Case C-414/11 *Daiichi*: The Impact of the Lisbon Treaty on the Competence of the European Union over the TRIPS Agreement

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Abstract

This article analyses the impact of the Lisbon Treaty on the competence of the European Union over the content of the TRIPS Agreement, based on a discussion of the judgment of the Court of Justice of the European Union in the *Daiichi* case, in which the Court decided in essence that exclusive external competence for the common commercial policy covers the whole of the TRIPS Agreement.

Keywords

Daiichi, Common Commercial Policy, European Union, TRIPS Agreement, Intellectual Property

1 Introduction

The competence of the European Union (EU) to act externally, in particular to conclude agreements with one or more third countries or international organisations, may be either shared with the Member States or exclusive. It must always be conferred on the EU but it may be explicit or implied. Other than in the circumstances whereby the Treaties expressly provide for it, external competence may result from other provisions of the Treaties, notably where this is necessary for the attainment of a specific objective with respect to which the Treaties have established internal competence—especially where that competence has already been used.¹

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¹ See especially the judgment in Case 22/70 *Commission v Council* [1971] ECR 263, para 16; Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977] ECR 741, paras 3–4, and case law cited therein; Opinion 1/03 Competence of the Community to conclude the

The common commercial policy is an exclusive competence of the EU. As a result, Member States no longer have competence over this area of their foreign policy.² But what does the common commercial policy entail? In its judgment of 18 July 2013 in Case C-414/11 *Daiichi*,³ the Grand Chamber of the Court of Justice of the European Union (Court or CJEU) decided, in essence, that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),⁴ which is one of the World Trade Organization (WTO) agreements, falls fully within the scope of the common commercial policy, and, therefore, within the EU's exclusive competence. The content, background, and consequences of the judgment are the subject of this article.

2 Before entry into force of the Lisbon Treaty: mixed competence

Article 113 of the Treaty establishing the European Economic Community (Treaty of Rome) and, after amendments brought about by the Treaty of Nice, article 133 of the Treaty establishing the European Community provided that the common commercial policy was to be based on uniform principles particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

According to case law prior to the entry into force of the Lisbon Treaty, the competence of the EU over the common commercial policy was exclusive⁵ and included (what were at the time) Community measures specifically focusing on international trade. This was because they primarily had the goal of promoting, facilitating or regulating trade, and had a direct and immediate effect on trade in the goods concerned.⁶

The TRIPS Agreement was concluded by both the (then) European Community and the Member States as a mixed agreement,⁷ the Court having held in Opinion 1/94 that apart from the provisions prohibiting the release into free circulation of counterfeit

new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] ECR I-1145, para 114, and case law cited therein.

² See Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU), arts 2(1) and 3(1)(e).

³ Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* [2013] ECLI:EU:C:2013:520.

⁴ The TRIPS Agreement is attached as Annex 1C to the Agreement establishing the World Trade Organisation (WTO Agreement). The European Community approved of the WTO Agreement by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994) [1994] OJ L 336/1. The EU and all of its Member States are WTO Members.

⁵ Opinion 1/75 Opinion of the Court of 11 November 1975 given pursuant to Article 228 of the EEC Treaty [1975] ECR 1355.

⁶ Case C-411/06 *Commission v Parliament and Council* [2009] ECR I-7585, para 71, and case law cited therein.

⁷ See also, inter alia, the judgment in Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-1344, para 33, and the judgment in Case C-431/05 *Merck Genéricos-Produtos Farmacêuticos Merck & Co* [2007] ECR I-7001, para 33. The TRIPS Agreement, however, was signed on 15 April 1994, and thus prior

goods,⁸ the TRIPS Agreement did not fall within the field of the common commercial policy.⁹ Likewise, the remaining provisions of that agreement did not fall within the (implied) external competence of the European Community. As a result, the Community and the Member States shared competence.¹⁰ The principle, therefore, as was apparent also from the later judgment in the *Merck Genéricos* case, was that the Member States enjoyed competence with regard to the protection of intellectual property rights as long as the Community had not already passed legislation.¹¹

The Court's position in Opinion 1/94 was based on an analysis of the content of the TRIPS Agreement. The Court found that the Community had exclusive competence to conclude international agreements concerning the means of enforcement of intellectual property rights and, thus, measures which prohibit the release into free circulation of counterfeit goods.¹² As regards other provisions of the TRIPS Agreement, the Court accepted that 'there is a connection between intellectual property and trade in goods.'¹³ However, that was an insufficient basis for concluding that those other provisions fell within the scope of article 113 EC because intellectual property rights do not relate specifically to international trade, and they affect internal trade just as much as international trade.¹⁴ The Court did accept that the holders of intellectual property rights could prevent third parties from carrying out certain acts and that measures, such as the prohibition of the use of a trade mark, the manufacturing of a product, the copying of a design or the reproduction of a book, disc or videocassette inevitably have effects on trade. Those effects, however, were insufficient. The Court proceeded on the basis that the common commercial policy could cover intellectual property rights only where those rights have a specific link with international trade, that is to say, trade with non-Member States or third countries. An important factor in this respect was, also, the fact that a decision which confirmed the exclusive competence of the Community over agreements

to Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property—Article 228 (6) of the EC Treaty [1994] ECR I-5267.

⁸ Special requirements related to border measures in Section 4 of Part III of the TRIPS Agreement correspond to EC law prohibiting the release into free circulation of counterfeit goods. The latter was based on art 113 EC, and the Community therefore was competent for concluding international agreements concerning provisions which corresponded to measures falling within the internal exclusive competence over trade policy. See Opinion 1/94 (n 7), paras 55, 71. Originally, the negotiating mandate as regards 'trade-related aspects of intellectual property rights, including, trade in counterfeit goods' was rather limited and focused on the need for principles, rules and disciplines dealing with international trade in counterfeit goods: see Ministerial Declaration of the Uruguay Round of 20 September 1986. The negotiations were significantly widened in part as a result of the European Communities (see, for example, European Communities, 'Draft Agreement on Trade-Related Aspects of Intellectual Property Rights' MTN.GNG/NG11/W/68, 29 March 1990). For a detailed history, see Daniel Gervais, *The TRIPS Agreement—Drafting History and Analysis* (4th edn, Sweet & Maxwell 2012) 11–31.

⁹ Opinion 1/94 (n 7) para 71.

¹⁰ *ibid* para 105.

¹¹ Case C-431/05 (n 7) para 34.

¹² Opinion 1/94 (n 7) para 55.

¹³ *ibid* para 57.

¹⁴ *ibid* para 57.

with third countries for the purpose of harmonising protection of intellectual property could have resulted in the Community institutions being able to escape the internal constraints to which they are subject in relation to procedures and to rules as to voting.¹⁵ Furthermore, the Court's position was that the measures that could be taken in response to a lack of protection of Community undertakings' intellectual property rights in third countries concerned the field of the common commercial policy, and were unrelated to the harmonisation of intellectual property protection, which is the primary objective of the TRIPS Agreement.¹⁶

That case law of the Court relates to Treaty provisions which, in setting out the common commercial policy in a non-exhaustive manner, did not refer to intellectual property.¹⁷ Neither article 113(1) EC (applicable at the time of the TRIPS Agreement's conclusion) nor article 133 EC (after amendment) referred to the commercial aspects of intellectual property in setting out the uniform principles of the common commercial policy.¹⁸ Despite developments in General Agreement on Tariffs and Trade (GATT)/WTO law, the Court was cautious in expanding the scope of the common commercial policy without any treaty basis.

3 After entry into force of the Lisbon Treaty: exclusive competence

3.1 Background

Since the entry into force of the Lisbon Treaty on 1 December 2009, article 207(1) of the Treaty on the Functioning of the European Union (TFEU) now provides that the common commercial policy is to be based on uniform principles including those relating to 'the commercial aspects of intellectual property'. Under article 3(1)(e) TFEU, the EU has exclusive competence over the common commercial policy. As a result, the issue of competence depends on the scope of the concept of 'commercial aspects of international property' rather than on the exercise of internal competences.

Following the broadening of the definition in the Treaty of the concept of 'common commercial policy' (and thus of the EU's explicit competence), the Court has now decided that the competence over the content of the TRIPS Agreement has changed.

¹⁵ *ibid* para 60.

¹⁶ *ibid* para 63.

¹⁷ Opinion 1/78 Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty—International Agreement on Natural Rubber [1979] ECR 2871, para 45.

¹⁸ Specific provisions of art 133 EC did refer to international agreements concerning commercial aspects of intellectual property. Art 133(5) EC provided, *inter alia*, for a procedure for negotiating and concluding international agreements relating to commercial aspects of intellectual property in so far as these agreements did not fall within the scope of arts 133(1) to (4) EC and without art 133(1) describing this subject matter as one of the subjects of the common commercial policy.

That decision was taken despite the fact that, with the exception of article 31(f) TFEU,¹⁹ the content of the TRIPS Agreement remains unchanged.

The *Daiichi* case came before the Court following a request for a preliminary ruling, pursuant to article 267 TFEU, from a Greek court before which a dispute was pending concerning the placing onto the market of a generic medicinal product whose active ingredient was protected by patent rights.²⁰ That court requested a preliminary ruling primarily on questions involving article 27 of the TRIPS Agreement. That provision defines patentable subject matter as ‘inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application’. Article 27(1) further provides that, in principle, patents are available and patent rights are to be enjoyed ‘without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced’. Article 27(2) and (3) determines the conditions under which WTO Members are entitled to exclude inventions from patentability. The referring court essentially asked whether the Member States are still competent for that which is covered by article 27, and if so, whether they can decide to accord direct effect to that provision. The remaining two questions concerned the substantive meaning of article 27 and the temporal scope of the TRIPS Agreement. The Court’s answer to the first question is the concern of this article.

The argument of the parties to the main proceedings and of the Member States that submitted observations was based both on the fact that the TRIPS Agreement is a mixed agreement and on the case law of the Court involving such agreements according to which, where the EU has exercised powers and adopted legislation to implement obligations deriving from the agreement, the EU is competent.²¹ According to the Commission, that argument was no longer relevant since the whole of the TRIPS Agreement now fell within the concept of ‘commercial aspects of intellectual property’, and therefore was subject to the EU’s exclusive competence.²² The Member States disagreed with the Commission in that respect, arguing that the majority of the provisions of the TRIPS Agreement concern international trade only indirectly.²³

3.2 Exclusive competence of the EU with regard to the content of the TRIPS Agreement

The Court’s conclusion that the common commercial policy includes the content of article 27, as well as all other provisions of the TRIPS Agreement, is based on reasoning made up of four elements.

¹⁹ *Amendment of the TRIPS Agreement*, WTO Doc WT/L/641 (8 December 2005) (Decision of 6 December 2005).

²⁰ *Daiichi* (n 3). The underlying facts of the dispute are set out in paras 23–31 of the judgment.

²¹ See *Daiichi* (n 3) paras 41–42, and case law cited therein.

²² *ibid* para 43.

²³ *ibid* para 44.

First, the Court distinguished between this case, which concerns article 207 TFEU and the case law concerning the earlier article 113 EC (ie, Opinion 1/94) and the later article 133 EC (ie, the judgment in *Merck Genéricos*). Taking into account the new article 207 TFEU, the Court found the case law on the latter two articles to be no longer relevant.²⁴

Second, the Court stressed that article 207 TFEU deals with trade between the EU and third countries, and not trade within the internal market.²⁵

Third, the Court repeated that on the basis of earlier case law, an EU act falls within the common commercial policy, if it is intended in essence to promote, facilitate or govern such trade, or has direct and immediate effects on international trade. Thus, a specific link to international trade is needed.²⁶

Fourth, the Court found that, without distinguishing between provisions, the provisions of the TRIPS Agreement exhibit a specific link with international trade because: (i) the TRIPS Agreement forms an integral part of the WTO system, and is one of the key multilateral agreements on which that system is built—this is apparent from the fact that Annex 2 of the WTO Agreement entitled ‘Understanding on rules and procedures governing the settlement of disputes’ (DSU) permits the suspension of concessions between the TRIPS Agreement and the other main agreements comprising the WTO Agreement, the right of so-called ‘cross-retaliation’; and (ii) the drafters of the TFEU could not have ignored the almost identical wording used in article 207(1) TFEU and in the title of the TRIPS Agreement.²⁷

The Court subsequently rejected the position that at least the provisions of Part II of the TRIPS Agreement regarding ‘Standards concerning the availability, scope and use of intellectual property rights’ concern subject matter, such as that set out in article 27, which falls within the field of the internal market. In the Court’s view, this position was incompatible with the objective of the TRIPS Agreement in general and of Part II thereof in particular. That general objective, according to the Court, is ‘to strengthen and harmonise the protection of intellectual property on a worldwide scale.’²⁸ The Court referred to the preamble of the TRIPS Agreement which states that that agreement aims to ‘reduc[e] distortions of international trade by ensuring, in the territory of each member of the WTO, the effective and adequate protection of intellectual property rights.’ Part II sets out the rules for each of the principal categories of intellectual property rights. The context of those rules is the liberalisation of international trade, not the harmonisation of the laws of the Member States—the EU remains free to adopt rules concerning intellectual property rights on the basis of competences in the field of

²⁴ *ibid* para 48.

²⁵ *ibid* para 50. See also the judgment in Case C-137/12 *Commission v Council* [2013] EU:C:2013:675, para 56.

²⁶ *Daiichi* (n 3) paras 51–52. See also Case C-137/12 *Commission v Council* (n 25) paras 57–58.

²⁷ *Daiichi* (n 3) paras 53–55.

²⁸ *ibid* para 58 referring to the judgment in Case C-89/99 *Schieving-Nijstad and Others* [2001] ECR I-5851, para 36.

the internal market. In exercising such competences, the EU must 'comply with the rules concerning the availability, scope and use of intellectual property rights in the TRIPS Agreement'.²⁹

In the Court's view, the EU therefore has exclusive competence, because article 27 of the TRIPS Agreement is a part of the common commercial policy.³⁰ In view of the wording of the preliminary question, the Court's answer refers only to article 27 of the TRIPS Agreement, even though the Court's reasoning shows in essence that it considered the TRIPS Agreement as a whole to fall within the EU's exclusive competence. Based on that answer, the Court found it unnecessary to answer the question on direct effect.³¹ The implication here is that the EU has competence to determine the direct effect of the TRIPS Agreement; it is no longer a competence of the Member States. As a result, national courts might need to revise their case law in this respect. However, the Court did not go any further into this in its judgment.

3.3 Confusion over the definition of 'commercial aspects of international property'

The starting point of the Court's reasoning was that the case law in the area of the relevant Treaty provisions before the Lisbon Treaty was no longer relevant. This position is not problematic in itself. The amendments of the Treaties support the conclusion that the exclusive competence over the common commercial policy has been widened. The wording of article 207(1) TFEU shows that the negotiators of the Lisbon Treaty chose to add commercial aspects of intellectual property as a subject matter falling within the common commercial policy. Presumably, the Member States made a choice in this respect to transfer at least the competence over the TRIPS Agreement, or a part thereof, to the EU. After all, the TRIPS Agreement is the principal multilateral agreement on intellectual property protection and, as a matter of WTO law, its content is described as concerning trade-related aspects of intellectual property. This is also apparent, as the Court observed, from the analogy between 'commercial aspects of intellectual property' in article 207(1) TFEU and 'trade-related aspects of intellectual property rights' in the full title of the TRIPS Agreement.³² Several language versions use similar, although not identical, wording; others use identical wording. The choice of such broad formulation, however, suggests that the intention was not merely to confirm the Court's case law, in particular Opinion 1/94. Rather, the use of a term that closely resembles that used to characterise all of the content of the WTO Agreement concerning intellectual property rights shows the intention to recognise an exclusive competence broader than

²⁹ *ibid* paras 56–60.

³⁰ *ibid* para 61.

³¹ *ibid* para 62.

³² So far, no WTO panel or Appellate Body report has interpreted the meaning of 'trade-related aspects of intellectual property rights'. This is perhaps not surprising, taking into account that similar issues of competence and scope do not arise between WTO Members with regard to the TRIPS Agreement.

that established in the case law. The Court, however, did not make reference to the negotiations on article 207 TFEU and the gradual and progressive broadening of the common commercial policy, which was a result both of the Court's case law and further developments in the international legal framework on international trade,³³ in order to determine whether the changes made to the scope of the exclusive competence over the common commercial policy had the aim of, *inter alia*, bringing all WTO agreements—or specifically the TRIPS Agreement or a part thereof—within that competence.

Although this reasoning could have been sufficient to justify the Court's answer to the first preliminary question, the Court nevertheless examined the content of the TRIPS Agreement to establish that the whole agreement concerns the common commercial policy. Even if the outcome of Opinion 1/94 was no longer valid, a specific link with international trade was still required. However, in contrast to earlier case law the Court did not examine the substantive character and content of the TRIPS Agreement's provisions. Its analysis was limited to the TRIPS Agreement's more general and formal characteristics, and in particular, to the general objectives and the structural relationship between the TRIPS Agreement and the other agreements forming part of the WTO Agreement. These characteristics were already known when Opinion 1/94 was delivered. At that time, it would appear that the Court considered them to be neither relevant nor sufficient in order to conclude that there was exclusive competence.

The Court attached importance to the fact that the TRIPS Agreement is an integral part of the WTO system. It is doubtful as to whether this fact shows that the substantive content of the TRIPS Agreement necessarily exhibits a specific link with international trade. It is regrettable that the Court did not provide any explanation in this regard. This element of the Court's reasoning seems to suggest that every agreement which, as a matter of WTO law, forms part of the WTO Agreement necessarily corresponds to what constitutes the common commercial policy under EU law. If this is the case, the content of a concept under EU law is determined by the political choices of the WTO Members (including the EU and its Member States). This would be a very strong form of co-adaptation between the EU and the WTO.³⁴

In this context, the Court did not take into consideration that the inclusion of the TRIPS Agreement to the WTO Agreement was the outcome of a compromise between developing and developed countries during the Uruguay Round, and that uncertainty remains regarding the legal and policy considerations for this decision.³⁵ It is similarly unclear to what degree the Court accepted that the content of the TRIPS Agreement or parts thereof is solely trade-related, or also exhibits a specific link with for example, the protection of public health.

³³ See also Geert De Baere and Isabelle Van Damme, 'Co-adaptation in the International Legal Order: The EU and the WTO' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law* (vol 111, Hart Publishing 2012) 320–24.

³⁴ Regarding the 'co-adaptation' hypothesis, see *ibid* 311–25.

³⁵ See, for example, Antony Taubman, *A Practical Guide to Working with TRIPS* (OUP 2011) 2, 11, 35.

According to the Court, the specific character of the link between the TRIPS Agreement and international trade was apparent, *inter alia*, from the fact that article 22 DSU provides for the possibility that in the event of a multilateral determination that a WTO Member has not implemented recommendations or rulings of the WTO dispute settlement bodies within a reasonable period of time, another WTO Member authorised by the Dispute Settlement Body (DSB) can take measures to induce compliance. One type of measure that can be applied is the suspension of concessions or other obligations under the WTO covered agreements.³⁶ In identifying a specific link between the TRIPS Agreement and international trade, the Court found it relevant that the suspension of obligations under the TRIPS Agreement was possible in the event of a breach of obligations under the other agreements, which form part of the WTO Agreement. Such cross-retaliation is indeed available under article 22(3)(c) DSU if '[the] party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough'. However, it is unconvincing to determine the existence of the specific connection between intellectual property and international trade on the basis of the relationship between the measure authorised with the aim of inducing a WTO Member to end the breach of an obligation and the obligation under another agreement which is the reason for that measure to be applied. Although the DSU lays down specific principles, measures such as the suspension of obligations are permitted under international law. Their objective is to end the breach by the responsible State of obligations under international law, which includes WTO law. This is also the objective of the measures permitted under the DSU under specific conditions.³⁷ Just like under general international law, the relationship between such a measure and the original breach of an obligation under WTO law is independent of the fact that the obligation that is the subject of the measure relates substantively to the obligation which has been breached and has given rise to responsibility.³⁸ Moreover, the Court has accepted in earlier case law that the grant of tariff preferences is a commercial policy measure, as is their suspension.³⁹ The content of the obligation breached by a particular measure thus determines the content of the measure taken in retaliation. This parallelism is perfectly acceptable, where the retaliation measures are taken in the same sector and are covered by the same agreement (and possibly regarding similar obligations) as those which are

³⁶ See in particular arts 22(2) and (6) DSU. Compensation is the other type of measure.

³⁷ See for example, *United States—Continued Suspension of Obligations in the EC-Hormones Dispute*, WTO Doc WT/DS320/AB/R (16 October 2008); *Canada—Continued Suspension of Obligations in the EC-Hormones Dispute*, WTO Doc WT/DS321/AB/R (16 October 2008) paras 382–84.

³⁸ See, *inter alia*, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 282; International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts*, UNGA res 56/83, Annex, 12 December 2001, arts 49–54.

³⁹ Case C-45/86 *Commission v Council* [1987] ECR I-1493, para 21; Opinion 1/94 (n 7), para 65.

the cause of those measures being taken. But its logic is perhaps more difficult to defend in the event of cross-retaliation.

The Court thus applied primarily formal criteria in characterising the substantive relationship between the TRIPS Agreement as a whole and international trade. In this way, the Court avoided giving effect to the text of article 207(1) TFEU which suggests that a distinction can be drawn between the commercial and non-commercial aspects of intellectual property—a distinction that was the basis of the Advocate General's analysis.⁴⁰ The same limitation can be found in the title of the TRIPS Agreement despite the fact that the content of this agreement contains few limitations regarding scope.⁴¹

The Advocate General's analysis illustrates the difficulty in distinguishing between the provisions of the TRIPS Agreement that relate to commercial aspects of intellectual property and those that do not. Without defining the autonomous concept of 'commercial aspects of intellectual property', the Advocate General appears to have distinguished between provisions that specifically relate to trade in goods and provisions whose content relates to the establishment of intellectual property rights which may then be commercially exploited and produce commercial effects.⁴² Article 27 falls within the second category. For this category, it is less obvious whether the provisions relate to commercial aspects of intellectual property. Based on this distinction, the Advocate General agreed with the Member States that not all of the provisions of the TRIPS Agreement fall within the EU's exclusive competence and that, accordingly, the rule developed in *Merck Genéricos* was still valid.⁴³ The Advocate General also appeared reluctant to take a position on the exclusive competence over the entire TRIPS Agreement because of the risk of indirect harmonisation.⁴⁴ His position was limited to the EU's exclusive competence in relation to article 27.⁴⁵ In order to determine which substantive provisions (the second category) fall within the EU's exclusive competence, the Advocate General proposed exploring whether such provisions 'may (...) occasionally assume a "strategic" position, on account of their impact on trade'.⁴⁶

Even if the terminology in article 207(1) TFEU is derived from the terminology used in WTO law for setting out the content of the TRIPS Agreement, the fact remains that, as has already been mentioned in this article, the use of the concept 'trade-related' in the

⁴⁰ As regards WTO law, this link was already recognised in the provisions of the General Agreement on Tariffs and Trade 1947 55 UNTS 194 (entered into force 1 January 1948) (GATT 1947) and after the entry into force of the WTO Agreement, the General Agreement on Tariffs and Trade 1994, 1867 UNTS 187 (entered into force 1 January 1995) (GATT 1994) (see for example, arts XII:3(c)(iii), XVIII:10, IX and XX(d) of GATT 1994).

⁴¹ See also Holger P Hestermeyer, 'The Notion of "Trade-related" Aspects of Intellectual Property Rights: From World Trade to EU Law—and Back Again' (2013) 44(8) ICC—International Review of Intellectual Property and Competition Law 925.

⁴² See Opinion of AG Cruz Villalón in *Daiichi* (n 3) paras 52, 61, and fn 15.

⁴³ *ibid* para 62.

⁴⁴ *ibid* para 60.

⁴⁵ *ibid* para 73.

⁴⁶ *ibid* para 66.

WTO is based on a political compromise between developing and developed countries during the Uruguay Round. With regard to the TRIPS Agreement itself, this choice was initially made in the so-called *Punta del Este* Declaration by which the Uruguay Round of negotiations was launched and which, ultimately, resulted in the establishment of the WTO.⁴⁷ The content of that declaration largely corresponds to the first recital in the preamble to the TRIPS Agreement.

The requirements under the TRIPS Agreement go further than those in existing multilateral agreements on intellectual property rights at the time of the WTO's establishment and to which the TRIPS Agreement itself makes reference. The TRIPS Agreement is also an agreement of which the content is partially determined by treaties that have been negotiated and signed outside the context of trade liberalisation and the GATT 1947 or the WTO, such as provisions of the Paris Convention for the Protection of Industrial Property of 20 March 1883 or the Berne Convention for the Protection of Literary and Artistic Works.⁴⁸ Through cross-referencing, provisions of such treaties constitute an integral part of the TRIPS Agreement, and therefore of WTO law.⁴⁹ In the TRIPS Agreement, those provisions are trade-related, but what is the position of the identical or similar provisions in a different multilateral or regional intellectual property agreement or in a trade agreement that is not part of the WTO system?⁵⁰ The Court's reasoning suggests that the type of agreement is relevant. As regards the TRIPS Agreement, the Court appears, for understandable reasons, not to have questioned whether that agreement is part of a trade agreement. It was therefore unnecessary to clarify whether it suffices that provisions on intellectual property rights be part of a trade agreement and what the essential characteristics of that type of agreement are.⁵¹

In WTO law, however, no substantive distinction is made according to whether a provision of the TRIPS Agreement is trade-related or not. The outcome of the Uruguay Round was an agreement that protects two kinds of interest: the potential trade barriers resulting from the application of the measures to protect and enforce intellectual property rights and trade barriers resulting from the lack of or inadequate protection

⁴⁷ General Agreement on Tariffs and Trade (GATT) Punta del Este Declaration, MIN(86)/W/19, 25 ILM 1623 (1986) (20 September 1986).

⁴⁸ Paris Convention for the Protection of Industrial Property, signed 20 March 1883, as revised 14 July 1967, 828 UNTS 305 (entered into force 19 May 1970); Berne Convention for the Protection of Literary and Artistic Works, signed 9 September 1886, as revised 24 July 1971, 1161 UNTS 3 (entered into force 15 December 1972).

⁴⁹ For example, art 2(1) of the TRIPS Agreement provides: '[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967)'.

⁵⁰ Hestermeyer (n 41) 930. For a discussion of the protection of intellectual property rights in more recent trade agreements between the EU and third countries, see, inter alia, Josef Drexel, 'Intellectual Property and Implementation of Recent Bilateral Trade Agreements in the EU' (2014) Max Planck Institute for Intellectual Property and Competition Law Research Paper No 12/09 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102530> accessed 1 June 2015.

⁵¹ See also, for example, Pierre Pescatore, 'Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?' (1999) 36 CML Rev 387, 389.

of intellectual property rights.⁵² The fact that the TRIPS Agreement does not relate to all aspects of intellectual property that may have trade implications does not affect this description. From the WTO's perspective, the whole of the TRIPS Agreement is trade-related despite the fact that the content of provisions in that agreement may correspond to that of identical or similar provisions in an agreement not part of the WTO system. The distinction between trade-related and other aspects of intellectual property under EU law does not appear to play any role in WTO law. It would appear that it was the political decision to add such provisions to the WTO treaties that gave rise to the characteristic of trade-relatedness. From this perspective, the Court's reasoning in *Daiichi* is, thus, consistent with the reality in the WTO. Its result equally ensures consistency between the different fields of the EU's external action in the WTO and exclusive representation by the Commission.⁵³

The rather formal test applied to the TRIPS Agreement differs from the more substantive test applied in Case C-137/12. In that case, the Court decided that the contested decision, which had the aim of authorising the signing on behalf of the EU of a convention between the Member States of the Council of Europe concerning the legal protection of services based on or consisting of conditional access, has a specific connection with international trade in services.⁵⁴ The Court held that that Convention is intended to introduce similar protection to Directive 98/84, which is aimed at ensuring an adequate legal protection for the services concerned in order to promote trade in those services within the internal market.⁵⁵ The Court referred in this context to paragraphs 58 and 60 of the judgment in *Daiichi*. It examined the preamble and the explanatory report on the Convention in order to determine its objectives. These showed that the Convention establishes a regulatory framework, almost identical to that of a European directive, which ensures the minimum level of protection of the services concerned across Europe and, therefore, beyond the borders of the EU. This objective was sufficient to hold that the primary aim of the contested decision shows a specific link with international trade in the services concerned, and thus justified bringing that decision under the common commercial policy.⁵⁶

It follows that the substantive definition of the common commercial policy and the criterion of a specific link with international trade are still valid. In *Daiichi*, however, the Court opted for a solution, which does not call into question the characterisation of the TRIPS Agreement in WTO law, and that recognises the gradual expansion of the common commercial policy under the Treaties. There are undoubtedly contradictions

⁵² See, for example, the first recital in the preamble to the TRIPS Agreement.

⁵³ See also, for example, Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon: The *Daiichi Sankyo* and *Conditional Access Services* Grand Chamber Judgments' (2014) 41(2) *Legal Issues of Economic Integration* 193, 200; Mirjam Abner, 'Les compétences exclusives en matière de politique commerciale commune' (2013) 3 *RAE—LEA* 589, 594.

⁵⁴ Case C-137/12 *Commission v Council* (n 25) para 65.

⁵⁵ *ibid* para 64.

⁵⁶ *ibid* paras 59–65.

between this judgment and the Court's earlier case law on the TRIPS Agreement. The Court in *Daiichi* could have used a large number of the considerations in the analysis of the competence issue in Opinion 1/94. The decision of the Court to put earlier case law aside for the sake of the new definition of the common commercial policy in article 207(1) TFEU, therefore, lacks persuasiveness. A full analysis on the basis of the meaning of the new definition and the historical background of the development of the scope of the common commercial policy, as opposed to the content of the TRIPS Agreement, and the relationship between this agreement and WTO law in general, was perhaps a more suitable choice for justifying the outcome of *Daiichi*.

3.4 The use of *Daiichi* for resolving the issue of competence as regards other intellectual property agreements

It is unclear whether *Daiichi* has consequences for the competence issue regarding the EU's external action concerning other non-WTO intellectual property agreements, possible new (plurilateral) WTO agreements or provisions on intellectual property in other trade agreements (and potentially in investment agreements).

The Court's reasoning in *Daiichi* suggests both a preference for pragmatism and an intention to offer legal certainty on the competence over the TRIPS Agreement. It provides no decisive answer on whether the common commercial policy can cover provisions on intellectual property rights that do not form part of the TRIPS Agreement. The Court does not rule out this possibility, but it seems probable that other considerations will factor in the analysis on a similar question of competence over another agreement. The formal criteria applied in *Daiichi* are perhaps difficult to apply in other, possibly regional or bilateral, agreements. A more substantive analysis of the specific link of a different agreement or an individual provision of a non-trade agreement with international trade may be needed. It is, therefore, doubtful whether the reasoning in *Daiichi* may be applied to other (trade) agreements and in the context of current or future negotiations of such agreements containing provisions on intellectual property. The same observation is applicable to potential new plurilateral WTO agreements because these do not necessarily correspond to the Court's definition of what forms an integral part of the WTO Agreement.

So it is now a matter of waiting for a case before the Court in which the competence question regarding especially a non-WTO agreement in relation to the concept of 'commercial aspects of intellectual property' in article 207(1) TFEU is raised. In such a context, the clarification on where the dividing line in the EU's external action regarding commercial and other aspects of intellectual property lies is perhaps inevitable.

3.5 Commercial aspects of intellectual property and internal competences

Implied exclusive competence for external action is the consequence of the existence and the exercise of internal competence. By contrast, explicit exclusive competence for

external action can have consequences for the internal distribution of competences between the EU and the Member States. These consequences of determining an exclusive competence of the EU are set out in article 2(1) TFEU: ‘only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts’. However, that article must be read in conjunction with article 207(6) TFEU, which states that the exercise of the competences conferred by article 207:

shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.

It follows that the distribution of external competences for the TRIPS Agreement does not, in principle, alter the distribution of internal competences for the same subject matter.⁵⁷ Despite the exclusive competence regarding the TRIPS Agreement, the Member States may retain internal competence in respect of the internal market as long as the EU has not exercised its internal competences. However, Member States’ competences are limited indirectly because the Member States, in exercising their competences, must comply with an international agreement whose content or validity they can no longer influence.⁵⁸

The Court has not looked further into the specific relationship between the exercise of external and internal competences as regards the subject matter of the TRIPS Agreement. If the exercise of the EU’s exclusive competence over the common commercial policy can have an indirect impact on the exercise of internal competences that still belong to the Member States, it nevertheless seems that it may be assumed that, by virtue of the principle of sincere cooperation in article 4(3) of the Treaty on European Union (TEU), a mild degree of cooperation between the EU and the Member States is appropriate. According to this principle, the EU and the Member States are to respect and support each other in carrying out the duties arising from the Treaties.⁵⁹ Because of the potential consequences of EU external action in the WTO for the exercise of Member State competences, the principle can mean that the EU must engage in dialogue with the Member States without presupposing of course that the Member States have

⁵⁷ Art 207(6) TFEU thus prevents a so-called reverse ERTA effect. See, inter alia, Markus Krajewski, ‘The Reform of the Common Commercial Policy’ in Andrea Biondi, Piet Eeckhout (eds), *EU Law After Lisbon* (OUP 2012) 305; Jan Wouters, Dominic Coppens and Bart De Meester, ‘External Relations after the Lisbon Treaty’ in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty—EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 174; Marise Cremona, ‘A Constitutional Basis for Effective External Action? An Assessment of the Provisions of EU External Action in the Constitutional Treaty’, (2006) EUI Working Papers LAW No 2006/30, 32 <<http://cadmus.eui.eu/handle/1814/6293>> accessed 1 June 2015.

⁵⁸ In this context, it must be noted that decisions of the various committees or other bodies of the WTO (of which all WTO members are also part) are increasingly used in dispute settlement as a relevant factor in treaty interpretation. See, for example, *US—Tuna and Tuna Products (Mexico)*, WTO Doc WT/DS381/AB/R (16 May 2012), paras 370–78.

⁵⁹ See, inter alia, Markus Krajewski (n 57) 305–06.

a decision-making right or that the principle of sincere cooperation requires the same degree of cooperation in this context as in the case of a mixed agreement.

4 Conclusion

The EU's external competence is dynamic and evolves as a result of developments both in EU law and international law. With regard to EU law, this competence changes according to revisions of primary law concerning the definition of internal and external competences, and the exercise of internal competences. With regard to international law, the external competence of the EU grows according to the expansion of primarily treaty law in new substantive fields of which some fall within the shared or exclusive competence of the EU. In that sense, treaty amendments concerning the external action of the EU are, often, rather reactive. The amended definition of the common commercial policy seems to illustrate this. In the Court's view, this amendment justifies the description of the TRIPS Agreement as falling within the EU's exclusive competence. The Court's reasoning, however, was primarily based on considerations concerning the content of the TRIPS Agreement and other WTO treaties. In so doing, the Court applied article 207(1) TFEU in a manner which allows only the competence question concerning the TRIPS Agreement to be resolved. Nevertheless, it remains unclear whether and, if so, how article 207(1) TFEU must be applied to other agreements or individual provisions concerning intellectual property rights.