

3-1-2000

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### Recommended Citation

Lee A. Askew, *ECJ, the ICJ and Intellectual Property: Is Harmonization the Key, The*, 7 *Tulsa J. Comp. & Int'l L.* 375 (1999).

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## THE ECJ, THE ICJ AND INTELLECTUAL PROPERTY: IS HARMONIZATION THE KEY?

*Lee Ann Askew*<sup>†</sup>

### I. INTRODUCTION

Most everyone agrees that intellectual property laws are essential to ensure that creators of inventions, ideas, designs, services, and the like are rewarded for their creativity and to promote the continuation of such creations. However, everyone does not agree on how to adequately protect these creations once they are out in the market place. The protection of intellectual property is at the forefront of agreements between nation-states because of the relative ease of copying, and the lax attitude of some nation-states to prevent and punish infringement. Because inventors and creators look to their governments to protect the product of much invested time and money, nation-states realize the importance of protecting their citizens' rights in order to promote the continuation of inventions and creations.

In recent decades, there has been recognition and a growing need for international intellectual property protection.<sup>1</sup> General technological advances promote the efficiency of developing new creations as well as comprise the value of products and services, thus, creating substantial

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<sup>†</sup> J.D. May 2000. Since I began my research on this topic in fall 1998, many changes have taken place some of which I will discuss. Intellectual property within the European Union (EU) is a rapidly growing body of case law and legislation that is ever changing. It is difficult for one to stay abreast of the constant activity within international intellectual property law. I have tried to include the most up to date material on the topic, but I am also aware of how it can and will likely become outdated very quickly. Therefore, this article is not meant to be a comprehensive discussion of EU or UN (United Nations) law, but merely a theoretical piece speculating on the impact of harmonizing international intellectual property law.

1. See A. David Demiray, *Intellectual Property and the External Power of the European Community: The New Extension*, 16 MICH. J. INT'L. L. 187 (1994).

cost for research and development.<sup>2</sup> Inventors and creators demand protection, and governments must provide them with protection if it wants to promote innovation.<sup>3</sup> If the inventor or creator is not adequately protected, he will find himself at a disadvantage in the highly competitive foreign market.<sup>4</sup> Agreements between European Union (EU) Member States and treaties such as the General Agreement on Tariffs and Trade (GATT) have diligently attempted to deal with international intellectual property protection.

"An argument which is becoming quite influential is the thesis that presently 'technology drives investment' and to the extent that technology 'is reluctant to flow where it is not protected' the lack of an adequate level of protection could stunt technological transfer and foreign investment."<sup>5</sup> Economic development must have new inventions and creations to run more efficiently; however, nation-states are split as to how to adequately protect these inventions and creations.<sup>6</sup>

This article focuses on how the EU and the European Court of Justice (ECJ) handles intellectual property law and disputes and hypothesizes how the International Court of Justice (ICJ) could implement some EU and ECJ methods to help it gain popularity among the UN Member States. Since the creation and implementation of organizations and agreements like the World Trade Organization (WTO), GATT, Trade Related Aspects of Intellectual Property Rights (TRIPS), and World Intellectual Property Organization (WIPO), the popular method of dispute settlement among the signatory countries (which most are signatory countries to the UN Charter as well) is arbitration. However, what if an injured party does not wish to settle the dispute by arbitration or an arbitration judgment cannot be enforced? Is all lost, or could a court of law provide some relief to the injured party? Does the EU provide an adequate method of protecting the rights of intellectual property owners that could be followed within the UN, or would the creation of a specialized court within the UN more adequately accommodate intellectual property rights?

First, some background of the EU and its institutions will be discussed to educate the reader on how ever changing the European Community is.<sup>7</sup> Next, a more in-depth analysis of the ECJ will be discussed, followed by the implementation of intellectual property protection and

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2. *See id.*

3. *See id.*

4. *See id.*

5. Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South*, 22 VAND. J. TRANSNAT'L L. 243, 260 (1989).

6. *See id.* at 243-44.

7. EU and the Community will be used interchangeably throughout this article. Also, the Court and ECJ will be used interchangeably as well.

harmonization throughout the EU and its Member States. Next, a brief overview of the UN and its institutions/organs will be discussed with most of the emphasis on the ICJ. Finally, the benefits of harmonizing international intellectual property laws will be discussed.

## II. THE EUROPEAN UNION AND THE EUROPEAN COURT OF JUSTICE

### A. *The European Union*

After World War II, Europe was in political and economic turmoil, thus making the dream of a unified Europe come closer towards a reality for European countries eager to gain back their political, social and economic independence. The European Union, created by the Treaty on European Union (TEU), is the successor to the European Community (EC), and is the umbrella for the European Community, Common Foreign and Security Policy, and Justice and Home Affairs,<sup>8</sup> also known as the "three pillars." Currently, there are fifteen Member States in the European Union and soon to be more.<sup>9</sup> Since its entrance into Europe, the EU has made impressive progress by maintaining external trade policies and implementing an internal market among the Member States. Its goals are to breakdown the internal barriers between the Member States and harmonize the law especially in the area of social policy. The introduction of the single currency, the EURO, is one example of harmonization that has taken place within the EU.<sup>10</sup> With the Treaty of Amsterdam (ToA) entering into force in May 1999 after being ratified by all of the Member States,<sup>11</sup> the role of the Community and its Member States has become more defined, as will be discussed below.

Four essential freedoms for the TEU were set out in the Community's establishing document: the free movement of goods, persons, services and capital. These remain the objectives of the Community today. "These basic freedoms of the common market can only be realized by

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8. The Treaty of Rome, which created the European Community, was signed on March 25, 1957 and entered into force on January 1, 1958. The Treaty on European Union, also called the Maastricht Treaty, was signed at Maastricht on February 7, 1992, and entered into force on November 1, 1993, thus creating the European Union. EU replaced the term EC around 1993. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 209 (1995).

9. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *See id.* Cyprus, Malta, Estonia, Slovenia, Poland, Hungary and Czech Republic are expected to be admitted in 2003.

10. For more information on the EURO, *see generally* Werner Van Lembergen & Margaret G. Wachenfeld, *Economic and Monetary Union in Europe: Legal Implications of the Arrival of the Single Currency*, 22 *FORDHAM INT'L L.J.* 1 (1998).

11. *See* Europa, *The History of the European Union* (visited Apr. 8, 2000) <<http://www.europa.eu.int/abc/history/1999>> [hereinafter Europa, *History of the EU*].

approximating the laws of the EU Member States, thus installing a system through which all obstructions to competition are removed."<sup>12</sup> Obviously, no free movement of intellectual property rights exists; however, over the years, intellectual property has been viewed as falling under the free movement of goods.<sup>13</sup> There are three major issues in the interplay between national industrial and commercial property rights [a.k.a. intellectual property rights] and the Community principle of free movement of goods.

The first is the determination of those national rights which qualify for recognition under [a]rticle 36. A related issue is whether accessory rights or interests can be protected as "mandatory requirements". . . . The third issue is the demarcation of the field of application and level of protection of industrial and commercial property rights.<sup>14</sup>

### *B. The Institutions*

The EU is governed mainly by five institutions: the Commission, the Council of Ministers, the Parliament, the European Council and the Court of Justice. Some other institutions that will be mentioned here but not discussed are the Court of Auditors; European Investment Bank; Economic and Social Committee; Committee of the Regions; European Ombudsman; and European Central Bank.<sup>15</sup>

In a similar fashion to the U.S., the Commission acts as an executive branch of the EU focusing its energy, powers and interests in the implementation of EU law.<sup>16</sup> Appointed by the Member States, the Commissioners, currently 20, carry out the policy issues of the EU, and they have authority to draft legislation.<sup>17</sup> Each Commissioner is responsible for a particular area of policy and ensures legislation is carried out.<sup>18</sup> A unique feature of the Commission is its power to mediate disputes involving EU law – traditionally, a judicial function.<sup>19</sup> Regulations, directives and decisions are the types of legislation adopted by the Commission – "six hundred to seven hundred new legal instruments each year."<sup>20</sup> Although faced with criticism, the Commission has proved vital to the function and progress of the Community.

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12. Victor Vandebek, *Realizing the European Community Common Market by Unifying Intellectual Property Law: Deadline 1992*, 1990 BYU L. REV. 1605.

13. See GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 396-97 (1993).

14. *Id.* at 397.

15. See generally *Europa*, (visited Apr. 8, 2000) <<http://www.europa.eu.int>>.

16. See JOHN MCCORMICK, *THE EUROPEAN UNION: POLITICS AND POLICIES* 103-04 (1996).

17. See *id.*

18. See *id.*

19. See *id.*

20. *Id.* at 116.

Seen as the most powerful institution of the four, the Council of Ministers is the final authority on what becomes EU law. Depending on the topic to be discussed, membership of the Council changes.<sup>21</sup> For instance, if employment is the issue, a council of employment foreign ministers will assemble to discuss legislation in the employment area. Likewise, if the environment is the issue, a council of environmental foreign ministers will assemble to discuss legislation in the environmental area. Typically, the Parliament and/or Commission submit proposed legislation to the Council of Ministers, who then accepts, amends or rejects the legislation.<sup>22</sup> This “quasi-veto” power is why some view it as the most powerful EU institution.

The Parliament, the largest of the institutions, is where propositions of law initiate.<sup>23</sup> Thought of as the legislative body of the EU in theory, it actually lacks the typical powers of a legislature – “it cannot introduce laws, enact laws, or raise revenues.”<sup>24</sup> It can only make requests to the Council and/or the Commission.<sup>25</sup> “In short, Parliament either shares powers with or negates the powers of the other EU institutions.”<sup>26</sup> However, the view of Parliament is changing. It has drawn more attention by arguing democratic accountability, thus, increasing its responsibility and being noticed more for its opinions.<sup>27</sup>

“Simply defined, European Council is a collective term for the heads of government of EU member states, their foreign ministers, and the president of the Commission.”<sup>28</sup> The Council can be thought of as filling the gap between the major institutions – setting up guidelines which the other institutions follow.<sup>29</sup> This can be seen through its composition – it is composed of government heads and members from the other institutions, with the exception of the Court.

### *C. The European Court of Justice*

Created from the oldest treaty of the former European Community,<sup>30</sup> the ECJ is the sole judicial organ of the EU.<sup>31</sup>

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21. See MCCORMICK, *supra* note 16, at 124-25.

22. *See id.*

23. *See id.* at 143-44.

24. *Id.*

25. *See id.*

26. MCCORMICK, *supra* note 16, at 143-44.

27. *See id.*

28. *Id.* at 182-83.

29. *See id.*

30. European Coal and Steel Community (ECSC).

31. *See Consolidated EC TREATY*, part 5, tit. I, ch. 1, sec. 4.

Its main functions are to ensure that the law is enforced, irrespective of political considerations (especially against Member States); to act as referee between Member States and the Community as well as between the Community institutions *inter se*; and to ensure the uniform interpretation and application of Community law throughout the Community.<sup>32</sup>

The Court also has been delegated broad powers by the TEU, including the power to invalidate national legislation.<sup>33</sup>

### 1. Structure of the ECJ

Currently, there are 15 judges – one representing each Member State and appointed by the respective Member State, though this appointment method is not delineated in the Treaties.<sup>34</sup> Judges on the Court serve staggered six-year terms, which means there are six to seven vacancies every three years, and a judge can be re-appointed.<sup>35</sup> Like judges on the U.S. Supreme Court, there is no retirement age; likewise, a judge cannot be removed from office except by “unanimous opinion of the other judges and advocates general,”<sup>36</sup> and only if “he no longer fulfills the requisite conditions or meets the obligations arising from his office.”<sup>37</sup>

The President of the Court is elected by the other judges for a three-year term and can be re-elected.<sup>38</sup> “His function is to direct judicial and administrative business of the Court and to preside at sessions of the full court,”<sup>39</sup> but he has no casting vote.<sup>40</sup> Each chamber<sup>41</sup> president is appointed by the court for a one-year term.<sup>42</sup>

Unlike the U.S. Supreme Court, there is only one opinion issued – no concurring or dissenting opinion is given, and the votes are not disclosed.<sup>43</sup> Judges swear to uphold the secrecy of their deliberations, thus

32. T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 57 (3d ed. 1994).

33. *See* Consolidated EC TREATY, art. 231 (ex art. 174).

34. *See* HARTLEY, *supra* note 32, at 58.

35. *See id.*

36. *Id.* *See infra* II.D.

37. HARTLEY, *supra* note 32, at 58 (paraphrasing art. 6 of the Statute of the Court of Justice).

38. *See id.*

39. *Id.* A full court consists of seven. Consolidated EC TREATY art. 221 (ex. art. 165).

40. *See* HARTLEY, *supra* note 32, at 58.

41. A chamber consists of three to five judges, typically hearing appeals against the Court of First Instance (CFI) [a new regional court created to help lessen the ECJ caseload], “any reference for a preliminary ruling or any other case except one brought by a Member State or Community institution,” and has the option of referring the case to the ECJ. *See id.* at 59 (paraphrasing Consolidated EC TREATY art. 221 (ex. art. 165)).

42. *See id.* at 8.

43. *See id.*

protecting them from pressure from Member States.<sup>44</sup>

## 2. Jurisdiction of the Court

The Court has only express, limited jurisdiction.<sup>45</sup> Primarily, the Court gives judgments, but occasionally it will issue advisory opinions or rulings upon request from any institution or a Member State.<sup>46</sup> The Court hears three issues on preliminary rulings: "interpretation of a provision of Community law, the effect of a provision in a national legal system, . . . and the validity of such a provision."<sup>47</sup> Even though such preliminary rulings are only advisory opinions, they carry legal consequences. For example, if an agreement is entered into by an institution or Member State that is incompatible with the EC Treaty, then the Treaty must be amended to accommodate the agreement.<sup>48</sup>

The Court has jurisdiction over infringement actions brought by the Commission or a Member State against another Member State for: (a) not fulfilling obligations under the EC Treaty, (b) a Member State applying national provisions when it should be applying the harmonization provisions of Article 100a ( now article 95 under the Treaty of Amsterdam (ToA) on major needs grounds set out by Article 36 of the EC Treaty (now article 30 under the ToA), or (c) a Member State making improper use of Article 223 or 224 (now articles 296 and 297 under the ToA) powers.<sup>49</sup>

44. *See id.*

45. *See Consolidated EC TREATY art. 225(3) (ex. art. 168a(3)).*

46. *See HARTLEY, supra note 32, at 66.* For example, an institution or a Member State can request an opinion on whether an international agreement which the Community intends to conclude with a non-member State is compatible with the EC Treaty. *See id.*

47. *Id.* at 66-67.

48. *See id.*

49. The judgment is typically money damages, and the party must comply immediately. *See THE EC ADVISORY BOARD, THE BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW, THE ROLE AND FUTURE OF THE EUROPEAN COURT OF JUSTICE, 7-8 (1996) [hereinafter EC ADVISORY BOARD].* Under Article 223,

a Member State is not allowed to supply information the disclosure of which it considers contrary to the essential interests of its security," and it is also to "take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes . . . .

*Consolidated EC TREATY, art 296 (ex. art. 223).* Under Article 224,

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a



The Court has jurisdiction over many types of direct actions. A direct action is an action that begins in the Court, as opposed to reaching the Court on appeal.<sup>50</sup> The Court has judicial review over the legality of acts of the Council, the Commission, the Council and Parliament acting together, and the Parliament's acts effecting third parties.<sup>51</sup> These can be brought by a Member State, the Council, or the Commission.<sup>52</sup> When a Member State or Community institution fails to act and infringes the EC Treaty, a Member State, Community institution or private person<sup>53</sup> can bring an action before the ECJ.<sup>54</sup>

There are two types of direct actions: by agreement of parties (which typically arise out of a contractual agreement) and by direct operation of law.<sup>55</sup> Direct actions by agreement of parties are not very typical; unlike direct actions by operation of law, (which involve the Community or a Member-State as the defendant), actions in tort damages, appeals of penalties imposed by EU regulations, and employment disputes between the Community and its employees.<sup>56</sup>

Enforcement actions are actions against a Member State imposed when a Member State is not complying with or has violated Community law.<sup>57</sup> If the party bringing the action against a Member State is the Commission (which is typically the case), then the Member State is first given an opportunity to explain its position.<sup>58</sup> Then, the Commission gives its position, which the Member State must obey or else the Commission will ask the Court to enforce its opinion.<sup>59</sup>

The Court receives other direct actions only on appeal. The Court can hear disputes between the Community and its employees only on appeal after the case has first been through the CFI (Court of First Instance).<sup>60</sup> Also on appeal, the Council Regulations for the Community Trademark and Plant Variety Rights has said that the Court can decide questions of law only after the Board of Appeals for the respective Communities initially hears the action.<sup>61</sup> Moreover, the Court has jurisdiction

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threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

*Id.* at art. 297 (ex. art. 224).

50. See HARTLEY, *supra* note 32, at 66.

51. See EC ADVISORY BOARD, *supra* note 51, at 8 (paraphrasing Consolidated EC TREATY art. 230 (ex. art. 173)).

52. See *id.*

53. Private persons have to go to the CFI first, then to the ECJ on appeal. See *id.* at 9.

54. See Consolidated EC TREATY art. 232 (ex. art. 175).

55. See HARTLEY, *supra* note 32, at 67.

56. See *id.*

57. See *id.*

58. See *id.*

59. See *id.*

60. See Consolidated EC TREATY art. 236 (ex art. 179).

61. See EC ADVISORY BOARD, *supra* note 49, at 9-10.

over miscellaneous matters pursuant to treaties.<sup>62</sup>

For some time, many international and European scholars, as well as the Court, thought the Court had no inherent jurisdiction; however, more recently, the ECJ has held that it does have inherent jurisdiction when it needs to issue a judgment under article 220 of the Consolidated EC Treaty.<sup>63</sup> As a result, this inherent right was incorporated into article 230 of the Consolidated EC Treaty by the Maastricht Treaty.<sup>64</sup>

### 3. Procedure of the Court

When a case goes before the Court, it proceeds very differently than a case before a U.S. court. There are four stages of a direct action proceeding: the written proceedings, the preparatory inquiry, the oral hearing and the judgment.<sup>65</sup> The written proceedings are very similar to the American pleading system. In a direct action, the applicant (plaintiff) submits a written document to the Court (not to the opposing party like in the American system) stating a basis for his claim.<sup>66</sup> Then, the Registrar<sup>67</sup> serves the document to the opposing party, who is then entitled to file his defense with the Registrar<sup>68</sup> (which is the equivalent of a defendant's answer to a pleading in the American system). At this stage, the applicant has an opportunity to reply to the defense, then the defense has an opportunity to answer in a rejoinder.<sup>69</sup> The pleading stage is then closed and the written proceedings are over.<sup>70</sup>

The preparatory inquiry concerns the determination of questions of fact made by the Court<sup>71</sup> and is somewhat different than the American system. When an application is made to the Court, the President of the Court assigns the case to one of the Chambers and appoints a judge, known as judge rapporteur, while the First Advocate General assigns the case to one of the advocate generals.<sup>72</sup> "The judge rapporteur will make a

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62. Penalties, *see* Consolidated EC TREATY art. 229 (ex. art 172); non-contractual liability, *see id.* art. 235 (ex. art 178) and art. 288 (ex. art. 215); European Investment Bank, *see id.* art. 237 (ex. art. 180); arbitration clauses, *see id.* art. 238 (ex. art. 181); disputes submitted under special agreements, *see id.* art. 239 (ex. art. 182); international agreements, *see id.* art. 300(6) (ex. art. 228(6)).

63. *See* EC ADVISORY BOARD, *supra* note 49, at 13 (citing Case 66/76, CFDT V. Council 1977 E.C.R. 305 construing Consolidated EC TREATY art. 220 (ex. art. 164)).

64. *See id.* (paraphrasing Consolidated EC TREATY art. 230 (ex. art. 173)).

65. *See* HARTLEY, *supra* note 32, at 69.

66. *See id.* at 70.

67. The Registrar is appointed by the Court for a six-year term to handle all procedural matters including any documents filed with the Court to be submitted to the Court and the parties. *See id.* at 62.

68. *See id.* at 70.

69. *See id.*

70. *See* HARTLEY, *supra* note 32, at 69.

71. *See id.*

72. *See id.* at 70.

preliminary report dealing with the issues of fact in the case," which is then submitted at a Court administrative meeting for the entire Court to determine "what issues of fact will need to be proved and what evidence is necessary for this purpose."<sup>73</sup> Unlike the American system, the Court decides if witnesses are to be called and who they will be.<sup>74</sup> The witness then testifies before the chamber and the parties, and then the testimony is put into writing.<sup>75</sup>

The oral hearing is somewhat equivalent to the American system of "everyone gets his day in court," but it is not as important to the outcome of the case since the court has already seen and heard the evidence before this proceeding. After the judge rapporteur submits his report (which states the facts and a summary of the parties' arguments) to the Court in preparation for the hearing before the parties, the parties' counsel will have the opportunity to make arguments and answer questions the Court or advocate general has at the hearing; thus concluding the parties "day in court."<sup>76</sup> After the oral hearing, the Court will adjourn, and the advocate general will prepare an opinion to be heard at the next hearing, which the parties will not have an opportunity to comment on.<sup>77</sup> The court will then retire for deliberations.

During deliberations and to maintain confidentiality, only the judges are present.<sup>78</sup> The judge rapporteur prepares a draft of what the Court's judgment will be.<sup>79</sup> Each judge, starting with the most junior judge, gives his opinion of the judgment.<sup>80</sup> A vote may be taken before a final decision is reached.<sup>81</sup> Once a final decision is reached, every judge signs it and then it is delivered in open Court and subsequently published in the Official Journal.<sup>82</sup> The whole judgment and the advocate general's opinion are published in the official law reports.<sup>83</sup>

A unique feature of the Court is that there is always just one judgment – meaning, no concurring or dissenting opinions.<sup>84</sup> Also, there is no appeal from an ECJ judgment that began in the ECJ (known as a direct action); hence, giving the court its name "the court of first and last resort."<sup>85</sup> When an action begins in a national court, that national court can

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73. *Id.* at 70-71.

74. *See id.* at 71.

75. *See* HARTLEY, *supra* note 32, at 71.

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See* HARTLEY, *supra* note 32, at 69.

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.* at 59.

85. As compared to a case that began in a national court, where the national court referred

make a request to the ECJ for a preliminary ruling on the relevant Community law for the case, which the national court will use as the law to apply to the facts of the case.<sup>86</sup> Then, the national court issues a judgment.<sup>87</sup> This judgment from the national court can be brought before the ECJ on appeal.<sup>88</sup> A tribunal whose decisions are not appealable must request a preliminary ruling from the Court.<sup>89</sup> The ability of the Court to give such a preliminary ruling has allowed the Court to establish the doctrine of direct effect: "if a legal provision is said to be directly effective, it is meant that it grants individuals rights which must be upheld by national courts," and the doctrine of the supremacy of Community law over national law: "[i]t is a basic rule of Community law that directly effective provisions of Community law always prevail over a provision of national law."<sup>90</sup> Once a judgment is issued, the Court has authority to penalize a Member State by imposing a fine for non-compliance in infringement proceedings.<sup>91</sup>

#### 4. Precedent and Source of Law in the ECJ

Unlike the American system, the doctrine of *stare decisis* is not practiced in the ECJ; however, the case law is vital to the development of Community law throughout the EU.<sup>92</sup> The Court does follow its previous decisions in most cases without analyzing them like American courts, but it rarely refers to any previous decisions.<sup>93</sup> Changing circumstances and changes in the opinions of the judges are reasons that have been suggested as to why the Court chooses not to follow its precedent; hence, "[w]here this happens, the Court does not normally overrule the earlier case as an English court would: it simply ignores it."<sup>94</sup>

There are basically three sources the Court looks to in deriving EU law: primary legislation, secondary legislation and international agreements.<sup>95</sup> Primary legislation is legislation created by the Member States including treaties, annexes, schedules, protocols, and amendments.<sup>96</sup> Secondary legislation is law created by EU institutions that expressly em-

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to the ECJ for a preliminary ruling on an issue of law. See HARTLEY, *supra* note 32, at 66.

86. *See id.*

87. *See id.*

88. *See id.* at 66.

89. *See id.*

90. HARTLEY, *supra* note 32, at 195, 234. Neither the doctrine of direct effect nor the doctrine of supremacy of Community law is expressly stated in any of the EU Treaties.

91. *See* Consolidated EC TREATY art. 228(2) (ex. art. 171(2)).

92. *See* HARTLEY, *supra* note 32, at 83.

93. *See id.*

94. *Id.* at 83-84.

95. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 343 (2d ed. 1995).

96. *See id.*

powers them by primary legislation to make binding, juridical acts.<sup>97</sup> The only international agreements recognized by the Court are those concluded by the EU with Member States and non-member States.<sup>98</sup>

The ECJ must make sure written Community law, unwritten Community law (such as custom), and general principles of law are observed when making judgments.<sup>99</sup> It will often apply general rules of international law in dealing with principles of proportionality, good faith and legal certainty, since there is no Community law directly dealing with these principles.<sup>100</sup>

Proportionality requires that there exist a reasonable relationship between the ends and the means. It implies both that the means must be reasonably likely to bring about the objective, and that the detriment to those adversely affected must not be disproportionate to the benefit to the public. It is to some extent analogous to the English concept of reasonableness.<sup>101</sup>

#### *D. The Advocates General*

Advocates general opinions are the foundation of the Court's opinion. Generally, the larger Member States, such as Germany, France, Italy, Spain, and the United Kingdom, each propose one, and the remaining Member States rotate in an advocate general.<sup>102</sup> An Advocate General has the same status as a judge, is appointed in the same manner as a judge, has the same qualifications and tenure as a judge and also receives the same salary.<sup>103</sup> They also rank equal in precedence with the judges according to seniority in office, but they have no voting power in deliberations.<sup>104</sup>

Among the advocate generals, one is appointed First Advocate General, whose function is to arbitrarily assign cases brought before the Court to each advocate general.<sup>105</sup> An advocate general is responsible for researching, with the help of his legal secretary, the issues of the case assigned to him.<sup>106</sup> Then, the advocate general gives his opinion (which must be impartial and independent) on the law applied to the facts of the case after the parties have argued their cases to the Court and before the

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97. *See id.* (citing EC TREATY art. 189).

98. *See id.*

99. *See id.* at 344.

100. *See CARTER & TRIMBLE, supra* note 95, at 344.

101. HARTLEY, *supra* note 32, at 155.

102. *See id.* at 60.

103. *See id.*

104. *See id.*

105. *See* Consolidated EC TREATY art. 222 (ex. art.166).

106. *See* HARTLEY, *supra* note 32, at 60.

judges retire for deliberation.<sup>107</sup> This opinion is given great weight and considered to have great value, though not binding on the Court's ultimate decision, and is usually followed fully, but sometimes is deviated from in part or in whole.<sup>108</sup> There is no position in the American system similar to the ECJ's advocate general.

### *E. Popularity with the ECJ*

The ECJ has gained popularity since its establishment, and there appears to be no relief in sight.

The current caseload is five times more than what it was in 1970. Between 1970-80, the number of cases tripled from 79 to 279. Direct actions nearly quadrupled from 47 to 180. Preliminary references tripled from 32-99. When the Court of First Instance (CFI) was established, 385 cases were brought (294 direct actions and 139 preliminary references). From 1993-95, the total number of cases before the ECJ and CFI exceeded 600 per year (including approximately 160 preliminary references and 250 direct actions). At the end of 1995, there were 508 cases pending before the ECJ and 427 cases pending before the CFI.<sup>109</sup>

Many reasons have been suggested for the increased caseload of the Court, such as lawyers and European citizens becoming more aware of the possibilities for dispute resolution, the enlargement of the TEU, Community law penetration into Member States, and Community policy development and intensification in policies affecting all Member States.<sup>110</sup> Also of relevance are the powers granted to the ECJ under Consolidated EU Treaty art. 228(2) (ex. art. 171(2)),<sup>111</sup> and the expansion of the Court's jurisdiction by treaties other than Community treaties.<sup>112</sup> Although the establishment of the CFI and enlargement of its jurisdiction has helped the caseload of the ECJ, the CFI continues to grow as well.<sup>113</sup>

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107. *See id.*

108. *See id.*

109. EC ADVISORY BOARD, *supra* note 49, at 1.

110. *See id.* at 2. Some of the important policy issues include: environment, consumer protection, trademarks, merger control, and harmonization of national regulations on public health matters and others. *See id.*

111. *See id.* art. 228(2) gives the Court power to fine a Member State for non-compliance of judgments in infringement proceedings.

112. *See id.* Other treaties that have given the ECJ jurisdiction are: Community Patent Convention, Brussels and Lugans Conventions on Jurisdiction and Enforcement of Judgments in Civil on Commercial Matters, and the Rome Convention on the law applicable to contracts. *See id.* at 2-3.

113. *See id.*

To help with the expediency of the caseload and the language barrier, ECJ judges have other resources at their disposal such as legal secretaries,<sup>114</sup> the Registry,<sup>115</sup> the Library,<sup>116</sup> Research and Documentation,<sup>117</sup> Translation Directorate,<sup>118</sup> and Interpretation Service and Databases.<sup>119</sup>

### III. PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN THE EU AND ECJ

There is no provision like Article I, Section 8, clause 8 of the U.S. Constitution<sup>120</sup> in any of the Treaties establishing the TEU that protects intellectual property rights like the U.S. does.<sup>121</sup> "Unfortunately, Member States legal systems have different approaches as to the precise definition of the rights, their acquisition, term, scope, administration, etc."<sup>122</sup>

When a Member-State law grants a monopoly of exploitation to the owner of such a right, it follows that the owner may forbid any unauthorized third, party, or infringer, from any sale, use or other exploitation within that State. If an industrial or commercial property right has considerable economic significance, the owner in one State usually seeks to obtain parallel protection in all of the other States of the Community. This is not always possible, either because someone else has prior conflicting rights in another State, or because another State does not protect the right, or imposes differing requirements for recognition of the right. That sets the state for a Community law conflict.<sup>123</sup>

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114. Legal secretaries went from 1 per judge to 3 per judge. They are in charge of conducting preliminary research on a case. See EC ADVISORY BOARD, *supra* note 49, at 6.

115. The Registry conducts procedures before the Court. See *id.*

116. The Library provides research on particular issues of national/comparative law that arise out of a case. See *id.*

117. Two hundred lawyer-linguists translate procedural documents, advocate general opinions, and judgments into all Community languages. See *id.*

118. This group of legal specialists is in charge of interpretation of oral proceedings. See *id.* at 6-7.

119. This service includes case law of ECJ and CFI, national decisions relating to Community law, notes written on case law and a library catalog. See EC ADVISORY BOARD, *supra* note 49, at 7.

120. See "The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

121. See Robert J. Coleman, *The 1991 Horace S. Manges Lecture - Intellectual Property and the European Community After 1992*, 15 COLUM.-VLA J.L. & ARTS 117, 118 (1991).

122. BERMAN, *supra* note 13, at 396.

123. *Id.* at 406.

“[R]arely in the overall Community harmonization of laws program has there been such national reluctance to reach a consensus.”<sup>124</sup>

However, in implementing its goal of establishing a common market place and breaking down internal barriers between Member States, the EU has sought to harmonize intellectual property law in hopes of increasing protection of intellectual property rights (which it refers to as ‘industrial and community property rights’) of its citizens and businesses. The EC Treaty does not specifically address a protocol for intellectual property rights, and it “may in no way prejudice the rules in the Member States governing their respective systems of property ownership.”<sup>125</sup> Many Member States that oppose the Union legislating intellectual property rights have relied on article 222 as an argument against harmonizing intellectual property law.<sup>126</sup> However, there is a trend toward viewing the Union as having the power to harmonize intellectual property law throughout the Member States.<sup>127</sup> The Court has found authority for harmonization within article 36 and 222, and it has created some legal instruments for those who desire to have their inventions and creations protected uniformly throughout the Member States.<sup>128</sup>

#### *A. Treatment of Intellectual Property Rights within the EU and ECJ*

The ECJ has ruled that Member States are free to legislate intellectual property rights in the absence of Union law addressing the particular right in question, as long as the Member State’s decision on how to legislate the intellectual property rights issue is not contrary to the last part of Article 36.<sup>129</sup> Also, the ECJ has interpreted Article 222 as giving the Court the power to make sure intellectual property rights are handled with regard to the Treaty.<sup>130</sup> Facially, the language appears to give Member States broad discretion on how it wishes to legislate. Unifying different intellectual property laws is imperative if the implementation of a

124. *Id.* at 396.

125. Coleman, *supra* note 121, at 110 (paraphrasing Consolidated EC TREATY art. 295 (ex. art. 222)).

126. *See id.*

127. *See id.* at 118-19.

128. *See id.* at 118. In Coleman’s view, the [ECJ] began to define the limits of Treaty provisions like [Consolidated EU Treaty art. 30 and (ex. art 36) and art. 295 (ex. art. 222), . . . which might have been thought to insulate national intellectual property rights and the way in which they had traditionally been exercised from the Union principles of free movement of goods and services.

*Id.*

129. Article 36 (now article 30 under the ToA) does not allow a Member State’s national rules to be “a means of arbitrary discrimination or a disguised restriction on trade between Member States.” *See id.* at 120.

130. *See* Coleman, *supra* note 121, at 121-22.



“smooth-operating” internal market is to be achieved.<sup>131</sup> Furthermore, good policy reasons exist for harmonizing intellectual property laws.

*ex post* – as perceived after the investment in innovation has been incurred, incentives to innovation are not longer required – these exclusive intellectual property rights are anti-competitive since they restrain other people from taking advantage of innovation or reputation without the consent of the holder. . . . *ex ante* – from the time when the decision to invest or create was made – such rights encourage some forms of innovation that otherwise might not be worthwhile and so lead to a more competitive economy. Some inventions, once available, can be easily copied and without protection, it would not be worth investing in making them.<sup>132</sup>

### 1. Current Treatment of Various Intellectual Property Rights

There have been minimal efforts to harmonize intellectual property law in the area of copyrights. Construing article 36 in regard to protecting copyright owners,<sup>133</sup> the ECJ “held that once goods have been lawfully placed in the Union market, either by the right holder or with his consent, national intellectual property rights cannot be used to prevent goods from entering another Member State.”<sup>134</sup> Therefore, “the importation of copyrighted goods cannot be prevented.”<sup>135</sup> The right holder’s intellectual property rights are considered “exhausted” at this point.<sup>136</sup> Intellectual property rights are exhausted once certain events take place, depending on whether it is a patent, copyright or a trademark.<sup>137</sup> If these rights were not exhausted at some point, the rights could expand indefinitely, thus causing interference in the common market.<sup>138</sup> Fortunately, there is less need for action with copyright and similar rights, since its protection is automatic and not dependent on registration.<sup>139</sup>

With regard to providing services, article 59 through 66 of the TEU (now articles 49 to 55 of the ToA) address protection of services, such as

131. *See id.*

132. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 216 (6th ed. 1997).

133. Article 36 “provides that treaty requirements ensuring the free movement of goods – in particular Article 30 – do not preclude restrictions on imports justified by the need to protect industrial and commercial property, including copyright and neighboring rights.” Coleman, *supra* note 12, at 119.

134. *Id.*

135. *Id.*

136. *See id.*

137. *See* FREDERICK ABBOTT ET AL., THE INTERNATIONAL INTELLECTUAL PROPERTY SYSTEM: COMMENTARY AND MATERIALS PART ONE 604-05 (1999).

138. *See id.*

139. *See* Coleman, *supra* note 121, at 122.

broadcasting.<sup>140</sup> The Court has ruled "these provisions must also be interpreted as not prejudicing national intellectual property regimes, although there is no explicit provision in the Treaty parallel to Article 36."<sup>141</sup> The "exhaustion" doctrine does not apply absolutely when the type of service is a right-holder's work exploited by permission through public performance or rental.<sup>142</sup> The policy behind such a ruling recognizes the right-holder "has a legitimate interest in receipts from successive performances or rental transactions."<sup>143</sup>

In the design field, the Court has recently

confirmed that neither the acquisition of an intellectual property right nor its exercise in and of itself constitutes an abuse of a dominant position, even where the objects in question are spare parts for which there is no alternative source of supply. Some further element of abuse must be shown, such as predatory pricing or a refusal to supply.<sup>144</sup>

Two possibilities exist for the move toward harmonization: a directive and a Community wide system for intellectual property rights.<sup>145</sup> As will be discussed, legislation in the area of trademark rights has been most successful thus far, and the move toward harmonizing patent law is not too far behind.

## 2. EU Trademark Directive

The first evidence of efforts to harmonize occurred with the enactment of the European Union Trademark Directive 89/104. At the time of the Paris Convention, registration methods differed in some areas of industrial property rights, like patents, that the Paris Convention had not directly addressed.<sup>146</sup> As a result, Member States had inherent power to make agreements with one another as long as the agreement did not conflict with the TEU; thus, clearly showing the need for some type of harmonization among the Member States, which the Union has not yet attained.<sup>147</sup>

The exclusive rights granted a trademark allow the owner to prevent any authorized use of an identical or similar mark if it leads to a 'like-

140. See Consolidated EC TREATY art. 49-55 (ex. arts. 59-66).

141. Coleman, *supra* note 121, at 119-20.

142. See *id.* at 120.

143. *Id.*

144. *Id.* at 121. For more information on design protection, see generally Graeme B. Dinwoodie, *Federalized Functionalism: The Future of Design Protection in the European Union*, 24 AIPLA Q.J. 611 (1996).

145. See BERMANN, *supra* note 13, at 422.

146. See Coleman, *supra* note 121, at 122.

147. See *id.*

likelihood of confusion' for consumers. The distinctiveness of the mark is judged on a country by country basis and not on an EU level. Thus the Commission makes it practically impossible for the Member States to extend the geographical protection of a national trademark.<sup>148</sup>

To alleviate some of these problems and give trademark owners more protection, the Trademark Directive was the first major legal instrument to be adopted under the Single European Act (SEA).<sup>149</sup> Designed to facilitate the free movement of goods by approximating national trademark laws, the Directive also attempts to eliminate the differences between the laws to prevent distorted competition within the internal market.<sup>150</sup>

The concept of unionizing trademark law was born in the early 1970's when the Commission decided trademark law should be dealt with through Article 100 and 235 of the TEU.<sup>151</sup> "Community Trademark infringement and validity conflicts [are] governed by the national law of the Member States as applied by the court hearing the action. Decision[s] . . . [are] binding in the entire EU to insure uniformity."<sup>152</sup> With the Commission adopting the Council Regulation for Community Trademark, which established a single trademark valid throughout the entire EU and the creation of the EU Trademark Office, any community trademark owner wishing to challenge trademarks under both Community Trademark Law and national trademark law is free to do so.<sup>153</sup>

One advantage that Community Trademark Law grants to a trademark owner is that the owner's trademark remains valid forever once it has been used in at least one Member state, unlike national law which will cancel a trademark registration if not used in the given territory for five years,<sup>154</sup> and unlike U.S. law where the owner loses his right to a trademark if he does not pay the fees to keep the trademark current or ceases using the trademark in interstate commerce.

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148. Vandebek, *supra* note 12, at 1613.

149. The Single European Act (SEA) occurred in 1986 and went into force on July 1, 1987. It "empowered the Union to legislate by qualified majority [vote] to establish the internal [Union] market by December 31, 1992." Coleman, *supra* note 121, at 123. The adoption of the unionization of trademark law through the SEA helped drop the internal market legislation from ten years to between two and three years. *See id.* at 124.

150. *See* Vandebek, *supra* note 12, at 1612-13.

151. Article 100 (now article 94 ToA) deals with harmonization of national laws. Article 235 (now article 308 ToA) deals with the creation of the Union Trademark system. *See* Coleman, *supra* note 121, at 122-23.

152. *Id.* at 1611.

153. *See id.*

154. *See id.*

### 3. EU Patent Law: A Comparison between European Patent Convention (EPC) of 1973 and Community Patent Convention (CPC) of 1975.

There are two patent organizations within the EU: the EPC and the CPC. The European Patent Convention (EPC) of 1973 protects patents (called a European patent, or EP) in a different way from the CPC. The EPC applies to any European state wishing to enter into the Convention, unlike the CPC, which only applies to Member States.<sup>155</sup> At its inception, all the Member States and five non-EC countries signed it.<sup>156</sup> Since then, the EPC has been ratified by all Member States and some other non-EU countries.<sup>157</sup> There are approximately 21 countries that have voluntarily entered into the Convention.<sup>158</sup> The EPC has achieved the creation of a European Patent, which has the effect of a national patent in any contracting State.<sup>159</sup> In fact, the uniqueness and flexibility of the EP system has made it a popular choice for patenting, especially in the industry.<sup>160</sup> Under the EPC, an inventor wishing to secure his intellectual property rights can file an application with the European Patent Office.<sup>161</sup> Once the office has conducted a search for similar inventions, it grants the inventor a patent.<sup>162</sup> At this point, the inventor's rights are protected in each of the ratifying states for twenty years.<sup>163</sup> Once granted by the completion of one application where an applicant can choose the number of countries in which a patent will apply, an EP is considered a national patent in all respects.<sup>164</sup>

In 1995, the CPC was ratified as a supplement to the EPC.

The CPC provides for a Community patent, with a "unitary character," effective on essentially the same terms throughout the Community. Community patents could be expected largely to supplant national patents, although the CPC permits national patent laws and systems to continue to exist for inventors who wish to use them. The CPC would further harmonize substantive concepts, notably that of infringement. A Litigation Protocol would harmonize national litigation procedures and create a new Community Patents Appeals Court. The Court of Justice would have jurisdiction to interpret the CPC within the general

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155. See Vandebek, *supra* note 12, at 1616.

156. See BERMANN, *supra* note 13, at 422-23.

157. See *id.*

158. See Vandebek, *supra* note 12, at 1616.

159. See *id.*

160. See *id.*

161. See BERMANN, *supra* note 13, at 422.

162. See *id.*

163. See *id.* at 422-23.

164. See Vandebek, *supra* note 12, at 1616.

system of Community law.<sup>165</sup>

The CPC's fate is still unclear due to the reluctance of some Member States to sign it.<sup>166</sup> The CPC seems to have made a unified patent system a goal by stating in its Preamble that the "creation of such a Community patent system is therefore inseparable from the attainment of the objectives of the [EU] Treaty."<sup>167</sup>

The EU Patent Agreement sets out the standard for review of claims concerning infringement and validity of EU patents.<sup>168</sup> Such claims will first be heard by the Revocation Divisions and the Patent Administration Division.<sup>169</sup> If a litigant is not satisfied at this point, an appeal can be made to the Common Appeal Court.<sup>170</sup> If a party wishes to seek an injunction and/or damages, these claims must be made to the national courts where the defendant is or where the patent was infringed.<sup>171</sup> In all cases, the ECJ has jurisdiction under Article 177 of EC Treaty to give preliminary rulings only.<sup>172</sup>

#### a. The Comparison

Differences exist between the CP and EP Systems. Not only is the EP system's scope more broad, but its membership is voluntary, unlike the CP System which is available only to Member States and is obligatory.<sup>173</sup> Also unlike the CP System, the EP System grants the requested patents in a centralized system without approximating national laws.<sup>174</sup> However, the CP system is a more financially practical method of obtaining patents throughout Europe since an applicant only has to pay one fee and the renewal fee is low.<sup>175</sup> Also, the CP System provides patent protection throughout the Member States, whereas the EP System's enforcement depends on each contracting State's national laws.<sup>176</sup>

The advantages of an EU-wide patent (CP System) include uniform laws and procedures and equal effect throughout the Member States, as well as a central office called the European Patent Office.<sup>177</sup> A possible

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165. BERMANN, *supra* note 13, at 423.

166. *See id.* at 423.

167. Vandebek, *supra* note, 12 at 1616-17.

168. *See id.* at 1615.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See* Vandebek, *supra* note 12, at 1615.

173. *See id.* at 1616.

174. *See id.*

175. *See id.* at 1617

176. *See id.*

177. *See* Vandebek, *supra* note 12 at 1614-15. This office is expected to collect fees and revenues, supervise financial matters and effects of a single EU patent and deal with exami-

problem with the pending system is that the single EU patent system would only complement the individual national patent systems, thus leaving a contracting State free to decide what conditions will invalidate a national patent.<sup>178</sup>

Although the CP System is heavily criticized for being too complex, it appears to be the better choice for an inventor desiring to get the most adequate patent protection possible. Nevertheless, a EU-wide patent system is clearly the most efficient way of obtaining TEU objectives and harmonizing intellectual property laws throughout Europe.

Because of Article 177 limitation on the Court to only interpret the Treaty, "the ECJ cannot rule on whether decision by national courts conform to the EU Treaty or ensure the uniform application of Community law through direct proceedings, . . . [thus making the] patent system entirely dependent upon the cooperation of the national courts."<sup>179</sup> As a result, this limitation leaves the Court to deal with the solutions offered by the Commission, which makes the Commission the most important institution in reaching EU Treaty objectives, since it is the creator and enforcer of patent regulations.<sup>180</sup>

When the Court has dealt with intellectual property issues, it has not always been consistent, especially in the area of competition law, specifically, licensing intellectual property rights.<sup>181</sup> In one breath, the Court acknowledged that the policy of intellectual property is "to exclude others and that there is no duty to grant licenses, even in return for a reasonable royalty."<sup>182</sup> In the next breath,

it suggested that refusing to license, while charging too much for the product protected by the right, or refusing to see it might amount to an abuse. If the intellectual property right is justified on the ground that it fosters creative activity, its very function is to enable holders to charge whatever the market will bear.<sup>183</sup>

Since then, the licensing of intellectual property has been hotly debated.

#### b. Biological and Pharmaceutical Inventions

The CPC has realized the need and chosen to single out biotechnological inventions as needing special attention, since its role is gaining

nation claims, revocation or opposition proceedings, and applications for renewal that will be required every two years. *See id.*

178. *See id.*

179. *Id.* at 1623-24 (interpreting Consolidated EC TREATY art. 234 (ex. art. 177)).

180. *See id.*

181. *See KORAH, supra* note 132, at 113.

182. *Id.* (paraphrasing Case 238-87, *Volvo v. Veng*, 1988 E.C.R. 6211).

183. *Id.* at 114.

importance within the European economy.<sup>184</sup> In attempts to achieve harmonization, the Commission created a Council Directive specifically dealing with biotechnological inventions, and it gives legal protection to inventions that are novel, innovative and have industrial application.<sup>185</sup> To gain the benefit of this legal protection, it is not necessary for the entire invention to be biotechnological.<sup>186</sup> A patent will be granted if one step of the invention is micro-biotechnological.<sup>187</sup> The desire for such a Directive was aimed at protecting biotechnological inventions against the United States and Japan by ensuring that industries will be offered effective EU-wide patent protection and safeguarding the results of the industry's research activities in the EU.<sup>188</sup>

Of all the patentable subject matter, one of the most vulnerable is the pharmaceutical industry. Pharmaceuticals are important to the health of individual. Many hours are spent on the research and development and safety testing before the products enter the market. Obviously, this costs money. Naturally, the way for industries to recoup is to be able to be the only source for their inventions. However, there is no guarantee the industries will have the opportunity to recoup before their product will be reverse engineered and sold for a lesser price by 'free riders' – "they take a free-ride on the investment of the innovator."<sup>189</sup>

Therefore, more consistent legislation to protect intellectual property rights is needed. A similar circumstance occurred in *Merck v. Stepher* where the Court upheld Member States ability to legislate nationally on intellectual property rights, and it still remains good law today.<sup>190</sup> Laws protecting pharmaceuticals are now harmonized since all of the Member States have joined the EPC, thus mandating Member States compliance with protecting intellectual property rights to the fullest extent under the Convention.<sup>191</sup>

### *B. How the Treaty of Amsterdam (ToA) has affected the EU*

Since the EU's establishment in 1952, none of the treaties have provided for legislation in intellectual property law.<sup>192</sup> "This means that legislation in this field must always be justified by reference to the internal market goal using [Consolidated EU Treaty art. 95 (ex. art. 100a)]."<sup>193</sup> Currently, the EU does not have policies or directives on intellectual

184. See Vandebek, *supra* note 5, at 1618.

185. See *id.*

186. See *id.*

187. See *id.*

188. See *id.*

189. KORAH, *supra* note 132, at 16.

190. See *id.* at 220, 230 (paraphrasing Case 187/80 *Merck v. Stepher* 1981 E.C.R. 2063).

191. See *id.* at 233.

192. See BERMANN, *supra* note 13, at 205.

193. *Id.*

property, and the ToA did not impose any treaty measure or protocol for intellectual property.

### 1. The Institutions

Since the conferences leading up to the ToA and the subsequent ratification of the treaty in May, 1999, conversation and emotions about the changes have been optimistic:

[f]irst and foremost, the Treaty of Amsterdam creates a framework within which European society can be structured. It provides a system of rights, political powers for its citizens, and policies aimed at addressing the citizens' main concerns at the European level. By now it is clear, that the European Union is in a position to guarantee its citizens: respect for human rights through a system of obligations and sanctions that apply to the Member-States; the defense of certain fundamental principles, such as non-discrimination and equality of men and women, particularly in social matters; transparency in the system and actions of the Union; and major responsibility in essential areas such as employment, environmental and consumer protection, public health and safety, freedom of movement, the security of Union citizens, and immigration.<sup>194</sup>

Conversely, others view the ToA as not living up to its expectations and not making progress with its stated objectives. "Because the Conference failed to adopt decisions on the enlargement adaptation issue, it is at time considered a complete failure and the Amsterdam Treaty viewed as being so unimportant as to make it a 'non-event.'"<sup>195</sup> "Commentators who were hoping for some great institutional overhaul before enlargement have been disappointed and have consequently written Amsterdam off as a fiasco or farce."<sup>196</sup>

The main areas effected by the ToA were: freedom, security and justice; the Union and the citizen; common foreign and security policy; and the Union's institutions.<sup>197</sup> The reformation of the institutions was to prepare it for the EU's enlargement in the next few years. "There was a dual objective: to improve the democratic legitimacy of the institutions and to strengthen the effectiveness of the institutional set-up with a view to enlargement."<sup>198</sup>

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194. Marcelino Oreja, *The Recent Evolution of the European Union*, 22 FORDHAM INT'L L.J. S1, S2 (1999).

195. Philippe Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1, 3 (1998).

196. Michel Petite, *The Treaty of Amsterdam*, Harvard Jean Monnet Working Paper No. 2/98, <<http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-2.html>>.

197. *See id.* (This article will only discuss the renovation to the institutions.)

198. *Id.*



As discussed earlier, in the past the Parliament has not been empowered like other common law country legislatures. But with the gains at the Conference on the ToA, the Parliament is now viewed as a "full arm of the European legislature alongside the Council."<sup>199</sup> One example is that the Parliament now has co-decision power and procedure with some of the other institutions in more areas than before.<sup>200</sup> Also, it is on an equal footing with the Council now when it comes to "the third reading" of the co-decision procedure of article 189b. "The removal of this rather one-sided reading puts Parliament on an equal footing with the Council. This means that where conciliation is unsuccessful, the proposed instrument will be dropped."<sup>201</sup>

Few changes were made to the Council, even in light of criticism of its powers and how it would have considerable impact on the new Member States when the EU enlarged.<sup>202</sup> One of the changes was to the Council's limited extension of the use of qualified majority voting.<sup>203</sup> "This may be regarded as the main failing of the Amsterdam Treaty."<sup>204</sup> The qualified majority will only effect the new treaty provisions, such as incentives measures for employment and social matters; equal opportunities for men and women; social exclusion; public health, anti-fraud measures; openness; outermost regions.<sup>205</sup> An extremely heated debate broke out about the reweighting of the Council's votes.<sup>206</sup> The Conference was split on the best formula for reweighting the votes, as some viewed it as diluting the power of the Council and because reweighting is linked to the number of Commission members.<sup>207</sup> To no one's surprise, no agreement was reached.<sup>208</sup>

Because reweighting is linked to the question of the number of Commission members a Protocol was drawn up by deferring consideration of the whole matter until after the next enlargement. This is now a precondition for any amendment of the composition of the Commission. It was stated that any new weighting would take account of the situation Member States that have to give up their second Commission member.<sup>209</sup>

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199. *Id.*

200. *See id.*

201. Petite, *supra* note 196.

202. *See id.*

203. *See id.*

204. *Id.*

205. *See id.*

206. *See* Petite, *supra* note 196.

207. *See id.*

208. *See id.*

209. *Id.*

The biggest discussion about the Commission dealt with the number of its members; however, other useful changes were accomplished as well.<sup>210</sup> There was wide agreement that the role of the President ought to be increased, thus, the position was upgraded.<sup>211</sup> Also, the Commission's right of initiative was strengthened as well.<sup>212</sup>

The Court was reformed in two notable ways. Under the freedom and security provisions, the Court has its jurisdiction initially set out by the Treaty with the following restrictions:

preliminary rulings may be sought only by last-instance courts. These courts must refer such cases, as stipulated in the third paragraph of the existing article 177 [now article 234]; in addition to jurisdiction to give preliminary rulings, there is also a type of actions 'in the interests of law', which may be brought by the Council, the Commission or a Member State; the Court has no jurisdiction to review operations relating to the maintenance of the law and order and the safeguarding of internal security.<sup>213</sup>

However, the Court's jurisdiction was broadened to cover the areas under the third pillar:

jurisdiction to give preliminary rulings is restricted to cases before courts in Member-States which have made a declaration stating that they accept this jurisdiction. The courts then have the right but no obligation to request a preliminary ruling; actions for review of the legality of decisions may be brought only by the Member-States or the Commission; the Court also has jurisdiction to rule on any dispute between Member-States or between the Member-States and the Commission regarding the interpretation or application of acts adopted under the third pillar.<sup>214</sup>

The Court of Justice is given jurisdiction to give preliminary rulings on the validity and interpretation of decisions and conventions if any Member-State declares that it will accept the jurisdiction of the Court for that purpose. This mechanism is similar to, and indeed modeled after, the mechanism employed by the International Court in The Hague [otherwise known as the ICJ].<sup>215</sup>

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210. *See id.*

211. *See* Petite, *supra* note 196; *see* Petite for more information on how it was upgraded.

212. *See id.*

213. *Id.*

214. *Id.*

215. *See* Manin, *supra* note 195, at 5.

The big issue at the Conference regarding the ECJ appears to have been its jurisdiction in regard to giving preliminary rulings. It lightens the caseload of the ECJ slightly and helps higher national courts to stay abreast of Community law. However, there is no doubt this restriction on preliminary rulings can affect lower courts – courts of first instance – with a Community law issue on how to apply the law.<sup>216</sup> This restriction in effect forces further delays in adjudicating matters even longer than before. Now, a lower court cannot seek guidance directly from the ECJ; it must first look to the highest court of its jurisdiction.

It is gratifying to see that none of the many ideas intended to limit the access to the Court or to restrict the Court's powers, which had been voiced in the public debate or proposed officially, passed the Conference. It is disquieting, however, that Title IIIa of EC Treaty, inserted by the Amsterdam Treaty, excludes the faculty for national courts of first instance to request preliminary rulings. Fortunately, the Council is empowered to adapt the provisions relating to the powers of the Court in this area when experiences have been gained during the transitional period of five years. This problem is of great importance for the effective protection of the rights of the individual persons affected by the provisions in this Title. For practical and economic reasons the decision of a court of first instance will, to them often mean the final decision. . . . The extension of the Court's jurisdiction to areas outside the Community Treaties is certainly an achievement, and it is important that this extension also applies to conventions, where the question until now has created great difficulties.<sup>217</sup>

## 2. Intellectual Property

The most discouraging outcome to patent prosecutors and inventors is what the treaty did not do for intellectual property law. Leading up to the Conference, there was wide agreement among those involved in the objectives of the treaty that EC Treaty article 113 (now article 133 under the ToA) had been interpreted and applied too narrowly; therefore, modernization of the article was imperative.<sup>218</sup> Also, it was clear that intellectual property should be explicitly included in the modernization of article 113 (now article 133 under the ToA) due to the worldwide trade negotiations, including GATT, TRIPS, and others and subject to a qualified majority system instead of a unanimity system.<sup>219</sup>

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216. See Ole Due, *The Impact of the Amsterdam Treaty on the Court of Justice*, 22 *FORDHAM INT'L L.J.* S48, S71(1999).

217. *Id.*

218. See Petite, *supra* note 196.

219. See *id.*

Those opposing the unanimity system strongly believed that Member States not in agreement with proposed legislation on the harmonization of intellectual property laws could pressure the Member States that were willing to accept harmonization, thus defeating the whole purpose of including intellectual property laws in article 113 (now article 133 under the ToA).<sup>220</sup> Also, based upon past instances of some Member States' conduct, those supporting the inclusion of intellectual property in the new article 113 were fearful Member States would make its agreement to harmonization conditional upon unreasonable demands being met.<sup>221</sup> In the end,

[d]espite long discussions and endless attempts it proved impossible to substantially modernize the provisions of Article 113 [now article 133 under the ToA] which was therefore left as it stands. A modest new provision was, however, included at the last minute, with the aim of introducing a "fast track": the Council acting unanimously, may at a future date extend the application of Article 113 to international negotiations and agreements concerning services and intellectual property not already covered by the article.<sup>222</sup>

On the brighter side, this is not the end of the ever-evolving European integration. Most would agree that the EU made more progress in the Conference on the ToA than in past Conferences.<sup>223</sup> "And like any treaty, everything will depend on what is made of it in practice."<sup>224</sup>

#### IV. THE UN AND THE INTERNATIONAL COURT OF JUSTICE

The International Court of Justice is the principal organ of the United Nations (UN). Established in 1946, it's the successor court to the Permanent Court of International Justice (PCIJ) that existed during 1922-1946 under the League of Nations.<sup>225</sup> Between 1922 and 1940, the PCIJ issued 29 decisions and 27 advisory opinions.<sup>226</sup> At first glance, this does not appear to be a very busy court; however, at the time, this was considered significant judicial activity. When the war began in 1939, the PCIJ's existence was questioned.<sup>227</sup> Soon thereafter, the Court was dispelled.

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220. *See id.*

221. *See id.*

222. *Id.*

223. *See* Petite, *supra* note 196.

224. *Id.*

225. *See* The International Court of Justice, *History* (visited Apr. 9, 2000) <<http://www.icj-cij.org/icjwww/igeneralinformation/ibook/bbookchapter1.htm>> [hereinafter *ICJ History*].

226. *See id.*

227. *See id.*

In 1943, the United States began discussions of reestablishing the Court.<sup>228</sup> After many discussions with other countries' officials, the Court was reestablished under its current name, the International Court of Justice or ICJ.<sup>229</sup> At the time the Court was established, resolution methods to disputes were still developing.<sup>230</sup> Several methods for peaceful settlement of disputes had been in place at the time the Court was created, and some countries felt a world court would be another viable method for dispute resolution. The UN Charter reflects and recognizes all of the methods of peaceful settlements of disputes: negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.<sup>231</sup>

Recognized as the Court for the World, it seeks to resolve disputes using principles of international law.<sup>232</sup> The Court has no power to render constitutional decisions on the decisions or actions of the other UN organs.<sup>233</sup> However, it is not bound by any previous decisions it has rendered.<sup>234</sup> In addition, the court has the power to issue advisory opinions upon request from the UN Security Council or the UN General Assembly.<sup>235</sup>

The Court has three main tasks: (1) "to decide disputes between States in accordance with the provision of its Statute;"<sup>236</sup> (2) supply judicial guidance and support for the work of other United Nations organs and for the autonomous specialized agencies through the provision of advisory opinions; (3) engage in the performance of the 'extra-judicial' activities.<sup>237</sup> Like any other court, its main task is to settle disputes,<sup>238</sup> contribute to peace and promote friendly relations among the States.<sup>240</sup>

228. *See id.*

229. *See id.*

230. *See ICJ History, supra* note 225.

231. *See* U.N. CHARTER art. 33.

232. *See* The International Court of Justice, *International Law* (visited Apr. 9, 2000) <<http://www.icj-cij.org/icjwww/igeneralinformation/ibook/bbookchapter7.htm>> [hereinafter *ICJ International Law*].

233. *See* SHABTAI ROSENNE, *THE WORLD COURT* 36 (4th ed. 1989).

234. *See id.*

235. *See ICJ History, supra* note 225.

236. ROSENNE, *supra* note 188, at 35. Non member States can also appear before the Court as applicant, respondent, and intervener – hence, the name World Court as well as International Court of Justice.

237. *Id.* at 35. These activities include appointing umpires, presidents of arbitral commissions and other tribunals, and similar offices.

238. *Id.*

239. *See* ROSENNE, *supra* note 233, at 37.

240. *See ICJ International Law, supra* note 225.

### A. Structure of ICJ and Parties before the ICJ

Currently, 15 judges sit on the ICJ, and the UN General Assembly and the UN Security Council elect each to nine-year terms of office.<sup>241</sup> Every three years elections are held for one-third of the seats, and each judge is of a different nationality, sitting independently of their country.<sup>242</sup> It follows that no two judges of the same nationality may simultaneously sit on the Court. Like the ECJ, retiring judges may be re-elected.<sup>243</sup> If it desires, a State may appoint a judge to sit *ad hoc* in a case when its nationality is not represented among the current Court.<sup>244</sup>

Much like the ECJ, the Statute of the Court allows the ICJ to set up a special chamber consisting of three or more judges to deal with particular cases of categories as the Court has discretion to determine.<sup>245</sup> Also, the Court can set up an *ad hoc*<sup>246</sup> chamber to handle specific disputes which consists of any number of judges the Court deems necessary with the approval of the parties.<sup>247</sup>

Member States of the UN can be heard by the ICJ; hence, the reason for the Statute becoming an integral part of the Charter – to make sure the Court had the support of the members and to ensure the Court was not viewed as distinct and by itself.<sup>248</sup> The Court's status as a principal organ imposes on it the responsibility of participating in the work of the Organization on an equal footing with the other principal organs, within the limits of its competence.<sup>249</sup> The Court will cooperate with the other organizations of the UN as long as it is within and compatible with its judicial character.<sup>250</sup> "It reacts to the initiatives of States and other organs in a spirit of cooperation. It has no power of initiating action itself."<sup>251</sup> An ICJ judgment in a contentious case is final, without appeal and only binding on the parties of the particular case.<sup>252</sup>

### B. Jurisdiction of ICJ and Compulsory Jurisdiction of the ICJ

The jurisdiction of the ICJ is very different from the EU. The ICJ has jurisdiction over a dispute only if the States have accepted jurisdiction in

241. See ICJ, *The Court at a Glance*, (visited April 9, 2000) <<http://www.icj-cij.org/icjwww/igeneralinformation/icjgnnot.html>> [hereinafter *ICJ The Court at a Glance*].

242. See *id.*

243. See *id.*

244. See *id.*

245. See U.N. CHARTER art. 26, para. 1.

246. For more information on the *ad hoc* chambers that have been formed, see ROSENNE, *supra* note 188, at 69-72.

247. See U.N. CHARTER art. 26, para 2.

248. See ROSENNE, *supra* note 233, at 28.

249. See *id.*

250. See *id.*

251. *Id.* at 36.

252. See U.N. CHARTER arts. 59 and 60.

one of three ways:

(1) by the conclusion between them of a special agreement to submit the dispute to the Court; (2) by virtue of a jurisdictional clause, i.e. typically, when they are parties to a treaty containing a provision whereby, in the event of a disagreement over its interpretation or application, one of them may refer the dispute to the Court. Several hundred treaties or conventions contain a clause to such effect; (3) through the reciprocal effect of declarations made by them under the Statute whereby each has accepted the jurisdiction of the Court as compulsory in the event of a dispute with another State having made a similar declaration.<sup>253</sup>

"It is well established in international law that a State cannot, without its consent, be compelled to submit its disputes with other States to mediation, arbitration, or any other kind of [peaceful] settlement;" hence, this voluntary jurisdiction is provided for by Article 36(1)<sup>254</sup> of the Statute.<sup>255</sup> A State can consent to compulsory jurisdiction of the ICJ by either becoming a member of the UN,<sup>256</sup> or by becoming a party to the ICJ Statute, without becoming a member of the UN, "by accepting the conditions to be determined in each case by the General Assembly upon recommendation of the Security Council."<sup>257</sup> Compulsory jurisdiction is also allowed through Article 36(1) and exercised when States agree to refer certain categories of legal disputes to the ICJ through certain conventions and treaties.<sup>258</sup> The ICJ Statute provides for States that are not parties to the UN Charter or to the ICJ Statute to consent to the Court's jurisdiction.<sup>259</sup>

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253. ICJ *The Court at a Glance*, *supra* note 241.

254. "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." U.N. CHARTER art. 36, para. 1.

255. See STANIMIR A. ALEXANDROV, RESERVATIONS IN UNILATERAL DECLARATIONS ACCEPTING THE COMPULSORY JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE 1 (1995).

256. See U.N. CHARTER art. 93, para. 1 (stating that all UN members are automatically parties to the Statute of the ICJ).

257. *Id.* "A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council." U.N. CHARTER art. 93, para. 2.

258. See ALEXANDROV, *supra* note 255, at 6 (construing U.N. CHARTER art. 36, para. 1).

259. See U.N. CHARTER art. 35, para. 2 ("The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court." *Id.*)

### C. Reservations in Unilateral Declarations

The term 'reservation' in the context of the compulsory jurisdiction of the Court issued in the broadest sense to include reservations, conditions, exclusions, exceptions or limitations on the jurisdiction recognized by the Declaration. The criterion is the expression by a State in its declaration of some condition or exclusion by which it seeks to limit the jurisdiction accepted, even though the condition or exclusion might arise independently of the declaration from the provisions of the Statute.<sup>260</sup>

A party can make almost any reservation it wishes as long as it is not inconsistent with the ICJ Statute or does not try to make reservations affecting the functioning and organizing of the Court.<sup>261</sup> The validity and permissibility of reservations will be determined on a case by case basis.<sup>262</sup> If a reservation is inconsistent with a statute, the question remains whether the reservation can be separated from the declaration, or if the invalid reservation deems the declaration invalid too, and then in turn, invalidates the compulsory jurisdiction.<sup>263</sup>

### D. Procedure, Judgment, and Sources of Law

The procedure of the Court is set out in the ICJ Statute and the Rules of the Court.<sup>264</sup> There is a written phase and an oral phase. The written phase is like the American courts where the parties submit pleadings to the Court and to one another.<sup>265</sup> The oral phase is the public hearings where the parties argue their case to the Court.<sup>266</sup>

The Court delivers its judgment in public after it has deliberated in chambers.<sup>267</sup> The judgment is final and without appeal.<sup>268</sup> Unlike the ECJ, concurring and dissenting opinions can be given, and a judge can attach his vote to a judgment; however, the deliberations remain secret.<sup>269</sup> Decisions of the Court have binding effect between the parties only. Despite the fact that all UN Member States are parties to the ICJ Statute,<sup>270</sup> there

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260. ALEXANDROV, *supra* note 255, at 17 (paraphrasing Herbert W. Briggs, *Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice*, 93 HAGUE RECUEIL 229, 230 (1958)).

261. *See id.* at 19.

262. *See id.* at 20.

263. *See id.*

264. *See* ICJ *The Court at a Glance*, *supra* note 241.

265. *See id.*

266. *See id.*

267. *See id.*

268. *See id.*

269. *See* ROSENNE, *supra* note 233, at 132, 136-37.

270. U.N. CHARTER art. 94 states, "Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."



have been a few instances of partial or complete failure to comply with an ICJ judgment.<sup>271</sup> Even though the Security Council has the power to enforce judgments,<sup>272</sup> it has yet to do so.<sup>273</sup> From 1946 to 1996, the Court has issued 47 judgments and 23 advisory opinions.<sup>274</sup>

In its resolution 44/23 of 17 November 1989, the General Assembly declared the period 1990-1999 as the United Nations Decade of International Law, and considered that one of the main purposes of the Decade should be: 'to promote means and methods for the peaceful settlement of disputes between States, including resort to and full respect for the International Court of Justice.'<sup>275</sup>

When applying the law to a particular case, the court draws from international treaties and conventions in force, international custom, general principles of law, judicial decisions (as subsidiary means), and the teachings of the most highly qualified publicists.<sup>276</sup> The Court is to derive the applicable international law from various sources:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>277</sup>

Other sources the Court uses that are not listed above are unilateral acts of international law, decisions and resolutions of international organs, general principles of equity and justice, and normal processes of judicial reasoning.<sup>278</sup> "By interpreting the international law in force and applying it to specific cases, the Court's decisions clarify that law, and

271. See ROSENNE, *supra* note 233, at 44-46.

272. U.N. CHARTER art. 94, para. 2 states

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

*Id.*

273. See ROSENNE, *supra* note 235, at 44.

274. See ICJ *History*, *supra* note 225.

275. *Id.*

276. See ICJ *The Court at a Glance*, *supra* note 241.

277. U.N. CHARTER art. 38, para. 1.

278. See ICJ *International Law*, *supra* note 225.

thereby frequently pave the way for the progressive development of international law by States, . . .<sup>279</sup>

### *E. Precedent in the World Court*

It has been said that it is not right to speak of precedents in the case of decisions of the Court.<sup>280</sup> "But the fact that the doctrine of binding precedent does not apply means that decision[s] of the Court are not binding precedents; it does not mean that they are not 'precedents.'"<sup>281</sup> The two bases on which the Court's use of precedent rests are the general jurisprudential basis and the statutory basis.<sup>282</sup>

The ICJ Statute states that a judgment of a chamber "shall be considered as rendered by the Court;"<sup>283</sup> however, the precedential value of a chamber decision is controverted.<sup>284</sup> One argument is that a chamber is an 'independent organism' under Article 26.<sup>285</sup> This argument is countered by interpreting Article 25, paragraph 1<sup>286</sup> of the Charter to mean that

elsewhere in the Statute [a] provision is made for the Court . . . to sit otherwise than in its 'full' formation. That [provision] contemplates the Court acting through chambers. . . . Thus, a decision of a chamber is not rendered by a judicial body independent of the Court; it is given by the Court sitting in a special formation.<sup>287</sup>

As a result, the Court has made use of chamber decisions when deciding cases as a full court.<sup>288</sup>

The same reasoning applies to *ad hoc* chamber decisions when keeping in mind how representative the chamber is of the Court and the relationship between the chamber and the international community, especially since the judges that sit on the *ad hoc* chamber have to have the approval of the parties.<sup>289</sup>

According to Article 59 of the ICJ Statute, no parties are bound to an advisory opinion; however, "the practical effect of an advisory opinion in

279. *Id.*

280. See MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 167-68 (1996).

281. *Id.* at 2.

282. See *id.* at 40-47 for more information on the jurisprudential and statutory bases.

283. U.N. CHARTER, art. 27, ICJ Statute.

284. See SHAHABUDEEN, *supra* note 280, at 165.

285. See *id.* (paraphrasing SHABTAI ROSENNE, *Article 27 of the Statute of the International Court of Justice*, 32 VA. J. INT'L L. 230 (1991)).

286. "The full Court shall sit except when it is expressly provided otherwise in the present Statute." U.N. CHARTER art. 25, para. 1.

287. SHAHABUDEEN, *supra* note 280, at 172-73.

288. See *id.* For more information on the particular chamber decisions used in subsequent cases heard by the full Court, see generally, SHAHABUDEEN, *supra* note 280.

289. See *id.* at 175.

securing conformity with a particular course of conduct is considerable."<sup>290</sup>

### *F. ICJ Influence on UN Specialized Agencies*

Part of the UN family is a large group of autonomous and independent specialized agencies.<sup>291</sup> Among these agencies is the WIPO.<sup>292</sup> The UN Charter empowers the General Assembly to require some of the Specialized Agencies to seek advisory opinions of legal questions from the ICJ.<sup>293</sup> However, the other autonomous bodies of the UN, such as the United Nations Children's Education Fund (UNICEF), the United Nations Environment Programme (UNEP), and the United Nations Conference on Trade and Development (UNCTAD), have been required to request advisory opinions and has yet to show a reason to need to.<sup>294</sup>

The UN Charter requires the Court to advise any public international organization whether its constituent instrument is in question before a case.<sup>295</sup> When this occurs, and it has happened in some contentious cases, the Court can require the organization to furnish it with any relevant information necessary to decide the case.<sup>296</sup> Also, most of the constituent instruments of the Specialized Agencies have a provision of dispute settlement authorizing the agency to take some disputes to the ICJ.<sup>297</sup> One of the objectives of this dispute settlement provision was to try and increase the judicial business of the Court; however, only three<sup>298</sup> of the Specialized Agencies have done so.<sup>299</sup> As a result, the Secretary-General has recommended organs' constituent instruments that contain this provision to look to the Court more often for advisory opinions.<sup>300</sup>

290. *Id.* at 165-66.

291. *See* ROSENNE, *supra* note 233, at 38-40. Today, these include: the Food and Agriculture Organization (FAO), the World Health Organization (WHO), the International Bank for Reconstruction and Development (IBRD), the International Civil Aviation Organization (ICAO), the International Development Association (IDA), the International Finance Corporation (ICF), the International Fund for Agricultural Development, the International Labour Organization (ILO), the International Maritime Organization (IMO), the International Monetary Fund (IMF), the International Telecommunication Union (ITU), the World Meteorological Organization (WMO), the United Nations Educational, Scientific, and Cultural Organization (UNESCO), the United Nations Industrial Development Organization (UNIDO), the Universal Postal Union (UPU), and for some purposes, the International Atomic Energy Agency (IAEA). *See id.*

292. *See id.*

293. *See id.* at 40 (paraphrasing U.N. CHARTER art. 96, para. 2.) This is done through Relationship Agreements.

294. *See id.*

295. *See id.* at 39 (paraphrasing U.N. CHARTER art. 34).

296. *See* ROSENNE, *supra* note 233, at 39.

297. *See id.* at 39.

298. UNESCO, IMO and WHO. *See id.* at 40.

299. *See* ROSENNE, *supra* note 233, at 40.

300. *See id.* at 42.

Members now are typically handling their international issues through arbitration, setting up standing tribunals to handle specific disputes of a specialized nature.<sup>301</sup> Under the UN, these include the International Centre for Settlement of Investment Disputes, the Law of the Sea Convention,<sup>302</sup> and United States Commission on International Trade Law Rules (UNCITRAL). The reasons offered are because of the ICJ's inability to enforce judgments and the lengthy time with which it takes to produce a judgment.

## V. IS HARMONIZATION THE KEY FOR THE ICJ AND THE UN?

### A. Similarities and Differences Between the ECJ and ICJ

Like the ECJ, if the ICJ has jurisdiction concurrently with another UN organ, it can resolve any legal questions that may be important to the dispute and allow the other organ to resolve the other issues.<sup>303</sup> The ICJ does not exercise jurisdiction over criminal matters between States or States and individuals; therefore, it is only involved in allegations regarding wrongful behavior of international responsibility.<sup>304</sup> Although the ICJ does not have the doctrine of *stare decisis*, its opinions do carry weight, like the ECJ, and it is unusual for another tribunal to disregard its judgments when they are relevant to a situation.<sup>305</sup> The ICJ primarily is in the business of deciding legal disputes for the international community and giving legal advice to other UN organs.<sup>306</sup> Historically, the ICJ has not been supported like other international tribunals. Some reasons offered for this lack of support of the ICJ are its limited jurisdiction, relatively rigid procedures, and enforceability of its judgments.<sup>307</sup>

Unlike the ECJ, The ICJ is an equal organ of the UN just like the other organs – it is neither inferior nor superior to any other organ; therefore, no other organ, State or individual is obligated to seek its opinion when an interpretation of an instrument, such as the Charter or the Rules of Procedure is needed.<sup>308</sup> As stated earlier, the ECJ is supreme of the Union institutions as a result of the doctrine of supremacy of Community law. Also unlike the ECJ, the ICJ can only exercise appellate jurisdiction when conferred upon by another instrument or agreement.<sup>309</sup> Further-

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301. See *id.* at 34.

302. See *id.*

303. See ROSENNE, *supra* note 188, at 37.

304. See *id.* at 38.

305. See *id.* at 39.

306. See *id.* at 39.

307. See CARTER & TRIMBLE, *supra* note 95, at 300.

308. See ROSENNE, *supra* note 233, at 36. Each organ is free to interpret as necessary. See *id.*

309. See *id.* at 38.

more, it does not formulate new rules of law but only applies existing law to the case before it.<sup>310</sup> The ICJ does not have the power to determine the "constitutionality" of actions or decisions made by another UN organ, unlike the ECJ which can evaluate an institutions' actions by request from anyone.<sup>311</sup> Unlike the EU Member States, UN Member States easily disregard an ICJ judgment if it desires.

### *B. Regional and Specialized Courts*

Subsequent to World War II, regional and specialized courts have grown in Western Europe. In fact, regional organizations are considered by many international scholars to be significant contributors to international law.<sup>312</sup> For instance, the European Court of Human Rights<sup>313</sup> was created to interpret and apply the European Convention for the Protection of Human Rights and Fundamental Freedoms. Its decisions have been successful with almost all West European countries agreeing to abide.<sup>314</sup> Another regional court that has recently entered the international scene is the International Tribunal for Law of the Sea created by the Law of the Sea Convention to hear disputes regarding use of the seas.

The United States has acknowledged this unique approach the EU has taken with regional organizations and has also been involved in helping implement a similar judicial organ – the Inter-American Court of Human Rights; however, its jurisdiction is very limited and considered advisory at this time.<sup>315</sup> The regional court that has recently drawn the most attention because of its success in resolving disputes among its Member States is the ECJ.

Whether a regional or specialized court would work for international intellectual property remains to be seen. At this time, the trend for resolving international disputes is in arbitration, usually through the WTO. Although arbitration allows flexibility with and between the parties, it often is a lengthy process because the arbitrators' caseload is heavy. The time,

310. *See id.*

311. *See id.* at 37.

312. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Introductory Note (1986) states:

[a]n international organization has the legal capacity and personality and the rights and duties given it by the international agreement that is its charter and governs its activities. Other capacities, rights, and duties may be given to it by particular international agreements, by agreements applicable to international organizations, or by customary international law. International organizations, when they act within their constitutional authority, sometimes make and often contribute to international law.

313. *See generally* L.J. CLEMENTS, M.Sc., EUROPEAN HUMAN RIGHTS TAKING A CASE UNDER THE CONVENTION (1994); LAMMY BETTEN & NICHOLAS GRIEF, EU LAW AND HUMAN RIGHTS (1998).

314. *See* CARTER & TRIMBLE, *supra* note 95, at 334-35.

315. *See generally* SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (1997).

money and resources that would have to be put into establishing a regional or specialized court probably outweigh the benefits at this time, but such a court may be feasible in the future. Some of the benefits of a regional or specialized court include expertise, quick resolution, judicial enforcement for noncompliance such as sanctions, consistency, continuity, and precedent

*C. The ICJ is not the only Judicial Organ that has to be Established within the UN*

A judicial organ can be established by the UN or by its individual members.<sup>316</sup> Article 33 offers various methods by which the members can settle international disputes, including arbitration, judicial settlement, or other peaceful means.<sup>317</sup> Article 95 allows members to take their differences to other existing tribunals or future dispute settlement means, if they agree to it.<sup>318</sup>

If another judicial organ, like a specialized court or chamber within the ICJ, was formed within the UN to handle only international intellectual property issues, we might come closer to the harmonization of intellectual property law issues like that in the EU. As mentioned earlier, chamber decisions of the ECJ are considered to carry as much weight as the full court, which is good for the plaintiff because it would help to expedite his cause of action quicker than having to wait until he could get docked in the full court. Some other benefits of such a creation might be complete harmonization of intellectual property laws within UN States, resolution of intellectual property disputes more quickly, an increase in the caseload of the ICJ, agency access, like the WIPO, to bring disputes, and additional support for the ICJ to enforce its judgments. Also, a UN patent system similar to the EPC and CPC could help protect international intellectual property inventors as well as establish consistency and continuity in the UN.

However, some changes would need to be made to the procedural law of the ICJ in order for such results to occur. For instance, the ICJ would need to consider opening its jurisdiction to individuals to bring in actions, like the ECJ has done. Also, a Community law equivalent—like a “UN law” would be helpful in establishing precedent in the ICJ. Such law would probably need to be created by the ICJ. A “UN law” would help the intellectual property owner to know how to more adequately protect his inventions and ideas since the ICJ does look to its earlier decisions and earlier chamber decisions to help it resolve disputes. Also, a “UN law” will help the intellectual property owner to know what law will

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316. See ROSENNE, *supra* note 233, at 33.

317. See U.N. CHARTER art. 33.

318. See *id.* art. 95.

be applied to his case in the event he has to bring an action for infringement.

An important hurdle that must be jumped is compulsory jurisdiction to the ICJ without any reservations. But if governments sincerely wish to promote further development of inventions and ideas, they will need to be more open to letting the ICJ handle the intellectual property issues and then abiding by and enforcing its judgments.

Also, because the ICJ does not follow precedent, it is difficult to predict the outcome of a case. To date, the ICJ has not rendered a decision on intellectual property issues, thus increasing the difficulty of gaining protection for intellectual property owners.

## VI. CONCLUSION

With the EU becoming members of some of the more important and significant international organizations, it has shown the ability to work through conflicting issues with other nation-states. As a result, it has gained increasing support from its Member States and continues to thrive throughout Europe.

Even though the UN was created mainly to maintain international peace and security, and the ICJ is its judicial organ to enforce that, the ICJ has jurisdiction over any Member States international issue that is brought before it. Therefore, if a State (or individual if the ICJ would open its jurisdiction for individuals) wished to bring an intellectual property issue before the ICJ, the Court could look to what the EU, the ECJ and specifically the EPC has done with intellectual property as a model and guide for harmonizing intellectual property law throughout UN States.

There is no easy solution for preventing piracy and adequately protecting intellectual property rights on an international level; however, the EU and ECJ have shown how commitment towards harmonizing intellectual property throughout its Member States – a model which organizations, agencies and courts can follow in the future.