTIP will not be able to circumvent EU legislation nor how new EU primary and secondary law is enacted under the Treaties. Thus the primacy of EU legislation should be retained, unless the ECJ should change its interpretation as established later on in this thesis. In regards to the specific legal area, mutual recognition of IP and IPRs, in Part 3-Rules, Chapter 3.8., of the same document EU refers to its internal policy for the subject matter of this thesis. This includes “...*protect the people and firms that come up with new ideas and use them to make high-quality products by enforcing IPR rules in a balanced way,*”<sup>38</sup>

EU has four key points, relevant for this thesis, that they want to establish under the TTIP,<sup>39</sup>

- Compliance with international IP treaties (section 1).
- High-standard agreed principles (section 3).
- Copyright and related rights (section 3).
- Cooperation with regards to multilateral and third-country IP issues (section 4)

The international treaties include among others WIPO-WCT<sup>40</sup>, WTO-TRIPs<sup>41</sup> and the Berne Convention<sup>42</sup>, to which both parties are signatories. The principles are for the sides to jointly agree on matters of “...*interpretation, implementation and/or practice in relation to certain IP issues debated in the international framework.*” This is a way to say that the sides will strive to find common ground between the rules on either side – without modification – in areas that they jointly agree upon. But this is only in consideration of the international framework, it avoids the more tangled and complicated internal legal issues on either side. The goal is to increase “...*legal clarity and certainty for transatlantic trade.*”<sup>43</sup>, and the EU thinks that both parties, EU and the US, should either affirm and/or join the existing international treaties, such as the WTO-TRIPs and the WIPO-Patent Law Treaty (PLT).<sup>44</sup> Regarding copyright and related rights EU looks for reciprocal treatment from the US, to have the same copyright there as in the EU.

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<sup>37</sup> European Commission, 2015, Inside TTIP-An overview and chapter-by-chapter guide in plain English, p. 19

<sup>38</sup> European Commission, 2015, Inside TTIP-An overview and chapter-by-chapter guide in plain English, Ch. 3.8, p.45

<sup>39</sup> European Commission, 2016, EU position paper on intellectual property, p. 1-3

<sup>40</sup> WIPO, WIPO Copyright Treaty (WCT), 2013

<sup>41</sup> WTO, 2013, TRIPS

<sup>42</sup> WIPO, Berne Convention for the Protection of Literary and Artistic Works 1979, 2013

<sup>43</sup> European Commission, 2016, EU position paper on intellectual property, p. 2

<sup>44</sup> European Commission, 2016, IP issues for TTIP, p. 1

For cooperation with regards to other multilateral and third-country IP issues the TTIP sets up for joint dealings with these by the EU and US, through “*Coordination of technical assistance to third countries*”.<sup>45</sup> This would only be doable with a common, and agreed upon, denominator for the relevant legislation.

## 2.3 Summary

TTIP itself will need to be fully, democratically and transparently approved by both the European Parliament and EU Member States as it is a mixed agreement.<sup>46</sup> With IP and IPR’s being a shared competence as we shall see (See Ch. 6), this definition for the TTIP is further supported by the European Commission in their “*Opinion of 25 June 2014 on the role of national Parliaments in concluding free trade agreements (FTAs)*”.<sup>47</sup> This opinion brings up both the TTIP, and the Comprehensive Economic Trade Agreement (CETA) between EU and Canada, as mixed agreements as they “... *concern policy areas within the competence of the Member States*”<sup>48</sup> The TTIP, while not being finalized, does show the issue with shared competences like the IP and IPR’s where differences in legislations and processes for dealing with the subject matter creates hurdles for EU to be able to fulfil mutual obligations between the parties.

There is a side to the TTIP and similar agreements that many proponents and critics both apparently are not always taking into consideration. As things stand legally the EU, under the Treaty of the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) are empowered to both negotiate and conclude binding international treaties. These have a binding effect on both the EU institutions and its MS’s. This power only applies to the full in areas where the competence transferred to the Union is exclusive. When there is a partial or shared competence, between EU and the MS’s, we have the added complication of “*mixed*” agreements.<sup>49</sup> This means that EU does not control all the legal aspects of an agreement, such as the TTIP, and there may be areas where EU MS’s national legislation will be enforced; causing legal uncertainty for nationals of EU’s trading partners as to what legal parameters applies in those situations.

A request for an opinion by the ECJ, and very interesting for the subject matter of this thesis, is currently under way.<sup>50</sup> It relates to the divisions of competences within the EU in regards to the ratification of international treaties, specifically the Free Trade Agreement (FTA) with Singapore.

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<sup>45</sup> European Commission, 2016, EU position paper on intellectual property, p. 3

<sup>46</sup> European Commission, 2015, TTIP and Regulation: An Overview

<sup>47</sup> European Commission, 2014, C(2014) 7557final

<sup>48</sup> European Commission, 2014, C(2014) 7557final, p. 2

<sup>49</sup> Schulz, 2015, The role of Parliaments in negotiations on international Treaties

<sup>50</sup> European Commission, 2016, A-2/15 Opinion on EU competence to sign and ratify the Singapore FTA, case C-363/22

# 3. EU and its obligations under International Law and Treaties

## 3.1 Introduction - What is the EU?

It can be argued that EU is an intergovernmental organisation (IGO), or as it calls itself “*supranational*”. The internationally accepted definition of an IGO is based on the following criteria<sup>51</sup>;

- Interstate body created by a multilateral treaty
- With a form of constitutional legal structure (TEU, TFEU and the Charter)
- Organs or institutions separated from its members

For the purpose of this thesis the point of how the EU perceives itself from the perspective of International law in this regard is a relatively moot point. The key is the legal rights and obligations of the EU under the same. The particular doctrines and characteristics of the EU, such as supremacy of EU law and direct effect, which may distinguish it from other IGO’s, primarily, affect its relationship with its MS’s.<sup>52</sup> But its relationship with other IGO’s and third countries or between EU MS’s and third countries is governed by International Law; this is supported by ECJ case law.<sup>53</sup> Pre-Lisbon ECJ case law interestingly enough points towards the Court seeing the European Community (EC) as an international organisation.<sup>54</sup> The ECJ has continued this practice of defining the Union in more recent, post-Lisbon case law.<sup>55</sup>

Some key external obligations currently having an effect on the subject matter on this thesis are EU’s legal relationship with the United Nations (UN), the Vienna Convention on the Law of Treaties (VCLT) and the World Trade Organization (WTO) via the Trade-Related aspects of Intellectual Property Rights (TRIPs) agreement and the World Intellectual Property Organisation (WIPO). The reasons these as relevant are;

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<sup>51</sup> Amerasinghe, 2005, Principles of the institutional law of international organizations, Classifications, p. 9-10

<sup>52</sup> C-26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, EU:C:1963:1 and C-6/64 Flaminio Costa v E.N.E.L., EU:C:1964:66

<sup>53</sup> C-286/90 Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp (EU.C.1992.453), 1992, para 9 & C-162/96 Racke v Germany, 1998, para 45

<sup>54</sup> C-386/08 Brita GmbH v. Hauptzollamt Hamburg-Hafen, 2010, para 41

<sup>55</sup> T-512/12 Polissario v. Council, 2015, paras 92-93

- The UN Charter establishes basic conditions under which International Law functions, defining the concept.
- The VCLT exists in two variations, one ruling the State v. State situation and the other Stat v. International Organizations. They define a framework for international treaties.
- The WTO (TRIPs) and WIPO agreements establishes an international framework for IP and related IPR's.

Since the EU is committed in different ways to these agreements they set the framework for the international playing field relevant for this thesis.

Based on the findings here we can safely state that EU is not defined, either by itself, or the international community as a State.<sup>56</sup> We can also note that International Law is relatively open-ended with room for interpretation. But in ECJ's case C-286/96 *Racke v. Germany* the Court clarifies that the Union has obligations under International Law - CIL, in the exercise of its power particularly with a non-member country.<sup>57</sup> It must however be within an area of its EU's exclusive competence, where the power has been conferred by the MSs of the Union to the EU. But if not things get a bit more complicated, as with the TTIP which encompasses several legal areas, not all of which fall under EU' exclusive competence.

### 3.2 International law and Customary International Law

It is important to first clarify a bit what international law is, so as to better understand how EU sees its position in relationship to its obligations under international treaties.

*“International Law defines the legal responsibilities of States in their conduct with each other, and their treatment of individuals within State boundaries.”*<sup>58</sup>

There are a limited number of sources for International Law recognized by the International Court of Justice (ICJ) in their Statute<sup>59</sup>;

- a. By the contesting states recognised treaties and international conventions, with expressly established rules
- b. Customary International Law (CIL), evidenced by its general practice as accepted law
- c. The general principles of law as recognized by civilized nations

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<sup>56</sup> Kokott & Sobotta, 2012, p. 1017

<sup>57</sup> C-162/96 *Racke v Germany*, 1998, para 45

<sup>58</sup> United Nations, United Nations Global Issues, 2016

<sup>59</sup> United Nations, 2016, Statute of the International Court of Justice, Art 38

- d. As a subsidiary means, to determine rules of law, judicial decisions as well as the teachings of the most highly qualified publicists of the various nations

The CIL (b.) with the general principles of law (c.) and treaties (a.) are considered by the UN, its MS's the ICJ to sources of primary International Law. The CIL concept is based on the idea that states are bound by a norm of International Law by custom and actions showing an obligation to be so, *opinio juris*.<sup>60</sup>

These days there has been quite a bit of criticism of the concept of CIL and *opinio juris* – the first as being imprecise and the second to be hard to accurately determine.<sup>61</sup> The CIL remains until further notice a critical component of international legal jurisprudence. But if we face an ongoing deterioration in these two pillars of International Law the development of international norms would likely become more problematic.<sup>62</sup>

### 3.3 United Nations and EU

The United Nations (UN) Charter of 1945 has set an objective to the establishment of certain conditions “...under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”.<sup>63</sup> The UN Charter is considered an international treaty and UN MSs are bound by it.<sup>64</sup>

Through the Lisbon Treaty EU took over EC's rights and obligations as being a single legal personality, including its observer status within the UN. As EU is not a state it is not a member of the UN, but it is part of a large number of UN multilateral agreements through its MS's.<sup>65</sup> The European Union has “enhanced” observer status since 2011 when the UN General Assembly adopted Resolution A/65/276<sup>66</sup>. This resolution gives the EU no vote but it allows for EU representatives to present common positions of the Union to the UN General Assembly.<sup>67</sup>

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<sup>60</sup> International Judicial Monitor, 2006, Customary International Law, p. 1

<sup>61</sup> Baker, 2010, Customary International Law in the 21st Century: Old Challenges and New Debates, p. 173-174 and International Judicial Monitor, 2006, Customary International Law, p. 2

<sup>62</sup> Baker, 2010, Customary International Law in the 21st Century: Old Challenges and New Debates, p. 204 and International Judicial Monitor, 2006, p.2

<sup>63</sup> United Nations, 2016, Preamble

<sup>64</sup> United Nations, Uphold International Law - United Nations, 2016

<sup>65</sup> EEAS- European External Action Service, 2016, The EU's relations with the United Nations

<sup>66</sup> United Nations, 2011, UN Resolution 62/276 on Participation of the EU in the work of the UN

<sup>67</sup> European Union Delegation to the UN, 2016, About the EU at the UN in New York - UN General Assembly: Speaking with one voice and EEAS- European External Action Service, 2016 The EU's relations with the United Nations

### 3.4 Vienna Convention on the Law of Treaties (VCLT)

In 1969 the International Law Commission (ILC) drafted the Vienna Convention on the Law of Treaties (VCLT)<sup>68</sup>. The VCLT entered into force on the 27 January 1980 and is a treaty that explicitly deals with International Law on treaties between states.<sup>69</sup> It thereby excludes any treaties between states and international organizations, or between such organisations.

For the purpose of this thesis it is interesting to note that as we have previously established, EU by not being a state, cannot sign the treaty and the USA, though having signed it on the 24<sup>th</sup> of April 1970 has not ratified it.<sup>70</sup> This does not mean that they do not recognize the treaty as at least a partial codification of CIL and as such binding upon them.<sup>71</sup>

#### 3.4.1 VCLT 1986 - Applicability

Most of the time international agreements are interpreted using the 1969 VCLT rules. But in the situation with the EU (former EC) the situation is not a situation of agreements between states, but agreements between a state and something else, more closely associated with a supranational/international organisation. To deal with this situation the ILC created a special draft version of the VCLT in, in 1986, to be used between international organizations or between states and international organizations (VCLT-IO).<sup>72</sup> This convention has however not entered into force.<sup>73</sup> Even though the EU is not a signatory of the VCLT and the VCLT-IO is not in force there are articles of interest for the interpretation of the WTO Agreement of which EU is a member.<sup>74</sup>

With the VCLT and VCLT-IO several articles are in principle identical, only with the addition of the “*International Organization*” added as a part to the agreement.<sup>75</sup> Art 26 VCLT/VCLT-IO sets down the international principle of “*Pacta Sunt Servanda*” as a foundation for all international agreements, while Art 27 is about observance of the treaties and internal law, it states; “*A party may not*

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<sup>68</sup> International Law Commission, 2016, Home

<sup>69</sup> United Nations, 1969, Vienna Convention on the Law of Treaties (CTC), Art 1

<sup>70</sup> United Nations, 2016, Parties to the VCLT Status as at : 14-04-2016 07:34:11 EDT

<sup>71</sup> U.S. Department of State, 2016, Vienna Convention on the Law of Treaties and Blanke & Mangiameli, 2013, The Treaty on European Union (TEU): A Commentary, p. 1395

<sup>72</sup> United Nations, 1986, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations

<sup>73</sup> United Nations, 2016, UNTC - Chapter XXIII Law of Treaties - VCLT-IO

<sup>74</sup> Steinberger, 2006, The WTO Treaty as a Mixed Agreement: Problems with the EC’s and the EC Member States’ Membership of the WTO, p. 843

<sup>75</sup> United Nations, 1969, Vienna Convention on the Law of Treaties - Certified True Copies (CTCs) & United Nations, 1986, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Art(s) 13, 17, 26, 27, 31 and 46

*invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”*

Art 31 is general rules of interpretation and leans on “*good faith*”<sup>76</sup> and finally Art 46 is on the competence to conclude treaties; a treaty is only binding if the negotiating party has the competence to do so under internal law. Art 31 is a fundamental rule and also that a treaty should be interpreted “...*in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose.*”<sup>77</sup> It also points to the importance of context and defined contractual special terms,<sup>78</sup> while Art 46 ties in closely with the principle of conferral and competences within the EU. It specifies that a party may not claim to no be bound by a treaty based on lack of competence by negotiators.<sup>79</sup>

### **3.4.2 VCLT 1986 – EU Case law on its obligations**

In the case *C-386/08 Brita GmbH v. Hauptzollamt Hamburg-Hafen*, the Court clearly specifies that the fact that the Union has not signed the treaty does not imply that the treaty provisions are not applicable in a situation not involving states specifically.<sup>80</sup> Another recent case showing the EU’s view on competence to be part of an international treaty under VCTL is *T-512/12 Polisario v. Council* (ECJ appeal *C-104/16 P*). The GC concluded that Polisario<sup>81</sup> was to be granted status as a legal personality with a right to represent as party to the treaty, thus making it a treaty falling under International Law and as such falling under the VCTL.<sup>82</sup>

### **3.4.3 Summary**

In conclusion and for the purpose of this thesis we can see that though EU is not a signatory to the VCLT, many MS’s are, and that the Union does recognize the underlying CIL principles of the treaty. Thus the EU and the ECJ do consider the validity and impact of the VCLT on the Unions international agreements.

This leads to third countries having certain legal expectations on a treaty signed with the Union based on the VCLT. For third countries signing an agreement with EU it is therefore of vital importance to be aware of the connection between Art 27 and Art 46 of the VCLT. The issue is connected to the legal expectations –

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<sup>76</sup> United Nations, 1986, VCLT-IO, Art 31(1) and United Nations, 1969

<sup>77</sup> United Nations, 1986, VCLT-IO, Art 31(1) and United Nations, 1969

<sup>78</sup> United Nations, 1986, VCLT-IO, Art 31(2-3) and United Nations, 1969

<sup>79</sup> United Nations, 1986, VCLT-IO, Art 46 and United Nations, 1969

<sup>80</sup> *C-386/08 Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2010, para 40 & 42

<sup>81</sup> See <http://www.britannica.com/topic/Polisario-Front> for more information on the organisation

<sup>82</sup> Reuters - Morocco suspends contacts with EU delegation over trade row, 2016 and *T-512/12 Polisario v. Council*, 2015, para 46 & 90-91

would a third country or its negotiators be aware of a “*manifest*” lack of competence on the part of the EU at the moment of the Unions consent to an international agreement or treaty? A lack of competence, thru conferred power, or negligence to consider all legal aspects on the part of the EU may cause an international treaty or agreement with a third country to be invalidated by the ECJ. A recent example of this is the *T-512/12 Polisario* case<sup>83</sup>.

### 3.5 EU’s current legal position internally and on International Law and treaties

For the purpose of this thesis the placing of the EU legislation, as perceived by the ECJ, both in the hierarchy of the European legal order and internationally must be considered, as this has a vast influence on the EU’s own perspective on the fulfilment of its international obligations.

Before the signing of the Lisbon Treaty<sup>84</sup>, both the Union and the individual MS’s could make international agreements with other countries. Part of this issue at the time stemmed from the EU not having a full legal personality. Any form of legal personality before the Lisbon Treaty was through the European Community (EC) acting as a supranational<sup>85</sup> body. This meant that when EU wanted such an agreement - every MS had to also agree and sign for it individually. With the Lisbon Treaty, EU replaced the EC as the legal entity.<sup>86</sup> The Union took over all the EC’s powers with the former EC agreement being renamed TFEU.<sup>87</sup>

The Lisbon Treaty did however maintain, under Art 218(6) TFEU, a requirement of a formal “consent” from the European Parliament in regards to important international agreements.

### 3.6 EU Primary Legislation as internal *Lex Superior*

The current legal stature of EU legislation as EU internal *Lex Superior* can be traced back to two (2) judgements by the Court of Justice in the 1960’s, which set a precedent that is still valid today - *C-26/62 Van Gend en Loos*<sup>88</sup> and *C-6/64*

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<sup>83</sup> T-512/12 Polisario v. Council, 2015, paras 227-228 and “On these grounds” the Court “hereby” declares. para 1

<sup>84</sup> Refers to the Consolidated EU Treaties – includes the Treaties and all amendments governing the European integration, beginning with the Treaty of Rome and up to the present time

<sup>85</sup> Cambridge University Press, 2016, Involving more than one country, or having power or authority that is greater than that of single countries: WTO, NATO

<sup>86</sup> European Union, TEU 2012 Treaty on European Union, 2012, Art 47

<sup>87</sup> Craig & de Búrca, 2011, p. 25

<sup>88</sup> C-26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, EU:C:1963:1

*Costa v. ENEL*<sup>89</sup>. In *Van Gend en Loos* the Court established the principle of *direct effect*<sup>90</sup> - meaning that properly enacted EU legislation may confer rights on individuals that MS's courts are bound to recognize and enforce. In *Costa v. ENEL* the Court established firmly the supremacy of EU law within the Union with reference to Art 189 EEC (Art 288 TFEU) by confirming the binding and directly applicability of EU law in all MS's and to its nationals, as otherwise EU legislation would be meaningless if it could unilaterally be nullified by a national legislative measure.<sup>91</sup> By these cases EU legislation became *Lex Superior* in the internal market.

In the case *C-22/70 AETR* the Court established that when concluding agreements “with one or more third countries or an international organization” it has to be negotiated by the Commission and concluded by the Council, but also subject to any more extensive powers vested in the Commission.<sup>92</sup> The *AETR* case thus provides for a progressive extension of the Union's non-exclusive powers through the exercise of the same powers by the Union. In this case by adopting a Regulation it excluded the MS's from exercising their concurrent powers in the same sphere, transport. Since this was in an area of international agreements, the Court of Justice by its judgment, being aware that the relevant internal measures could not be separated from the external relations<sup>93</sup>, basically concludes that MS's can no longer on their own enter into any agreements in this specific area – transport - with third countries.<sup>94</sup>

These cases began the process of setting the stage for the EU as a new legal order in of itself on the international arena.

### 3.7 EU Primary Legislation as external *Lex Superior*

The ECJ's decision in the *Joined cases C-402/05 P and C-415/05 Kadi I* has been criticised by many as seen as the ECJ being untrue to EU's commitments to respect public International Law.<sup>95</sup> The perception is that the ECJ's ruling in this case enforces the position of EU legislation as *Lex Superior* and that it thereby gives the EU a possibility to bypass its international obligations.

The ECJ established the position of EU legislation in view of the UN and International Law with a major caveat. First in para 291 of the judgement the

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<sup>89</sup> C-6/64 Flaminio Costa v E.N.E.L., EU:C:1964:66

<sup>90</sup> C-26/62 NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, EU:C:1963:1, p. 12, B-On the substance of the Case

<sup>91</sup> C-6/64 Flaminio Costa v E.N.E.L., EU:C:1964:66, p. 594

<sup>92</sup> C-22/70 AETR Commission v. Council, 1971, Grounds of judgment, pt. 75

<sup>93</sup> C-22/70 AETR Commission v. Council, 1971, Grounds of judgment, pt. 54-55

<sup>94</sup> C-22/70 AETR Commission v. Council, 1971, Grounds of judgment, pt. 70-71, 81-82, 84

<sup>95</sup> Kokott & Sobotta, 2012, Abstract.

Court makes it clear that the EC (now EU) must respect International Law when exercising its powers when adopting measures based on the same, interpreted and limited in scope by relevant rules of International Law.<sup>96</sup> However AG Maduro brought up the lack of institutional safeguards built into the UN system at the time. He then went on to clarify that in a situation where the Community legal order had its own rules in place for the areas of interaction with International Law; “...international law can permeate that legal order only under the conditions set by the constitutional principles of the Community.”<sup>97</sup>

The Court in their judgement agreed, thereby establishing the EU Treaties as having primacy over International Law; though this does not include EU secondary law<sup>98</sup>. The Court made clear that it does not follow that a Community measure automatically is immune from judicial review based on the primacy of obligations under International Law which finds its basis in EU primary law.<sup>99</sup> But no challenge, to the principles at the foundation of EU’s legal order, is to be permitted under Art 307 EC (Art 351 TFEU). In this case the fundamental human rights under the Charter.<sup>100</sup>

### **3.8 ECJ Opinion 2/13 on EU ascension to the European Convention of Human Rights (ECHR)**

Already in 1996 the ECJ ruled in its *Opinion 2/94* on EU’s accession to the European Convention of Human Rights (ECHR), where the Court clearly stated that the Community lacks any conferred power under the Treaty to; “...enact any rules on human rights or conclude international conventions in this field.”<sup>101</sup> Neither did the Treaty imply any such power and the EC (now EU) could not accede to the ECHR without amendments to the Treaty.<sup>102</sup>

Currently EU’s effort to ascend to the ECHR is based on Art 6(2) TEU, stating that EU; “...shall accede to the...” ECHR, with the caveat that this; “...shall not affect the Union’s competences as defined by the Treaties”.

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<sup>96</sup> Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (Kadi I), EU:C:2008:461, para 291

<sup>97</sup> Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (AG), 2008, Para 24.

<sup>98</sup> Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (Kadi I), EU:C:2008:461, paras 306-307

<sup>99</sup> Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (Kadi I), EU:C:2008:461, para 327

<sup>100</sup> Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (Kadi I), EU:C:2008:461 paras 299-300, 304-305.

<sup>101</sup> European Court of Justice, 1994, Opinion 2/94 on Accession of the EC to the ECHR, para 27

<sup>102</sup> European Court of Justice, 1994, Opinion 2/94 on Accession of the EC to the ECHR, paras 35-36

In their *Opinion 2/13*, the Court ruled out the latest draft due to conflicts with EU law.<sup>103</sup> A key passage starts at para 178(a), where the Court raises the issue of the “...specific characteristics and the autonomy of EU law”<sup>104</sup>. In paras 179-186 the Court defines its stance on international agreements relying on previous rulings. Para 183 of the Opinion the Court notices that a key factor is that “...there is no adverse effect on the autonomy of the EU legal order,”<sup>105</sup> The Court in the final opinion then stops EU’s ascension to the ECHR by saying that it is not compatible with EU law, particularly Art 6(2) TEU or with Protocol (No 8) which relates to Article 6(2) TEU on EU’s accession to the ECHR. This is based on the Courts perception that the agreement would place the EU and ECJ under the jurisdiction of the court in Strasbourg. This is exactly what the Council of Europe<sup>106</sup> was looking for “...the EU will be bound to respect the ECHR and will be placed under the external control of the European Court of Human Rights.”<sup>107</sup>

ECJ notes that it cannot under EU law allow the Union and its MSs to be bound by external, and particular, interpretations of EU law.<sup>108</sup>

### 3.9 EU Secondary legislation

ECJ has defined EU primary law as Lex Superior. Still, it is interesting to note that despite positioning of International treaties below EU Primary but above secondary law, it is still not a given that the International treaties trump secondary law.

In the case *C-612/13 P ClientEarth v. Commission*<sup>109</sup>, the ECJ stated that the international Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)<sup>110</sup>, could not be relied upon to access compliance studies of MSs regarding EU environmental law in context of infringements procedures. Especially as it was used to try and challenge EU’s *Regulation 1049/2001* on Access to European Parliament, Council and Commission documents<sup>111</sup>. The

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<sup>103</sup> Council of Europe, 2016, Accession of the European Union to the European Convention on Human Rights

<sup>104</sup> European Court of Justice, 2014, Opinion 2/13 of the Court (Full Court) on Accession by the Community to the ECHR, para 178(a)

<sup>105</sup> European Court of Justice, 2014, Opinion 2/13 of the Court (Full Court) on Accession by the Community to the ECHR, para 183

<sup>106</sup> The Council of Europe is the European organisation monitoring Human Right’s issue under the ECHR, authors own description – see also Council website at <http://www.coe.int/en/web/about-us/who-we-are>

<sup>107</sup> Council of Europe, 2016, Cooperation with International Institutions and Civil Society, The background

<sup>108</sup> European Court of Justice, 2014, Opinion 2/13 of the Court (Full Court) on Accession by the Community to the ECHR, para 184

<sup>109</sup> C-612/13 P ClientEarth v. Commission, 2015

<sup>110</sup> European Commission, 2016, Aarhus Convention

<sup>111</sup> European Union, 2016, Regulation 1049/2001 on Access to European Parliament, Council and Commission documents

Court reasoned that it was not to be relied upon as it “...*was manifestly designed with the national legal orders in mind...*”<sup>112</sup> this despite the EU being party to the Convention<sup>113</sup> and should be bound by it. But the Court specified that the Convention did not take into consideration “...*the specific legal features of institutions of regional economic integration, such as the European Union...*”<sup>114</sup> This may limit the legal effects of enforcement of international treaties, unless they are clearly binding on the EU as a whole.

### 3.10 Summary

EU and the ECJ are nothing if not consistent. Following the rulings in *C-26/62 Van Gend en Loos* and *C-6/64 Costa v. ENEL* setting up EU legislation as Lex Superior internally vs. national law, in joined cases *C-402/05 P & C-415/05 P Kadi* the ECJ concluded that; “*It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system...*”<sup>115</sup> Thereby providing for the same Lex Superior status for EU legislation in relationship to external relations under international treaties. With variations to the extent those international agreements approach the definition, as well as protection, of the individual it can be argued that the Court in *Kadi I* established safeguards for a consistent interpretation by the EU in regards to international treaties. It thus established a base for legal certainty for individuals inside the EU.

Through their cooperation under several UN agreements the EU is obliged to follow International Law as defined by UN and its institutions, including enforcement of EU sanctions. It is bound by the UN Security Council’s measures, in accordance with the ECJ out of respect for its commitment to its context.<sup>116</sup> However it does so on the condition that it is within the boundaries of EU law. At the time of *Kadi I* the EU itself was not and still is not, a UN member.

In its Opinion 2/13 the Court pointed out that an international agreement does affect its own powers; “...*if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order*”<sup>117</sup>

Thus the supreme source of law in the Union is EU primary law, consisting of the Treaties (TEU and TFEU) and the Charter of Fundamental Rights of the European

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<sup>112</sup> C-612/13 P ClientEarth v. Commission, 2015, para 40

<sup>113</sup> European Union, 2005, Council Decision on the Aarhus Convention

<sup>114</sup> C-612/13 P ClientEarth v. Commission, 2015, para 40

<sup>115</sup> Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (AG), 2008, para 285

<sup>116</sup> Kokott & Sobotta, 2012, Ch. 3 Dualist but Ready to Compromise?

<sup>117</sup> European Court of Justice, 2014, Opinion 2/13 of the Court (Full Court) on Accession by the Community to the ECHR, para 183

Union (the Charter), with attached annexes, appendices and protocols as well as later additions and amendments.

Then there is EU's secondary law – Regulations, Directives and Decisions are legislative acts that have to be dealt with within the context of EU's primary law. As sources of law go we see both from case law and literature that the EU places International treaties between EU primary and secondary law.<sup>118</sup> However, even EU secondary law may under specific circumstances trump EU's obligations under International treaties, adding a potential issue for third countries in respect to legal expectations.

This highlights the issue of conflicts between EU's fragmented internal (EU vs. MS) vis-a-vis its united external (EU vs -third country) legislation. It has to be understood that EU's internal legislative power, despite being internal Lex Superior, is limited by the competences conferred on it. Meanwhile in the name of consistency the ECJ has also confirmed the EU legislation's position as Lex Superior in relationship to International Law, while admitting to the CIL's influence in areas where EU has no legislation of its own.

All this is important for the subject matter of this thesis, since even if there were changes to the current positioning of EU legislation in the international legal order, there is no way for a third country to simply bypass or circumvent the EU's own internal interpretation, via the ECJ, and application of the international treaties. Neither can any MS's national legislation bypass or circumvent EU legislation as interpreted by the ECJ in regards to international treaties.

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<sup>118</sup> Borchardt, 2010, p 80, The legal sources of Union Law and Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (Kadi I), EU:C:2008:461, paras 306-307

## 4. EU *acquis communautaire* on international obligations

### 4.1 Introduction

Every MS of the Union is bound by the international treaties that the EU is a signatory of, regardless of whether the MS has signed the treaty as an individual state or not. This is due to the conferral of powers to the EU.<sup>119</sup> So how can a third country dealing with this hierarchy of EU legislation, and associated treaties, make sure that an agreement signed with EU does not infringe on legal certainty as provided by said legislation? By understanding how the EU *acquis* works, how the ECJ interprets it, and how it affects the areas covered by the agreement.

The current relevant EU *acquis* has its roots in the two main treaties Treaty on the European Union (TEU), originally signed in Maastricht in 1992 and the Treaty on the Functioning of the European Union (TFEU), originally signed in Rome in 1958. There are also the Treaty establishing the European Atomic Energy Community (EAEC) and the Charter of Fundamental Rights of the European Union (the Charter), though they are of limited or no use for the purpose of this thesis. All these have been updated and added to over time the latest consolidated versions, as used for this thesis, are from 2012.<sup>120</sup>

The basic legal principles at play when looking at EU's external actions are;<sup>121</sup>

- Conferral defined as Common objectives (Art 1 TEU), Competences conferred (Art 4(1) TEU) and the Principle of Conferral (Art 5(2) TEU)
- Loyalty defined as the Principle of sincere cooperation (Art 4(3) TEU)
- Separation of powers between European Parliament, European Council and the Council (Art(s) 13-16 TEU)

Loyalty refers to the interaction between the EU and its MS's in the execution of obligations under the Treaties – TEU, TFEU and the Charter. The separation of powers is the guidelines for the actions of the Unions institutional framework. A key relevant part, for the purpose of this thesis, is the principle of Conferral; it defines the division of power between the EU and its MS's. Another key article

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<sup>119</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Art 216

<sup>120</sup> European Commission, Treaties currently in force - EUR-Lex, 2016

<sup>121</sup> van Vooren & Wessel, 2014, EU External Relations Law, p. 9

when approaching EU *acquis* in general is Art 7 TFEU where the EU is obliged to ensure “...consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.”<sup>122</sup>

This is something that is the Unions prevailing approach in all their legal dealings, and is even reflected in relationship to the EU’s international obligations. It does not imply that this is an easy goal to achieve, but it is the way the EU has agreed and decided among its MS’s to try and guarantee legal certainty within its own complicated *acquis*.

## 4.2 Treaty of the European Union (TEU)

Art 47 - EU as a legal personality/entity. One of the most important articles of the TEU, for the purpose of this thesis, does not show up until Title 6, Final provisions. It is Art 47 TEU which establishes a legal personality for the EU. It defines EU’s legal personality by explicit recognition of the EU as an independent entity in its own right. This means that the EU has conferred upon it, by its MS’s the ability to:<sup>123</sup>

- conclude and negotiate international agreements in accordance with its external commitments;
- become a member of international organisations;
- join international conventions, such as the European Convention on Human Rights, as stipulated in Art 6(2) of the TEU.

This structure can create confusion among EU’s international partners in understanding EU’s external relations - as it means EU in of itself, as well as the individual MS’s, can be part of the same international organizations, for instance the United Nations (UN).

Art 3(5) – Purpose of EU’s external relations. With its own legal personality defined the Union defines parameters for the purpose behind its external relations and interaction with the wider world. Art 3(5) TEU defines a list of purposes that lie behind EU’s activities on the international scene. The ones chosen to be relevant for the purpose of the research for this thesis are to uphold and promote EU’s values and interests, free and fair trade and a strict observance and development of International Law. That includes upholding key principles behind EU’s own legislation on the international stage. Art 3(5) TEU specifies that the

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<sup>122</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Title II - Provisions having general application

<sup>123</sup> EUR-Lex, 2016 Legal personality

EU will adhere to International Law and respect the principles of the UN Charter, by means of competences conferred upon it through the Treaties.<sup>124</sup>

Art 5 - General principles for EU's external relations. The TEU has certain key parts that are defining a framework for EU and its international commitments. The relevant core legal principles for external relations are set out in Art 5 TEU. It strictly defines the limitations of EU's powers by setting out the principles of conferral, subsidiarity and proportionality<sup>125</sup>. The principle of conferral in particular is key to understand the relevant EU legislation for this thesis. It specifies that the Union shall only act when necessary to achieve the objectives of the Treaties and as far as the MSs have conferred power upon the Union to do so.<sup>126</sup>

Art(s) 21-22 – Objectives of EU's external relations. Next is the objectives of the EU when it comes to our subject matter – external relations - relating to the Union's areas of external actions concerning International Law and global trade. In Art 21 TEU, the EU states that in striving to develop and build partnerships with third countries, as with the TTIP, it will be guided on the international scene by the principles behind its own creation. Important for the purpose of the research for this thesis is respect for International Law and the rule of law. EU also clarifies that thru its pursuit of common policies will work for cooperation in all fields of international relations supporting, once more, respect for International Law and the rule of law. For this thesis Art 21(2)(e) is a key one, where the EU commits to integration of world economy by removing restrictions on international trade. EU has thereby defined its objectives for what it should strive to achieve by its external actions and relationship building.

EU has also established the role of a specific institution, the European Council, to deal with external relations in Art 22 TEU. It provides for the European Council to control EU's foreign policy by unanimous action within the framework of Art 21 TEU to ensure consistency between EU's external actions and other policies.<sup>127</sup>

### **4.3 TEU – Summary - Obligations**

The goals for the EU's actions as defined in Art 3(5) TEU are lofty indeed, but our specific focus is on the parts governing global trade and International Law

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<sup>124</sup> European Union, TEU 2012 Treaty on European Union, 2012, Art 3(6)

<sup>125</sup> First established in C-8/55 *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, EU:C:1956:11, p. 299, C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114, Grounds of judgment pt. 16 and later C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others.*, EU:C:1990:391pt. 13-14

<sup>126</sup> European Union, TEU 2012 Treaty on European Union, 2012, Art 5(2), 5(3) & 5(4)

<sup>127</sup> European Union, TEU 2012 Treaty on European Union, 2012, Art 21(3)

including the concept of “*the rule of law*” which could be looked at as guarantee for at least a certain amount of legal expectation in dealing with the EU.<sup>128</sup>

By Art 5 TEU the EU, as a legal personality/entity of its own, has been limited to acting only in areas of its exclusive competence and in so far as it fulfils the objectives of the Treaties. This shows the beginnings of the potential for complications of possible limitations to legal certainty once we reach areas of shared competence between the Unions and its MS’s.

Art 5, 21 and 22 TEU deals with relevant principles and objectives outlining the Union’s foreign policy and established the power of the European Council to act in a unanimously to represent the Union in matters of external relations.

The TEU and TFEU are primarily connected through Art 1 and 40 TEU. Art 1 sect. 3 puts them on the same level of the EU legislative hierarchy as part of EU Primary legislation while Art 40 TEU refers to the limitations in regards to external relations based on the competences defined under the Treaties.

#### **4.4 Treaty on the Functioning of the European Union (TFEU)**

In the TFEU Part 5, The Union’s External Action, the Treaty deals with the foreign policy of the Union. Art 205 links into the TEU Art’s 21-22 on the principles forming the framework for the Union’s actions on the international scene.

The TFEU puts more details into the limitations of the Union’s framework for dealing with external relations. Let’s look at key provisions for the purpose of this thesis. In particular Art 206 and 207 TFEU establishes what is called the Common Commercial Policy<sup>129</sup> (CCP) of the EU, while Art’s 216-219 TFEU establishes procedures for establishing international treaties with third countries by the Union.

Arts 206-207 TFEU establishes the CCP. Its purpose is to create uniform principles for EU regarding trade in goods and services. It specifies among other things trade agreements and the “*commercial aspects of intellectual property rights*”.<sup>130</sup> The CCP lays down the legal boundaries for the work of the Council and Commission regarding international treaties. Importantly for third countries is that in Art 207(1 and 3) TFEU it specifically speaks of the responsibility to ensure that any negotiated agreement is compatible with internal policies and rules of the

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<sup>128</sup> Defined as - the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws. See also European Commission, European Neighbourhood Policy and Enlargement Negotiations - Rule of Law - European Commission, 2016

<sup>129</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Title II

<sup>130</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Art 207(1)

Union, as in the procedure under Art 218 TFEU. 207(4) TFEU also specifies that for agreements negotiated and concluded as referred to in 207(3) TFEU the Council, being the key negotiator, must act by *qualified majority*<sup>131</sup>. But in international agreements in the fields of trade in services, commercial aspects of IP and direct foreign investments, the Council has to be unanimous – when such an agreement has provisions where adoption of such rules internally inside the Union requires unanimity.

As regards the TTIP the EU is aligning its efforts with Art 206 TFEU and the goals of world trade development and “*abolition of restrictions on international trade*” through the lowering customs and technical barriers to trade. There are also guidelines on aspect of dealing with an area of specific shared competence like the commercial aspects of Intellectual Property (IP) in Art 207(1). The Union’s efforts “...*shall be based on uniform principles, particularly with regard to changes in... the commercial aspects of intellectual property...*” and assure that it will be conducted in the previously defined context of principles and objectives of EU’s external actions.

Arts 216-219 TFEU sets the procedures for the EU’s external relations defined by international treaties with third countries and international organisations. Once again the importance of them being within the framework of EU’s policies, the objectives set out in the Treaties or legally binding acts of the Union or affecting either common rules or changing their scope is being addressed.<sup>132</sup> The TFEU also ascertains that these agreements are binding on the Union and its MS’s.<sup>133</sup>

Art 218 TFEU refers back to Art 207 TFEU noticing that all international agreements shall be handled, i.e. without having an effect on the Union’s obligations according to Art 207 TFEU.<sup>134</sup> In Art 218(6) the Council is given the rights to adopt decisions that conclude an agreement, if they first obtain the consent of the European Parliament in the following cases - agreements with important budgetary implications for the Union<sup>135</sup>, like the TTIP. Art 218(8) specifies that the Council shall act by qualified majority through the whole procedure.

## 4.5 TFEU – Summary – Obligations

In regards to the TTIP negotiations and EU legislation it is important to understand the EU’s position. As we have seen, when negotiating with third

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<sup>131</sup> EUR-Lex, 2016, Qualified Majority

<sup>132</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Art 216(1-2)

<sup>133</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Art 216(2)

<sup>134</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Art 218(1)

<sup>135</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Art 218(6)(a)(iv)

countries, EU leans on their exclusive competence to negotiate trade and investment agreements, through their trade and investment policy. In particular with reference to the following articles of the TFEU; Art 207 on Common Commercial Policy, Art 218 on agreement negotiations, Art 290 on delegated legal acts, Art 291 on implementation of legal acts and Art 294 on procedures for the adoption of acts and other provisions.

Art 207 (3) TFEU is where this author sees potential for issues in regards to areas of shared competence and legal certainty. It assures us that all international treaties will be compatible with internal policies and rules of the Union. Thereby pointing out that anything having an effect on internal policies and rules will fall under EU jurisdiction. As case law has shown, EU's interpretation through the ECJ is that, for EU purposes, EU primary law is Lex Superior in the hierarchy of international legislation. The ECJ as well as the Union and its MSs are bound by this.

Art 207(4) TFEU is a safeguard built in to makes sure EU's internal procedures for adoption of provisions are followed, even when negotiating agreements with third countries. TFEU article, 216-219, specifies procedure and process for acceptance of the international treaties. How can the EU guarantee consistent rulings in an area, like the IPR's, where enforcement of national IP-legislation by national courts still exists in parallel with EU's own system of special IP institutions?

The TFEU reinforces the underlying principles of the TEU regarding the framework for EU's process of approval and acceptance of international treaties.

Arts 290-291 and 294 TFEU are dealing with delegation to the Commission (290 TFEU), MS implementation (291 TFEU) and finally procedure for adoption of legal acts (294 TFEU). The Union's scope of exclusive competence, where the EU MSs may not legislate on matters of trade nor conclude any international trade agreements, are within the areas of goods, services, foreign direct investments and the commercial aspects of intellectual property. The same applies to transport and capital movement in relationship with the CCP.<sup>136</sup>

In their document "*European Parliament – Rules of Procedure*"<sup>137</sup>, the rules are set out quite clearly for EU and the International Agreements. While the Commission does the actual negotiations on behalf of the EU they only do so with the authorisation from the Council. Once the negotiations are completed the agreement is presented to the Council and the Parliament who may or may not agree on the outcome. If they agree with the agreement, the next step is signature and ratification. In the case of a mixed agreement the MSs must also ratify it

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<sup>136</sup> European Commission, Policy Making - What is trade policy?, 2016

<sup>137</sup> European Parliament, 2016, TITLE III, Ch. 1-2

through their own internal processes. The powers of implementation by the Commission is under MS is controlled via EU *Regulation 182/2011*<sup>138</sup> laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

#### 4.6 Intellectual Property Rights under the Charter of Fundamental Rights of the European Union

The individual's right to "...own, use, dispose of and bequeath his or her lawfully acquired possessions." such as one's own IP, is recognized by Art 17(1) of the Charter which is part of EU's primary law.<sup>139</sup> The IP specifically is specified in Art 17(2) of the same – "*Intellectual property shall be protected.*" It can be read from Art 17(1) of the Charter, and has been stated in case law from the ECJ, that this right is not inviolable but has to be balanced by considerations of other freedoms.<sup>140</sup>

The premise for the issue with legal certainty in the area of the subject matter for this thesis - third country IPR holders - in their dealings with the EU is supported by analogy in ECJ case law in *Promusicae*<sup>141</sup> where the Court looked to a Directive 2002/58<sup>142</sup> for clarification of the scope of IP protection as provided under the Charter. In Arts 53-54 of this case the ECJ refers to the fact that Art 15(1) of the Directive<sup>143</sup>, through its express reference to Art 13(1) of Directive 95/46<sup>144</sup>, restricts the list of exceptions for protection of property rights. The ECJ's interpretation is that a MS may adopt restrictive legal measures regarding confidentiality of; in this case, personal data "...*inter alia for the protection of the rights and freedoms of others.*" Therefore Art 15(1) of Directive 2002/58 is to be interpreted so – that the intention of the legislature of the Union for the scope of the protection of right to property is to not exclude situations where authors, using civil proceedings, are looking to obtain such protection. By this the Court does open the door for use of *Directive 2002/58* to allow the possibility for MS's to enforce an obligation to disclose, in this case, personal data under civil proceedings even when it is considered protected property under the Charter.<sup>145</sup>

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<sup>138</sup> European Union, 2011, 182/2011 Regulation laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers

<sup>139</sup> European Union, 2012 Charter of Fundamental Rights of the European Union, Art. 17(2)

<sup>140</sup> C-70/10 *Scarlet Extended*, 2011, paras 43-46 and C-314/12 *UPC vs. Constantin*, 2014, paras 61-63

<sup>141</sup> C-275/06 *Promusicae*, 2008, paras 61-62, 65-66

<sup>142</sup> European Union, 2002, 2002/58/EC Directive on privacy and electronic communication, Art 53-54

<sup>143</sup> European Union, 2002, 2002/58/EC Directive on privacy and electronic communications, Art 15(1)

<sup>144</sup> European Union, 1995, 95/46/EC Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Art 13 Exemptions and restrictions

<sup>145</sup> European Union, 2002, 2002/58/EC Directive on privacy and electronic communications, Art 54

The Court's ruling points to the balance of reconciling different fundamental rights when implementing secondary EU legislation in this case – the protection of private life v. protection of property. It shows one side of the fragmentation of the EU's legal IP protection under the Charter as MS's have the option to choose whether to infringe on the individuals rights under the Charter under certain circumstances, as long as they consider the balance between different rights.

The right to property under the Charter is not inviolate. It has to be balanced against other rights under EU *acquis*. Therefore EU's IP protection provided for an author may vary within the Union's MS's as well as within different areas of IP.

## 4.7 Summary

The initial guarantee for a certain amount of legal expectations can be seen in EU's acknowledgment of respect for the "*rule of law*" as defined in Art 3(5) TEU.<sup>146</sup>

The definition of EU as a legal personality on its own, defined in Art 5 TEU, binds it to its own commitments, within power conferred upon it, within the framework of the objectives of the Treaties. The principles, objectives and part of the process for this is outlined in Arts 5, 21 and 22 TEU, regarding the Unions foreign policy and how the European Council unanimously may represent the whole Union in matters of external relations. This relates to the competences given to the Union on behalf of the MS's. The Union is obliged to act in accordance with its own legislation.

The TFEU reinforces the underlying principles of the TEU regarding the framework for EU's process of approval and acceptance of international treaties. Arts 216-219 TFEU, are procedural and covers the process of acceptance of international treaties. In TFEU, Art 207(3) assures third countries, as well as MSs, that all international treaties will be compatible with internal policies and rules of the Union. So anything having an effect on internal policies and rules will fall under EU jurisdiction. In Art 207(4) TFEU are safeguards that EU's internal procedures for adoption of provisions are followed, even when negotiating agreements with third countries.

This leads to third countries having no option but to accept that within EU's jurisdiction, as defined by the Treaties and the principle of conferral - EU primary law rules supreme. The issue appears when an issue goes past the EU legal filter and ends up in a national court for a resolution. Here the national law, as

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<sup>146</sup> Defined as - the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws. See also European Commission, European Neighbourhood Policy and Enlargement Negotiations - Rule of Law - European Commission, 2016

interpreted under EU primary and secondary legislation, will still prevail with possibility for stronger enforcement and harsher punishments for infringements, due national differences in interpretations of what is actually to be protected under IP legislation.

In regards to the purpose of this thesis it is also important to note here that the right to property under the Charter, which is part of EU primary law, is not inviolate. It has to be balanced against other rights under EU *acquis*.

Thus the potential issue occurs – can legal expectations as well as legal certainty for third countries negotiators and their nationals be upheld under EU legislation?

# 5. EU and international intellectual property right agreements

## 5.1 Introduction

EU defines IPRs as consisting of the rights related to “...*industrial property rights, such as patents, trademarks, designs and geographical indications, copyright and rights related to copyright.*”<sup>147</sup> With its related rights of the individual author recognized as a fundamental human right in Article 17(2) of the Charter. But the EU is also, directly or indirectly, part of a number of international treaties on intellectual IPR’s.

## 5.2 The Berne Convention

In regards to certain specific aspects of IP legislation, copyrights, one underlying component of the WTO-TRIPs and the WIPO-WCT is the WIPO administered agreement called the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)<sup>148</sup>. Originating in September 1886 the latest version is from 1979.

The agreement introduced copyright as an automatic intellectual property right the moment a work is available in a “*fixed*” format<sup>149</sup> with no registration requirement. It also requires mutual recognition of copyrights held by citizens of all its signatory countries.<sup>150</sup> The Berne Convention is part of the basis for later international treaties from both WIPO<sup>151</sup> and WTO<sup>152</sup> and both acknowledge the link.

## 5.3 World Intellectual Property Organization (WIPO)

The World Intellectual Property Organization (WIPO) is an agency of the UN and specializes in IP protection, services, policy, information and cooperation,

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<sup>147</sup> European Commission, A Single Market for Intellectual Property Rights, 2011, A Single Market for Intellectual Property Rights, p 3.

<sup>148</sup> WIPO, Berne Convention for the Protection of Literary and Artistic Works 1979, 2013

<sup>149</sup> WIPO, Berne Convention for the Protection of Literary and Artistic Works 1979, 2013, Art 2(2)

<sup>150</sup> WIPO, Berne Convention for the Protection of Literary and Artistic Works 1979, 2013, Art 5(1)

<sup>151</sup> WIPO, WIPO Copyright Treaty (WCT), 2013, p 2, Art 1

<sup>152</sup> WTO, 2013, p 321, Art 1(3)

including dispute resolution.<sup>153</sup> It manages three main branches of IPR's – with the possibility to register thru them for international protection of patents (Patent Cooperation Treaty-PCT), trademarks (Madrid- International Trademark System) and design (Hague- International Design System).

IP under WIPO is defined as; “...creations of the mind: inventions; literary and artistic works; and symbols, names and images used in commerce.”<sup>154</sup> WIPO uses two sub-categories;<sup>155</sup>

- Industrial Property covering patents, industrial designs and trademarks
- Copyright covering literary works, films, music, artistic and architectural design.

With intellectual property being a shared competence, the WIPO agreement becomes a mixed agreement (See Ch. 6), and both the Union and the MSs had to ratify the WIPO agreements. The agreements provide a framework for IP and IPR handling in the designated areas and for WIPO to promote the protection of intellectual property. WIPO also acquired the more complex task of promoting technology transfer and economic development through the 45 Recommendations it adopted in 2007 under the “WIPO Development Agenda”.<sup>156</sup>

### **5.3.1 WIPO - Copyright Treaty (WCT)**

The EU and its MSs ratified both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) in December 2009.<sup>157</sup> EU is not however a member of WIPO as it is not a state nor fulfils the requirements for a WIPO membership.<sup>158</sup>

This makes them binding on the EU and its institutions as well as the MSs and the EU is thereby bound to respect copyrights established in all the MSs of the WIPO.

### **5.3.2 WIPO - Patent Law Treaty (PLT)**

This Treaty, adopted in June 2000 aims to streamline and harmonize procedures for patent applications, both national and regional. The PLT limits the sets of requirements in a patent application that may be applied by a contracting party, the only exception being the filing date.<sup>159</sup> The European Patent Organisation (EPOrg) is a signatory though the treaty is not in force yet, which would bind the

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<sup>153</sup> WIPO, 2016, Inside WIPO

<sup>154</sup> WIPO, What is Intellectual Property?, 2016, p 2.

<sup>155</sup> WIPO, What is Intellectual Property?, 2016, p 2.

<sup>156</sup> WIPO, 2016, The 45 Adopted Recommendations under the WIPO Development Agenda

<sup>157</sup> European Commission, 2009, European Commission welcomes ratification of the WIPO Copyright Treaties

<sup>158</sup> World Intellectual Property Organization, 2016, Member States

<sup>159</sup> WIPO, 2016, Patent Law Treaty (PLT)

EU MSs who are EPOrg MSs, but not EU itself.<sup>160</sup> The US is also a signatory, but has added minor caveats.<sup>161</sup>

## 5.4 World Trade Organization (WTO) Annex 1C TRIPs

The WTO is one of the few international organizations that the EU is a full member of.<sup>162</sup> For the specific purpose of this thesis, apart from the Union's fulfilment of general obligations under UN and the VCLT treaties and agreements, we also have to consider the more specific requirements of the World Trade Organisation (WTO) and its Annex 1C, the Treaty on Trade-Related aspects of Intellectual Property rights (TRIPs).

The internal competence division in relationship to the WTO agreement was complicated and the ECJ was asked to give its opinion, this was provided in the form of the ECJ's *Opinion 1/94*<sup>163</sup>. The Court clarified that the fundamental issue to consider was whether the EC had the exclusive competence to conclude an agreement such as the WTO agreement and its annexes, such as TRIPs.<sup>164</sup> Already in para 3 of the opinion it was stated that it was agreed between the EC and its MS's that ensure that the negotiations were conducted with maximum consistency the Commission would act as the sole negotiator. However there was a caveat built into the same paragraph, namely this decision did not "...prejudge the question of the competence of the Community or the Member States on particular issues'."<sup>165</sup> This led the Council to put into their decision to approve the agreement that it was with regards to areas of the EC's competence only.<sup>166</sup> This text is echoed in the whole document, with reference to the *1/94 Opinion*<sup>167</sup>.

TRIPs is a more substantial international agreement for protection of IP than the WIPO's. In the TRIPs the WTO defines IPRs as "*Intellectual property rights are*

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<sup>160</sup> WIPO, 2016, WIPO-Administered Treaties-Patent Law Treaty

<sup>161</sup> With the reservation under Article 23(1). (see PLT Notification No. 39)

<sup>162</sup> van Vooren & Wessel, 2014, EU External Relations Law, p. 253

<sup>163</sup> European Court of Justice, 1994, Opinion 1/94 on the competence of the European Community to conclude the Agreement establishing the WTO

<sup>164</sup> European Court of Justice, 1994, Opinion 1/94 on the competence of the European Community to conclude the Agreement establishing the WTO, para 14

<sup>165</sup> European Court of Justice, 1994, Opinion 1/94 on the competence of the European Community to conclude the Agreement establishing the WTO, para 3

<sup>166</sup> European Union, 1994, 94/800/EC: Council Decision on behalf of the EC approved Uruguay Round Agreement, Art 1(1)

<sup>167</sup> European Court of Justice, 1994, Opinion 1/94 on the competence of the European Community to conclude the Agreement establishing the WTO

*the rights given to persons over the creations of their minds.*”<sup>168</sup> and it covers seven (7) predefined areas of IP;<sup>169</sup>

- Copyright and related rights
- Trademarks
- Geographical indicators
- Industrial designs
- Patents
- Layout-designs of Integrated circuits
- Undisclosed information – trade secrets and test data

In the case of TRIPs we should look at EU case law to substantiate how the ECJ interprets the EU and the EU MSs obligations under the treaty. In *C-431/05 Merck Genéricos Produtos Farmacêuticos*, the ECJ held that the TRIPs agreement, being part of the WTO Agreement and signed by the Community and approved by Decision 90/800 is an integral part of the Community legal order. This means that the ECJ may give preliminary rulings concerning its interpretation.<sup>170</sup>

In the joined cases *C-300/98 and C-392/98 Dior and Others* the Court verifies that depending on the area of TRIPs being under scrutiny the EU only has competence within the areas of IPR where the EU has enacted rules.<sup>171</sup> The Court held that the EC (now EU) does not have any applicable legislation specifically for the subject matter of Art 33 TRIPs, Patents - Term of Protection of 20 years, and it was up to the MSs to retain their competence in deciding about direct effect or not for Art 33 TRIPs.<sup>172</sup>

Following the ECJ’s *Opinion 1/94*<sup>173</sup>, and Council *Decision 94/800/EC*, we can see that as far as the WTO agreement and its annexes go the EU is only obliged to be bound within the powers conferred upon it.

The TRIPs agreement has direct effect within the EU, limited to areas covered by EU rules, unless MS’s decide otherwise themselves. But under the WTO Agreement there is an explicit need for all MSs to fulfil their obligations, it states;

*“Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.”*<sup>174</sup>

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<sup>168</sup> WTO, 2016, WTO | intellectual property (TRIPS) - what are intellectual property rights?

<sup>169</sup> WTO, 2016, WTO | intellectual property - overview of TRIPS Agreement

<sup>170</sup> C-431.05 Merck Genéricos Produtos Farmacêuticos, 2007, Ruling, I-7039-7040

<sup>171</sup> C-300/98 & C-392/98 Dior v. Tuk, 2000, para 47-48 & Court rules: para 2-3

<sup>172</sup> EU Law Blog, 2016, TRIPs Agreement, Direct Effect and Patents: Case C-431/05

<sup>173</sup> European Court of Justice, 1994, Opinion 1/94 on the competence of the European Community to conclude the Agreement establishing the WTO

This creates an even more confined space for the MSs to act within the WTO than within the EU under TFEU.<sup>175</sup> It is also important to understand that the WTO obligations are assessed in terms of individual operator's expectations of economic benefit in their dealings with other WTO MS's markets.<sup>176</sup>

## 5.5 Summary

The current international treaties and legislation affecting EU's own is based on which treaties the EU has ascended to. It is limited by the powers conferred on the EU by its MS's. So EU's obligation is to assure both external and internal authors of IP that their IPR's will be respected in accordance with the international treaties signed and ratified by the Union and at times in conjunction with the MSs.

The lack of coherence on the international playing field between different types of IPR's is an issue in the first place. As can be understood, by the material presented in this chapter, international agreements cover different and at times overlapping area of IPR's. When EU legislation is added on top of that, through based on the same international agreements, it adds layers of complexity to the picture. EU's obligations are to; uphold its own legislation in the area of IPR's and to allow MSs to maintain their national systems for IPR protection. But also to fulfil and respect any requirements under the international treaties of which EU is part. With EU primary law being Lex Superior for EU's internal market, this trident of legislations are bound to interact and at times cause conflict between contracting parties.

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<sup>174</sup> WTO, 2016, Agreement establishing the WTO, XVI:4

<sup>175</sup> Kuijper, 2014, Some comments on the EU in different international regimes, p.5

<sup>176</sup> Bartels, 2015, The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects, p. 1072

# 6. Mixed Agreements - The competence split between EU and the MS's

## 6.1 Introduction

So called “*mixed agreements*” are agreements between EU and external countries in areas covering issues of shared competence. One relevant example is the *Cotonou Agreement*<sup>177</sup>, a mixed agreement that had to be signed by both EU and its MS's.<sup>178</sup> This framework agreement, spanning a 20 year period from 2000-2020 is the most comprehensive that the EU has with developing countries. It governs EU's external relationships with 79 countries within Africa, the Caribbean and Pacific (ACP). It is revised every 5 years, based on a revision paragraph.<sup>179</sup> The ratification procedure for this agreement follows the intent and purpose of Art 4 TFEU on shared competences and as the European Commission itself clarifies it;

*“Where its competence is shared with Member States, the agreement is concluded both by the EU and by the Member States. It is therefore a mixed agreement to which Member States must give their consent.”*<sup>180</sup>

“*Mixed agreements*” is a relatively unique EU feature that is an issue for International Law with its assumption of the powers of a State, EU is not a State and lacks its own sovereign territory. What the EU can do is defined by the powers conferred on it under the Treaties. In the previous chapters we have briefly touched upon the “*competences*” of the EU. These competences, i.e. areas of jurisdiction within the EU, are defined in Art(s) 2-6 of the TFEU. There are three different main types or categories of EU competences, areas within which the Union and/or the MS's have powers of decision;<sup>181</sup>

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<sup>177</sup> European Commission, 2000, Partnership Agreement EU-ACP

<sup>178</sup> Bonde, 2016, Mixed agreement

<sup>179</sup> European Commission, 2016, ACP - The Cotonou Agreement - International Cooperation and Development

<sup>180</sup> European Commission, 2016, International agreements

<sup>181</sup> European Commission, 2016, on the EU competences and the European Commission powers

- Art 2(1) and 3 TFEU – Areas where EU has *exclusive competence*, only the Union can act in the area and is able to legislate and adopt binding acts.
- Art 2(2) and 4 TFEU – Areas where EU and MS's *share competences*. MS's can act only if the Union has chosen not to. Both Union and MS's are able to legislate and adopt legally binding acts. MS's has a right to exercise its own competence when the EU does not.
- Art 2(5) and 6 TFEU – Areas where EU has competence to support, coordinate or supplement the actions of the MS's. The Union may not adopt legally binding acts that require the member states to harmonise their laws and regulations.

Apart from these there are also three (3) areas of MS internal competency where they must arrange for coordinated policies within the Union, the areas of economic, employment and social policy.<sup>182</sup>

This thesis, in order to answer the research question has specifically focused on those areas of the law where third countries under international agreements will encounter shared competences under Arts 2(2) and 4 TFEU. More specifically it looks at the areas of Intellectual Property (IP) and Intellectual Property Rights (IPR's).

## 6.2 Shared competences and Protocol 25

The areas of shared competencies covers those that fall between the competences defined in Arts 3 (exclusive) and 6 (supportive) of the TFEU as can be read in Art 4(1) TFEU. In Art 4(2) the key is that the list is not exhaustive – the text “...*in the following principal areas:*” indicates this. In an attachment to the Treaties there is also a specific addition dealing with shared competences - Protocol 25, on the exercise of shared competence. It consists of one article alone and refers to Art 2(2) of the TFEU:

*“... on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.”<sup>183</sup>*

Protocol 25 adds specificity to the power of the Union in regards to shared competences. That is - if the EU provides a Union approved legal act, it has an enforceable power by the Union only within the scope of the act itself. Therefore the only way the EU can expand its competences is by establishing new legislation in new fields.

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<sup>182</sup> European Union, TFEU 2012 Treaty on the Functioning of the European Union, 2012, Art 5

<sup>183</sup> European Union, 2012, Protocol (25) On the exercise of Shared Competence

### 6.3 Intellectual Property Rights as a shared competence?

The European Commission as part of its work monitors the effects of IPR's such as patent and trade mark-related legislation across the EU.<sup>184</sup> Intellectual Property Rights (IPR's) are related to different forms of creations of the mind. Examples of IPR's are patents, trademarks, designs, copyrights or geographical indications. These rights are also there to allow these creators and inventors to get compensation for their investment in developing their ideas. In regards to trademarks and geographical indicators they also provide a user with a certain guarantee of fulfilled expectations since they identify the origin of the goods concerned.<sup>185</sup>

In Art 4(3) TFEU regarding the areas of research, technological development and space, in which IPR's play an important role, the EU *acquis* notes that the Union may as part of its competence define and implement programmes – but not to the exclusion of the MS's own competence .

In a document titled “*Intellectual, Industrial and Commercial Property*”<sup>186</sup>, drawn up by the European Parliament in 2016, the Union clearly states that “*Although governed by different national laws, intellectual property rights (IPR) are also subject to EU legislation.*”<sup>187</sup> As we have seen previously the Union also has as its objectives in this area to improve the protection and enforcement of IPR's in third countries. This is done through participation in international organizations as well as being signatories to international agreements and treaties in the area of IP.

- Multilateral agreements: WTO-TRIPs and WIPO-WCT & PLT et al.
- Bilateral trade agreements: FTA's and specifically the TTIP
- Plurilateral<sup>188</sup> agreements, such as the Anti-Counterfeiting Trade Agreement, which was rejected by the European Parliament in July 2012.<sup>189</sup>

The multilateral agreements mentioned here create an international framework for basic harmonization of IP and IPR's, while the FTA's are more specific about the

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<sup>184</sup> European Commission, 2016, What the Commission does

<sup>185</sup> WIPO, What is Intellectual Property?, 2016, What is Intellectual Property?

<sup>186</sup> European Parliament, 2016, Intellectual, Industrial and Commercial Property FTU\_3.2.4 2016

<sup>187</sup> European Parliament, 2016, Intellectual, industrial and Commercial Property - Objectives

<sup>188</sup> . Bacchus, 2013, the WTO treaty permits "plurilateral" agreements among some but not all members

<sup>189</sup> BBC, 2012, Acta: Controversial anti-piracy agreement rejected by EU and European Commission, 2016 - Plurilateral agreements

implementation of the same as well as the effect of national or regional legislations.

## 6.4 Community Trademarks and Design

EU's Community Trademark and Design registration and administration are handled by the European Union Intellectual Property Office (EUIPO) (previously the Office for Harmonization of the Internal Market (OHIM)<sup>190</sup>). EUIPO is an EU agency originally established under Council Regulation 6/2002 in December 2001.<sup>191</sup> The regulation established the Community Design registration and protection as an EU wide, unitary IPR for designs. In accordance with the same Regulation there is a provision, under certain conditions, for "*Unregistered Community Designs*" – these can also benefit from IPR protection against deliberate copying even when there is no prior registration with the EUIPO.<sup>192</sup> The Offices decisions fall under the jurisdiction of the ECJ and may be appealed.<sup>193</sup>

Apart from EU's internal unitary design protection the EU has also acceded to the Geneva Act of the Hague Agreement on international registration of industrial designs<sup>194</sup> in 2007. It works in a similar manner to the Community Trademark and Design registration, as it allows a single application to WIPO for registering a design in all countries that are part of the agreement.

## 6.5 Patents within EU and neighbouring European countries

In 1977 the European Patent Organisation (EPOrg) was set up based on the European Patent Convention (EPC) of 1973.<sup>195</sup> The organisation is not part of the EU structure and not bound legally to the Union.<sup>196</sup> It consists of two organisational bodies that are independent and intergovernmental, the European Patent Office (EPO) and other is the supervising Administrative Council.<sup>197</sup>

Currently their patent laws are adopted by the 38 member states of the EPOrg, which includes all the EU MS's and some states outside of the Union.<sup>198</sup> The

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<sup>190</sup> European Union Intellectual Property Office (EUIPO), 2016, Change of name of the Office – EUIPO

<sup>191</sup> European Union, 2002, 6/2002 Council regulation on Community Design, Art 2 Office

<sup>192</sup> European Commission, 2016, Community design protection

<sup>193</sup> European Union, 2002, Art 61

<sup>194</sup> WIPO, 2016, Legal Texts Relevant to Industrial Designs, Common Regulations Under the 1999 Act and the 1960 Act of the Hague Agreement

<sup>195</sup> European Patent Office, 2014

<sup>196</sup> European Patent Office, 2016, Legal foundations

<sup>197</sup> European Patent Office, 2014

<sup>198</sup> European Patent Office, 2016, Legal foundations

procedure for European patent grants, though autonomous, is linked closely to the EPOrg's MS's national patent legislation.<sup>199</sup> The patent rewarded is for all practical purposes a national patent which carries extended geographical scope within the MS's of the EPOrg designated on the application.

In 2012 the EU MS's and the Parliament agreed on a legislative "patent" package for the creation of a unitary patent protection within EU. This initiative was based on two regulations and an international agreement.<sup>200</sup> The regulations intention was to enhance cooperation in the efforts to create a unitary patent protection. Part of the process is to set up a Unified Patent Court (UPC) with the assistance of the MS's to operate the new unitary patent system.

The Commission has called for a rapid agreement on technical issues, in a try to get the Unitary Patent package to come into force by the end of 2016. Despite this not all EU MS's have ratified the "Unitary Patent Court Agreement" as of today. This mean that despite the regulations entering into force on the 20<sup>th</sup> of January 2013, they do not legally apply until the Agreement on a Unified Patent Court enters into force.<sup>201</sup>

## 6.6 Case law of the ECJ

In the case *C-431/05 Merck Genéricos Produtos Farmacêuticos*, the Court noted that the TRIPs agreement was concluded by both the EC and the MSs as it was within an area of shared competence.<sup>202</sup>

In the case *C-414/11 Daiichi Sankyo v. DEMO*, the Council of Europe worked on a Convention to protect broadcasters *neighbouring rights*<sup>203</sup>. The Council and MS's decided that there was to be joint participation by the EU and the MS's for this Convention. The Commission disagreed and brought an annulment action before the ECJ. The ECJ ruled that, as in accordance with Art 207(1) TFEU the Common Commercial Policy (CCP) is an exclusive competence of the EU. "...and relates *inter alia* to the commercial aspects of intellectual property."<sup>204</sup>

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<sup>199</sup> European Patent Office, 2016, Court practices

<sup>200</sup> European Union, 2012, Regulation 1257/2012, Regulation 1260/2012 and European Union, 2012, Agreement on a Unified Patent Court

<sup>201</sup> European Patent Office, 2016, EPO - Unitary patent

<sup>202</sup> C-431.05 Merck Genéricos Produtos Farmacêuticos, 2007, Ruling, I-7039-7040

<sup>203</sup> European Commission, 2016, Digital Single Market, "Neighbouring rights are rights similar to copyright but that do not reward an authors' original creation (a work). They reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort (for example by a producer) which may also include participation in the creative process."

<sup>204</sup> C-414/11 Daiichi Sankyo v. DEMO (Summary), 2013, para 2(3)

The WTO-TRIPs agreement falls under the competence defined by the CCP<sup>205</sup> thereby the MS's have no veto or say in the matter.

It may not be without limitations though as the ECJ points out that only those areas with a “...*specific link to international trade*”<sup>206</sup> can fall within the scope of the commercial aspects in accordance with 207(1) TFEU, and of the CCP.<sup>207</sup> This test of EU exclusive competence points towards a very pro-EU stance by the ECJ when establishing the limitations on areas of competence. Despite the outcome this case still reflects the current situation within IP and IPR legislation as remaining - to the extent that the EU has not legislated in an area - a shared competence.

Another interesting case relating to the subject matter of this thesis is *C-114/12 Commission v. Council*, on IPR's and EU's exclusive competence concerning the external competence of the Union for negotiation of copyright related protection. In this case it was within the context of an action for annulment. Despite the fact that the Union has previously confirmed that IP and IPR's is a shared competence, the ECJ in this case states that under article 3(2) TFEU conclusion of an international agreement when necessary to enable the Union, under EU law, to exercise its internal competence, is an exclusive competence.<sup>208</sup>

## 6.7 Summary

The Union clearly states that “*Although governed by different national laws, intellectual property rights (IPR) are also subject to EU legislation.*”<sup>209</sup> But not even EU internally seems to agree with the exact scope of EU's external competence in regards to IP. ECJ's *Opinion 1/94* concluded in short that;

- The Community has the sole competence, under Article 113 ECT, to conclude the multilateral agreements on trade in goods.
- The Community and its MSs share the competence to conclude GATS.
- The Community and MSs share the competence to conclude TRIPs.

This would indicate that the ECJ looks at IP, under TRIPs, as a shared competence.

Then in the *C-414/11 Daiichi Sankyo v. DEMO* case went on to a more in-depth interpretation of the explicit external competence of the EU regarding IP, under Art 207 TFEU on the CCP. This was broadcasting rights and considered

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<sup>205</sup> C-414/11 Daiichi Sankyo v. DEMO (Summary), 2013, para 2(1)

<sup>206</sup> C-414/11 Daiichi Sankyo v. DEMO (Summary), 2013, para 2(3)

<sup>207</sup> C-414/11 Daiichi Sankyo v. DEMO (Summary), 2013, para 2

<sup>208</sup> C-114/12 Commission v. Council, 2104, para 102

<sup>209</sup> European Parliament, 2016, Intellectual, industrial and Commercial Property - Objectives

“*commercial aspects of IP*” and as such an implied competence for the conclusion of an international agreement in accordance with Art 3(2) TFEU. Again with reference to 3(2) in *C-114/12 Commission v. Council*, the ECJ stated that the conclusion of an international agreement when necessary to enable the Union, under EU law, to exercise its internal competence, is an exclusive competence. The Court’s reasoning was that commitments under the agreement were already extensively covered by EU legislation.

With the outcome of these two cases it would seem that the ECJ is backing away from its *Opinion 1/94* on IP falling under the area of a shared competence. This provides the EU with a wide scope of possible actions within the area of IP and IPRs. So what is left for the MSs?

Trademarks and Design does have unified handling, and combined with the EU accession to the Geneva Act, allows for EU authors to get IPR protection for designs not only within the EU and in the countries that are part of the international agreement.<sup>210</sup> But it does not remove the possibility for national registrations of trademarks and designs.

There is today a lack of unified approach to patents and patent registration within the EU. Though a European patent can be had it is not EU-related and the Union has no coherent, ratified unitary patent protection.

What is important to be aware of as far as EU *acquis* goes for the purpose of this thesis is that the area of Intellectual Property Rights (IPR’s) though seemingly a hybrid of exclusive and shared competences, ultimately falls under the heading of shared competence. This as the ECJ in its case law gave the Union the exclusive right to negotiate the WTO-TRIPs agreement, but at the same time the MS’s still have their own national IPR legislations and registration processes in place.

A complication here arises out of the so called “*mixed*” agreements where ratification from the MS’s are needed for the international treaty to achieve binding effect. As we saw above the areas of IP and IPR’s are part of the shared competences making the TTIP a mixed agreement. This definition for the TTIP is further supported by the European Commission in their “*Opinion of 25 June 2014 on the role of national Parliaments in concluding free trade agreements (FTAs)*”. This opinion brings up both the TTIP, and the Comprehensive Economic Trade Agreement (CETA) between EU and Canada, as mixed agreements as they “... *concern policy areas within the competence of the Member States*”.

As IP protection within EU’s internal market, for the same category of IPRs, provided for an author may vary between the Union’s MS’s it may also do so in relationship to international treaties.

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<sup>210</sup> European Commission, 2016, Community design protection

## 7. Conclusions

*“There is nothing wrong in change, if it is in the right direction. To improve is to change, so to be perfect is to change often.” - Winston Churchill<sup>211</sup>*

For third countries the EU’s approach to its international treaties may seem like a legal version of the *Camera Obscura*<sup>212</sup> (see Figure 1) where the original picture seen on the outside is turned upside down inside the box, with EU being the box. This can well be seen as an accurate description for the subject matter of this thesis EU’s obligations from the perspective of a third country. With the Lisbon Treaty the European Union was established as its own legal personality.<sup>213</sup> Thereby making it possible for the Union to negotiate and conclude binding international treaties within the areas of its conferred competences. In regards to the competences of the EU regarding international treaties Art 3(2) TFEU specified that the Union shall have an exclusive competence to conclude an international treaty, but this has to be read in conjunction with Art 216 TFEU.

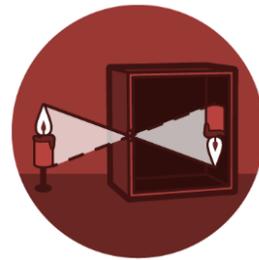


Figure 1 Camera Obscura

Whereas Art 3(2) TFEU provides for the exclusive right of the Union, Art 216 TFEU clarifies that it is limited to when necessary to achieve one of EU’s objectives under the Treaties, within the framework of EU’s policies. As the text is formulated with express external empowerment in this area for the Union, it follows that MS’s in practice are pre-empted from any independent conclusion of international agreements in areas where the Union legislates. But this empowerment of the EU through the CCP is curtailed by the areas of shared competence, like IP and IPR’s. So can the EU guarantee legal certainty through rulings on this subject matter, where enforcement of national IP-legislation by national courts still exists in parallel with EU’s own system of special IP institutions?

The hypothesis for this thesis was that third country IP holders cannot be guaranteed legal certainty, under an international agreement with the EU, in areas of shared competences. The stated purpose and intention of this thesis was either

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<sup>211</sup> Winston S. Churchill, 23 June 1925, House of Commons

<sup>212</sup> Holland, 2016, History of projection screens

<sup>213</sup> European Union, TEU 2012 Treaty on European Union, 2012, Art 47

to prove or disprove this initial hypothesis by answering the following research question;

"Can EU legislation guarantee legal certainty under the TTIP in areas of shared competence?"

This was done through the three primary legal aspects identified as relevant for the EU-TTIP relationship (See Ch. 2) on the subject matter - IP and IPRs (Ch. 6);

- 1) EU obligations under International Law and treaties (Ch. 3)
- 2) EU perspective on international obligations under EU primary and secondary legislation (Ch. 4)
- 3) EU and international intellectual property rights (Ch. 5)

The key to the issue at hand, legal expectations and certainty in the subject matter for third countries and its nationals under FTA's with EU is that there is a built-in conflict in the EU system. From the research performed for this thesis we see that on one hand we have the internal market with its shared competences; in our case IP within the *internal* market – on the other we have the Union's exclusive *external* right to negotiate international treaties through the CCP. This issue is highlighted by the ECJ case law, which shows the built-in conflict between EU's exclusive competence to negotiate international agreements, and the MS's exclusive competence within some areas of IP legislation. The conflict between the internal and external division of legal rights for the same or closely related competences creates a situation where third countries *legal expectations* from a treaty signed with the EU may very well not be fulfilled. Does this then mean that legal certainty cannot be achieved?

From a legal standpoint the concept of specialized law trumping general law has a long pedigree within international jurisprudence. Already in 1625 Hugo Grotius<sup>214</sup> published "*De jure belli ac pacis*" (The Law of War and Peace) in Latin. That publication is by many considered a foundational work in International Law.<sup>215</sup> There he stated that among agreements with equal qualities the more specific should be given preference, being better suited to deal with the subject matter.<sup>216</sup>

We know that EU considers its own legislation as *Lex Superior*, in relationship to national legislation after the ECJ's rulings in *Costa v. ENEL* and *Van Gend en Loos*. And added to that is the ECJ's ruling in *Kadi I* which establishes the same for external relations. Meanwhile the rest of the world sees it as a form of *Lex Specialis* compared to International Law; it being more complex and comprehensive. This begs the question, in particular regarding EU's legislation in

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<sup>214</sup> Encyclopedia Britannica, 2016, Hugo Grotius - Dutch statesman and scholar

<sup>215</sup> Apple & White, 2016, Leading figures in International Law - Hugo Grotius

<sup>216</sup> Grotius, 1625, *De jure belli ac pacis*. Book 2, Ch. 16. para XXIX

areas of shared competence; how can you find a middle ground – or common denominator between two negotiation parties with externally and internally differences in the handling IP and IPR legislations?

The EU has been and still is working towards developing a more integrated infrastructure for IPR protection, its purpose to contribute towards economic growth and job creation. Another purpose has been to strike a proper balance between right-holder and user/customer interests. The US has its own IPR infrastructure and they are both based on the same international agreements and therefore on similar principles, thus making the transatlantic playing field for IP relatively predictable for traders.<sup>217</sup>

The EU's IPR protection is a shared competence and therefore it creates an issue of understanding the process for the settlement of IP and IPR issues within the EU internal market for third countries. EU can only guarantee the fulfilment of legal expectations by its trading partners under its international obligations and secondary legislation –as interpreted by the ECJ under EU primary law - thus only as far as EU has legislated on the subject matter within an area.

Third countries can expect fulfilment of legal expectations only as far as EU has legislated and legal certainty only within the framework of EU's secondary legislation as interpreted by the ECJ under EU primary law. By the above and for the purpose of this thesis, it can be reasonably concluded that IP and IPR's are a shared competence within the EU. Therefore, based on the research done for this thesis, it is highly likely that the EU today cannot guarantee the legal certainty of IPR's under the TTIP. In the extension one can relatively safely assume that this issue goes beyond IP and IPRs and can affect all areas with shared competences and any international treaty or agreement signed by the EU itself especially when not applying MS ratification. Thus legal expectations and certainty are both at risk.

In the beginning of the introduction I wrote "*If it ain't broke, don't fix it!*" But the EU legislation in this case seems to be broken. In case the decision eventually becomes to sign the TTIP by both the EU and the USA, there will be a need to establish the purpose behind the new agreement so that fits with the purpose of EU, of EU primary law, of EU Directives and Regulations (secondary law) and how it relates to IP as a shared competence. This is a must for any expectations of fulfilment of obligations by the EU arising from it. As things currently stand only the ECJ, through the process of a preliminary ruling, based on interpretation of EU primary law, i.e. the Treaties and the attached Charter can provide a binding decision on this. The issue with that approach is that the ECJ works on case by case basis, providing narrow and often case specific rulings on the interpretation. It is also important to note that the ECJ, as we have seen, turn to its own

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<sup>217</sup> European Commission, 2016, EU position paper on intellectual property, p. 1

secondary legislation for definitions of limitations on the EU's international obligations under international treaties.

This will naturally have an effect also on other Third Country FTA's that EU is looking to sign in the future. As examples one can think of the potential agreements with the 7 member states of the regional group Association of South East Asian Nations (ASEAN), Japan<sup>218</sup> and the recently begun negotiations between Australia and EU<sup>219</sup>. Australia Due to its isolated negotiation position, a single nation, for instance would have a very weak position in negotiating with EU, similar to its situation with the TPP.

So is there a possible solution to this built-in legal uncertainty and potential mismatch for legal expectations? Well, there are some far reaching alternatives that can be looked at;

- EU provides full harmonization of the legislation, within the internal market, in all areas covered by the potential FTA.
- EU, in the FTA, with the approval of its MSs adds a *pacta sunt servanda* chapter. I.e. a section called "*Full compliance and guarantee of legal certainty*" that clearly sets out how EU perceives its possibility of establishing legal certainty in areas of shared competence.

In the opinion of this author neither of these are likely to occur, but looking at some of the case law used for this thesis and the way that the EU has even torn up older trade agreements, based on their incompatibility with EU legislation, it seems that something has to be done. It is highly likely that the initiation of any such change has to come from the outside of the Union.

Further research in this area could be done to see how these issues may affect the validity of both newer and older FTA's signed by the EU without going through the ECJ evaluation.

Related to that I would like to finish this thesis by citing AG Maduro's Opinion on *Kadi I* in regards to the ECJ's role as the final arbiter on the interpretation of EU law in EU's international relationships;

*"However, the Court cannot, in deference to the views of those [international] institutions, turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect. [...] Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them. Consequently, in situations where the Community's fundamental values are in the*

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<sup>218</sup> European Commission, 2016, Agreements - Trade, updated May 2016

<sup>219</sup> Australian Government, 2016, FTA negotiations and the public consultations process

*balance, the Court may be required to reassess, and possibly annul, measures adopted by the Community institutions, even when those measures reflect the wishes of the Security Council.”* <sup>220</sup>

Thank you!

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<sup>220</sup> Joined cases C-402/05 P & C-415/05 P Kadi v Council and Commission (AG), 2008, Para 44

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