

RESEARCH ARTICLE

The Borders of EU Competences with Regard to the International Regulation of Intellectual Property Rights: Constructing a Dam to Resist a River Bursting Its Banks

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In view of the recent negotiations on the highly anticipated Free Trade Agreements to which the EU shall be party (e.g. CETA and TTIP), assessing the extent to which the EU can regulate intellectual property rights in its external relations seems relevant. Two recent cases of the Court of Justice of the EU have reversed its landmark decision in Opinion 1/94, in which intellectual property regulation was almost entirely excluded from the EU's exclusive competence in trade matters. Firstly, in the *Daiichi Sankyo* case, the Court elaborated upon the EU's explicit external competence in the field of intellectual property. This explicit competence is provided for by Article 207 TFEU on the common commercial policy, which allows the EU to conclude agreements concerning the 'commercial aspects of intellectual property'. In the *Broadcasting Rights* case, the Court founded its decision on the EU's implied competence to conclude international agreements, as provided for by Article 3(2) TFEU. Considering the outcome of these two judgments, the Court seems to grant the EU a wide scope of action with regard to intellectual property rights. As a consequence, questions arise with regard to the post-Lisbon era role that is left for the Member States in the field of intellectual property. Therefore, the aim of this article is to outline the scope of the EU's exclusivity in IP matters and to highlight the borders.

Keywords: Intellectual Property; TRIPS; Common Commercial Policy

I. Introduction

All EU action is bound by the principle of conferral, according to which the Union can only act within the limits of the competences attributed to it by the Member States through the Treaties. This is limited to attaining the objectives set out therein.¹ It was only since the adoption of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights² that intellectual property (IP) started to occupy the EU's trade agenda. It was not until the adoption of the Amsterdam Treaty in 1997, that the EU legislator started referring to the area of IP. The possibility for the EU to negotiate and conclude international agreements concerning 'IP' as a part of the Common Commercial Policy (CCP) was introduced by the Amsterdam Treaty in Article 113 Treaty establishing the European Community.³ The Nice Treaty changed the wording to 'commercial aspects of IP' in Article 133 Treaty establishing the European Community.⁴ Both provisions separated the field of IP from the other domains of the CCP. Whilst the first paragraph referred to those fields which belonged exclusively to the EU, the fifth paragraph indicated that a different settlement applied to the field

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¹ Consolidated Version of the Treaty on the European Union [2008] OJ C115/13 (TEU), art 5(2).

² Marrakesh Agreement Establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 33 ILM 1144, Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

³ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Community and Certain Related Acts [1997] OJ C340/3 (Treaty of Amsterdam).

⁴ Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Community and Certain Related Acts [2002] OJ C325/33 (Treaty of Nice).

of IP. Hence before the Treaty of Lisbon, the EU's external competence in the field of IP was a shared competence between the EU and the Member States. This led to the practice of so-called 'mixity', involving both the Member States and the EU in the negotiations and conclusion of international agreements concerning intellectual property rights (IPRs).⁵

Since the Lisbon Treaty an era of EU external exclusivity dawned. Article 207(1) Treaty on the Functioning of the European Union⁶ not only introduced an exclusive competence for the EU over trade in services and foreign direct investment, but also over the 'commercial aspects of IP' (now included in its first paragraph). Article 207(1) TFEU now states:

'The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action'.

Article 3(1) TFEU expressly foresees the exclusive competence of the EU with regards to the CCP. Hence, when negotiating and concluding international agreements in the domains of the CCP, Member State involvement is not required. However, although the concept of 'commercial aspects of IP' has been introduced in the Nice Treaty in 2001, neither the EU Treaty-drafters, nor the Court of Justice of the EU (CJEU or Court) have ever clarified the exact meaning of this concept. As a result, there has been legal uncertainty with regard to the precise scope of the explicit external exclusivity of the EU in the field of IP.

Apart from the explicit external exclusivity, Article 3(2) TFEU also foresees an implicit exclusive competence for the EU in regard to concluding an international agreement 'when its conclusion is provided for in a legislative act of the Union, when this is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'. This codification of pre-Lisbon case law⁷ enables the EU to exclude Member States participation in its external policy in two main situations. On the one hand, EU exclusivity is triggered when the internal and external aspects of a particular policy area can only be exercised effectively together.⁸ This is called the complementarity principle and applies even in the absence of prior EU internal legislation.⁹ On the other hand, the EU will have the power to act alone when the intended international agreement concerns an area 'covered to a large extent' by Union rules, because the agreement could 'affect the Union rules' or 'alter their scope'.¹⁰ This is called the *ERTA* principle¹¹ and requires parallelism between the internal and external field because its application depends upon a degree of prior secondary legislation. While the first situation will not be the subject of further discussion within this article, the latter situation will be relevant in the section on 'implied exclusivity following the *Broadcasting Rights* judgment' (see Part II, Section B).

Internally, measures in the field of IPRs have generally been adopted on the basis of the internal market legal basis.¹² Since the Lisbon Treaty, Article 118 TFEU explicitly provides for the competence of the EU, in the context of the establishment and functioning of the internal market, to create European IPRs, to set up a uniform protection system, and to create centralised authorisation, coordination and supervision arrangements. This internal competence is a shared competence, allowing Member State action in so far the Union has not exercised its competence.¹³

Given the complexities and vagueness of the legal bases available within the field of IP, it is not surprising that the external competences within the area of IP has repeatedly been the subject of legal discussions.

⁵ See Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited-The EU and Its Member States in the World* (Hart Publishing 2010) (for a comprehensive overview of the practice of 'mixity').

⁶ Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU).

⁷ See eg Case 22/70 *Commission of the European Communities v Council of the European Communities (ERTA)* [1971] ECR I 263; Opinion 1/76 [1977] ECR 741; Case C-476/98 *Commission of the European Communities v Federal Republic of Germany (Commission v Germany)* [2002] ECR I-9855.

⁸ *Commission v Germany* (n 7) para 83.

⁹ Geert De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 52–58.

¹⁰ *ibid* 43–53.

¹¹ Referring to *ERTA* (n 7).

¹² See eg former Treaty Establishing the European Community (Amsterdam Consolidated Version) art 100; Treaty Establishing the European Community (Nice Consolidated Version) art 95; and TFEU art 114.

¹³ TFEU art 2(2).

Let us briefly look at three incidents by way of example. The first incident arose even before IP was mentioned within the EU Treaties, on the occasion of the conclusion of the World Trade Organisation (WTO) Agreements.¹⁴ In its Opinion 1/94,¹⁵ the Court established that the EU did not have the exclusive competence to conclude the TRIPS Agreement.¹⁶ The first reason was that IPRs ‘do not relate specifically to international trade; they affect internal trade just as much as, if not more than, international trade’.¹⁷ The second reason was that this would enable the EU institutions to circumvent the internal voting requirements and the constraints upon harmonisation within the field of IP.¹⁸ A second dispute revolved around a disagreement between the Commission and the Council regarding the competence to establish a position on the accession of Vietnam to the WTO within the WTO General Council.¹⁹ The case was withdrawn before a judgment could be pronounced, but Advocate General (AG) Kokott in her Opinion maintained that the competence within the field of IP did not belong exclusively to the EU, but was a shared competence allowing Member State action only in so far as the EU did not exercise its competence.²⁰ Finally, an issue arose over the legitimacy of the Anti-Counterfeiting Trade Agreement (ACTA)²¹, the adoption of which was ultimately vetoed by the European Parliament *inter alia* because the EU’s competence to harmonise the criminal enforcement of IP was being questioned.²²

In recent years, the Court has again been confronted with questions relating to the EU’s external competence in IP matters, both with regard to the EU’s explicit competence as foreseen in Article 207(1) TFEU and its implied competence provided by Article 3(2) TFEU. This article first discusses the relevant case law and some interim conclusions with regard to the EU’s scope of action in the field of IP since the changes brought about by the Lisbon Treaty. Then, the article enquires into the borders of the EU’s external competences with regard to IP and presents some interim conclusions concerning the role left for the Member States. Finally, the article puts forward some general conclusions with regard to the EU’s role in the field of IP.

II. A River Bursting its Banks on Two Sides

A. Explicit Exclusivity Following the *Daiichi Sankyo* Judgment

An important post-Lisbon case is the *Daiichi Sankyo* case,²³ which enabled the Court to shed some light upon the concept of ‘commercial aspects of IP’. It concerned a preliminary question on whether Article 27 of the TRIPS Agreement, setting out the framework for patent protection, falls within the Member States’ area of competence or within the EU’s sphere of competence.²⁴ In this context, the Court examined the scope of the CCP competence. AG Cruz Villalón took a very nuanced stance. He argued in favour of a case-by-case approach, evaluating the ‘specific link’ between each individual TRIPS provision and international trade.²⁵ In his opinion, the provisions on the availability, scope, and the use of IPRs, including Article 27 TRIPS, do not concern the ‘commercial aspects’ of IP and hence fall outside of the scope of Article 207(1) TFEU.²⁶ The Court, referring to the novelty introduced by Article 207 TFEU, decided differently. The Court first put forward that only those EU rules with ‘a specific link to international trade’ are capable of falling within the concept of ‘commercial aspects of IP’.²⁷ In line with previous case law on the scope of the CCP, the Court also referred to the criterion that only provisions principally aiming to promote, facilitate, or govern trade, and having a direct and immediate effect on trade, fall within the scope of the CCP.²⁸ The Court then concluded

¹⁴ Marrakesh Agreement (n 2).

¹⁵ Opinion 1/94 [1994] ECR I-5267.

¹⁶ *ibid* para 71.

¹⁷ *ibid* para 57.

¹⁸ *ibid* para 60.

¹⁹ Case C-13/07 *European Commission v Council of the European Union (Vietnam)* EU:C:2010:327 (removed from register on 10 June 2010).

²⁰ Case C-13/07 *European Commission v Council of the European Union (Vietnam)* EU:C:2009:190, Opinion of AG Kokott, para 85.

²¹ Anti-Counterfeiting Trade Agreement (adopted 3 December 2010, opened for signature 1 May 2011) 50 ILM 243 (ACTA).

²² European Parliament (Directorate-General for External Policies), ‘The Anti-Counterfeiting Trade Agreement (ACTA): An Assessment’ (June 2011) EP/EXPO/B/INTA/FWC/2009–01/Lot7/12, 29–30.

²³ Case C-414/11 *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon* EU:C:2013:520.

²⁴ *ibid* para 32.

²⁵ Case C-414/11 *Daiichi Sankyo Co. Ltd, Sanofi-Aventis Deutschland GmbH v DEMO Anonimos Viomikhaniki kai Emporiki Etairia Farmakon* EU:C:2013:49, Opinion of AG Cruz Villalón, para 58.

²⁶ *ibid* paras 58–81.

²⁷ *Daiichi Sankyo* (n 23) paras 49–52.

²⁸ Opinion 2/00 [2001] ECR I-9713, para 40; Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestali* [2005] I-3785, para 75; and Case C-411/06 *Commission of the European Communities v European Parliament and Council of the European Union* [2009] ECR I-7585, para 71.

that all TRIPS provisions have this specific link with international trade because they are part of the WTO-system. The Court came to this conclusion after a concise analysis of three elements: the title of the TRIPS Agreements, its preamble, and the link between the TRIPS Agreement and the other WTO-agreements as provided for by Article 22 DSU.²⁹

When considering the consecutive amendments of the CCP legal basis, the Court's judgment is justifiable. Moreover, by making the EU's competences parallel to the fields covered by the WTO Agreements, the judgment satisfies the EU Commission's demand for wider competencies on the basis of more efficiency and consistency within the EU's trade policy.³⁰ By taking into account these trade concerns, the Court returned to its reasoning in Opinion 1/75³¹ and Opinion 1/78³² in which it had opted for a dynamic and flexible approach to the CCP in light of evolutions within the international trade framework.³³ Furthermore, contrary to Opinion 1/94,³⁴ the Court in the *Daiichi Sankyo* judgment, by bringing all the WTO Agreements within the scope of Article 207(1) TFEU, respects the spirit of the WTO Agreements as an 'inseparable whole' or as a 'single undertaking', which is expressed in Article II:2 of the Marrakesh Agreement Establishing the WTO Agreement.³⁵ The judgment is also in line with Opinion 1/08, in which the Court already considered that the scope of the CCP should reflect the scope of the WTO agreements by linking the term 'trade in services' to the GATS agreement.³⁶

However, except for these positive aspects, the judgment can be criticised from several perspectives.³⁷ A first form of criticism is that the Court fails to explicitly state what actually triggers this 'specific link' with international trade.³⁸ Apart from clarifying that all rules adopted within the WTO framework meet this standard, the Court provided no further directions on how to apply this criterion to the different categories of IPRs.³⁹ Rather than determining that the subject matter, by its very nature, concerns international trade, the Court engages in a superficial reasoning. Essentially TRIPS is trade-related because it is adopted within the framework of a trade agreement.

Hence, the Court did not provide the necessary tools to solve future competence questions in the field of IP and several question remained unanswered. Firstly, it is unclear how the CCP competence relates to other IP provisions adopted outside of the WTO-context. In this respect, it is interesting to note that the content of the TRIPS Agreement largely builds on pre-existing IP Agreements adopted within the framework of the World Intellectual Property Organization (WIPO).⁴⁰ Will these IP agreements, containing more or less the same substantive provisions, then by analogy fall within the scope of Article 207 TFEU (*i.e.* for the negotiation of amendments), or are they not sufficiently trade-related?

²⁹ *Daiichi Sankyo* (n 23) paras 53–61.

³⁰ Mirjam Abner, 'Les Compétences Exclusives en Matière de Politique Commerciale Commune, CJUE, 18 Juillet 2013, *Daiichi Sankyo et Sanofi-Aventis Deutschland*, aff. C-414/11' (2013) 3 *Revue des Affaires Européennes* 589; Laurens Ankersmit, 'The Scope of the Common Commercial Policy after Lisbon: The *Daiichi Sankyo* and Conditional Access Services Grand Chamber Judgments' (2014) 41 *LIEI* 193; Isabelle Van Damme, 'De Impact van het Verdrag van Lissabon op de Bevoegdheid van de Unie met betrekking tot de TRIPS-Overeenkomst' (2014) 7/8 *Tijdschrift voor Europees en Economisch Recht* 335; Joris Larik, 'No Mixed Feelings: The Post-Lisbon Common Commercial Policy in *Daiichi Sankyo* and *Commission v. Council (Conditional Access Convention)*' (2015) 52 *CMLR* 779.

³¹ Opinion 1/75 [1975] *ECR* 1355.

³² Opinion 1/78 [1979] *ECR* 2871; Marise Cremona, 'A Policy of Bits and Pieces? The Common Commercial Policy after Nice' (2002) 4 *Cam Yrbk Euro Legal Stud* 61; Angelos Dimopoulos and Petroula Vantsiouri, 'Of TRIPS and Traps: The Interpretative Jurisdiction of the Court of Justice of the EU over Patent Law' (2014) 39 *EL Rev* 210.

³³ 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* (Hart Publishing 2012) 320.

³⁴ In Opinion 1/94, the Court considered the GATT Agreement to fall within the CCP competence, but the main parts of the GATS and TRIPS Agreements to fall outside of the scope of the CCP competence.

³⁵ See Jacques HJ Bourgeois, 'The EC in the WTO and Advisory Opinion 1/94: An Echernach Procession' (1995) 32 *CMLR* 763, 785; Pierre Pescatore, 'Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There An Escape From A Programmed Disaster?' (1999) 36 *CMLR* 387, 389.

³⁶ Opinion 1/08 [2009] *ECR* I-11129; Dimopoulos and Vantsiouri (n 32) 220.

³⁷ *Daiichi Sankyo* (n 23) para 52.

³⁸ See Van Damme (n 30) 338–341.

³⁹ See Dimopoulos and Vantsiouri (n 32) 220.

⁴⁰ TRIPS Agreement art 2 explicitly refers to the Paris Convention for the Protection of Industrial Property (adopted 20 March 1883, entered into force 7 July 1884, revised 14 July 1967) 828 UNTS 307 (Paris Convention), the Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, entered into force 4 December 1887, revised 24 July 1971) 828 UNTS 221 (Berne Convention), the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (adopted 26 October 1961, entered into force 18 May 1964) 496 UNTS 44 (Rome Convention), and the Treaty on Intellectual Property in Respect of Integrated Circuits (opened for signature 26 May 1989, not yet in force) 28 *ILM* 1484; see also Van Damme (n 30) 340–341.

Furthermore, the impact of the *Daiichi Sankyo* judgment on other EU agreements that contain clauses concerning IP protection, but without an obvious link to international trade has been questioned.⁴¹ Will the Court conduct an individual assessment of the trade-related nature of each provision in agreements concluded outside of the WTO framework? Or does the *Daiichi Sankyo* judgment imply that all provisions of the new generation of EU free trade agreements (FTAs) automatically fall within the CCP competence because they are *trade* agreements and because their objectives are related to the promotion or facilitation of trade? Given that over the last decade, cooperation at the multilateral WTO-level has often been substituted by bilateral initiatives, it would have been more useful to provide a clear interpretation of the concept 'commercial aspects of IP', by offering unequivocal standards on content.⁴² Secondly, the inevitable question arises which IPR provisions are not covered by the CCP competence because they do not consist of 'commercial aspects' (see Section B)? Thirdly, it remains unclear whether the reasoning that being part of the WTO-system necessarily entails a trade-related character only applies to TRIPS, or whether this assessment can be extended to all the agreements adopted in the context of the WTO system. This would mean that all future action within the WTO framework would belong to the exclusive sphere of EU competence.

A second form of criticism is that the Court's arguments to bring the entire TRIPS agreement within the CCP competence are not always convincing. In essence, the Court's reasoning was based on three elements: the possibility of cross-suspension of concessions between the WTO agreements, the goals set out in the Preamble of the TRIPS Agreement, and the wording of the title of the TRIPS agreement.⁴³

With regard to the first element, scholars have criticised the Court's acceptance of Article 22(3) Understanding on Rules and Procedures Governing the Settlement of Disputes⁴⁴ as an argument to demonstrate the direct relation between the TRIPS provisions and international trade.⁴⁵ This WTO provision allows WTO Members, in exceptional circumstances of the failure to comply with an obligation by another WTO Member, to request the Dispute Settlement Body for authorisation to suspend the application to the Member concerned of concessions or other obligations under the WTO agreements. If the WTO Member considers that it is not practical or effective to suspend concessions or other obligations with respect to the same agreement, and if the circumstances are serious enough, the WTO Member may seek to suspend concessions or other obligations under another WTO agreement. The possibility of cross-suspension of WTO obligations is merely an implementation, within the WTO context, of the principle of international law that allows a State to adopt measures in response to a wrongful act committed by another State.⁴⁶ Given that the practice of countermeasures is not specifically conceptualised for the protection of IPRs and not even designed for trade-related issues, it seems rather forced and artificial to use the principle to bring all TRIPS provisions within the EU's exclusive CCP competence because of their 'trade-related' nature. Moreover, the same argument has been previously rejected by the Court as unconvincing in Opinion 1/94.⁴⁷

A second element on which the Court founded its decision, was the reference to 'the need to promote effective and adequate protection of intellectual property rights' in the TRIPS Preamble. In this respect, the *Daiichi Sankyo* judgment demonstrates a shift in the interpretation of the rationale of the TRIPS Agreement. Whilst in Opinion 1/94 the Court had concluded that the essence of the TRIPS Agreement did not relate to the CCP and international trade but mainly envisaged the harmonisation of IPRs within the internal market, the Court in the *Daiichi Sankyo* case held that the objective of the TRIPS provisions is to facilitate trade rather than to harmonise the Member State's legislation. Although the Court in the latter case also acknowledged that not all TRIPS rules concern customs or other operations of international trade as such, the Court,

⁴¹ Van Damme (n 30) 341.

⁴² Arguably, these FTAs will fall within the scope of the CCP, eg Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/1 (KFTA) (which referred to Article 207 TFEU as a legal basis, in conjunction with Art 218(5) TFEU, Art 91 and Art 100(2) TFEU on transport and Art 167(3) TFEU on culture) (see Part II, Section B).

⁴³ *Daiichi Sankyo* (n 23) paras 54–60.

⁴⁴ See eg Van Damme (n 30) 339; Mihail Vatsov, 'The Complicated Simplicity of the DEMO Case: Side Effects of Developments in the Law – Daiichi Sankyo and Sanofi-Aventis Deutschland v DEMO (C-414/11)' (2014) 36 EIPR 202.

⁴⁵ WTO, 'Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization' (15 April 1994) <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm> accessed 20 July 2015.

⁴⁶ See eg ILC, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' (3 August 2001) vol II ILC Yearbook ch II; Hubert Lesaffre, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Countermeasures' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010).

⁴⁷ Opinion 1/94 (n 15) paras 64–65.

referring to the Preamble of the TRIPS Agreement, considered that all TRIPS provisions are aimed primarily at reducing distortions of international trade by ensuring the effective and adequate protection of IPRs.⁴⁸

Taking into account that the TRIPS Preamble and Article 22(3) DSU already existed prior to Opinion 1/94,⁴⁹ while that the reference to ‘commercial aspects of IP’ within the first paragraph of Article 207 TFEU is new since the Lisbon treaty, it can be assumed that the third element was the decisive factor in the *Daiichi Sankyo* case.⁵⁰ The similarity in wording between the WTO-concept ‘trade-related aspects of IP’ and the EU-concept ‘commercial aspects of IP’ is indeed striking. However, one can wonder why the EU Treaty-drafters did not just refer to ‘trade-related aspects’ within Article 207(1) TFEU.⁵¹ Can this be explained by linguistic differences or did the EU Treaty-Drafters envisage a specific EU concept? By referring to the title of the TRIPS Agreement as an argument to conclude EU exclusivity, the Court seems to equate the term ‘commercial’ with the wording ‘trade-related’ as used in the WTO context. This decision is in line with the opinion of some who argue that the concept of ‘commercial aspects of IP’ intended to import the concept ‘trade-related’ from the WTO-level.⁵² Cremona, for example, brought forth that the Presidency drafting the Nice Treaty intended to link the EU external competence in the area of IP to the TRIPS Agreement by means of a Protocol, but in the end decided to drop it.⁵³ Hermann submitted that the concept ‘commercial aspects of IP’ was meant to encompass the existing TRIPS provisions at the time, not the future amendments of the TRIPS Agreements.⁵⁴ In opposition to this static interpretation of the concept, other legal scholars have defended a dynamic interpretation, incorporating the potential evolutions of the WTO-framework.⁵⁵ In contrast, AG Cruz Villalón, in his *Daiichi Sankyo* AG Opinion, argued for an autonomous EU interpretation, independent of the WTO system.⁵⁶ But how should this EU concept of ‘commercial aspects of IP’ be defined?

The vague formulation of the concept ‘commercial aspects of IP’, and the criterion of ‘a specific link with international trade’, allows for various interpretations.

Under one interpretation, IP provisions that create barriers to trade by precluding the exportation or importation of goods that infringe IPRs, should necessarily fall under the EU’s trade competence just because of this trade-restrictive effect. In this context, several authors have put forward a rule-of-reason approach, according to which, measures that have an equivalent effect to quantitative restrictions within the meaning of Article 34 TFEU must fall within the scope of the CCP.⁵⁷ Tests based upon the rule-of-reason approach refer to criteria linked to ‘the risk of obstacles to trade and distortions of competition between the Member States’ in order to assess whether EU measures fall within the scope of the CCP.

Eeckhout’s view, for example, is that, by analogy with the *Titanium Dioxide* case,⁵⁸ the CCP should apply whenever there is a risk of diverging external policies by the Member States that could lead to distortions of competition within the Union.⁵⁹ Hence, in Eeckhout’s perspective, the CCP legal basis is, to some extent, the external counterpart of the internal market legal basis provided by Article 114 TFEU.⁶⁰ However, although this approach ensures coherence between the EU’s internal and external policy making and generates efficiency by using the well-developed internal market criteria as a method of interpretation, it cannot be upheld in the area of IP. Given that national IP legislation is not a measure

⁴⁸ *Daiichi Sankyo* (n 23) paras 56–61.

⁴⁹ See Van Damme (n 30) 338.

⁵⁰ Apart from the new internal voting requirements introduced by art 118 TFEU.

⁵¹ *Daiichi Sankyo*, Opinion of AG Cruz Villalón (n 25) [15].

⁵² Cremona (n 32) 70–71; Piet Eeckhout, *EU External Relations Law* (2nd edn, OUP 2011) 285–286; Marek Krajewski, ‘The Reform of Common Commercial Policy’ in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law after Lisbon* (OUP 2012) 301; Holger P Hestermeyer, ‘The Notion of “Trade-Related” Aspects of Intellectual Property Rights: From World Trade to EU Law and Back Again’ (2013) 44 *Int’l Rev Intell Prop & Comp L* 925, 928.

⁵³ Cremona (n 32) 70–72.

⁵⁴ Christoph Hermann, ‘Common Commercial Policy after Nice: Sisyphus Would Have Done a Better Job’ (2002) 39 *CMLR* 9, 18–19.

⁵⁵ Hörst G Krenzler and Christian Pitschas, ‘Progress or Stagnation? The Common Commercial Policy after Nice’ (2001) 6 *EFA Rev* 291.

⁵⁶ *Daiichi Sankyo*, Opinion of AG Cruz Villalón (n 25) para 58.

⁵⁷ Claus-Dieter Ehlermann, ‘The Scope of Article 113 of the EEC Treaty’ in Pierre-Henri Teitgen (ed), *Melanges Offerts à Pierre-Henri Teitgen* (Editions A. Pedone 1984) 145–169; Christian WA Timmermans, ‘La Libre Circulation des Marchandises et la Politique Commerciale Commune’ in Paul Demaret (ed), *Relations Extérieures de la Communauté Européenne et Marché Intérieur: Aspects Juridiques et Fonctionnels* (Story-Scientia 1988) 91–108; Piet Eeckhout, ‘The External Dimension of the Internal Market and the Scope and Content of a Modern Commercial Policy’ in Marc Maresceau (ed), *The European Community’s Commercial Policy after 1992: The Legal Dimension* (Martijn Nijhoff Publishers 1993) 93–101.

⁵⁸ Case C-300/89 *Commission of the European Communities v Council of the European Communities (Titanium Dioxide)* [1991] *ECR* I-2867.

⁵⁹ Eeckhout, ‘External Dimension’ (n 57) 99–100.

⁶⁰ Piet Eeckhout, ‘Exclusive External Competences: Constructing the EU as an International Actor’ in CJEU (ed), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law* (T.M.C. Asser Press 2013).

restricting trade between Member States in the sense of Article 34 TFEU,⁶¹ this would mean that all IP legislation is excluded from the scope of the CCP. Clearly, this rule-of-reason approach cannot be maintained.⁶² Moreover, this approach has never been adhered to by the Court. Instead of focusing on the effects of a CCP measure on the internal market, the Court has focused on the impact of the CCP measure on international trade.⁶³

A second perspective on the interpretation of the criterion 'commercial aspects of IP' could come from the Court's own case law in relation to the nature of IPRs. In the *Phil Collins* case, the Court held that the exclusive rights conferred by IPRs, including industrial, literary and artistic property rights, are by their very nature such as to affect trade in goods and services, as well as the competitive relationships within the Union. As a result, they fall under the scope of the free movement provisions and the treaty provisions relating to competition.⁶⁴ However, the Court expressly made the distinction between moral rights and economic rights. Whereas the first category of rights enables authors and performers to object to any distortion, mutilation or other modification of a work that would be prejudicial to their honour or reputation, the second category of rights enables the right holder to exploit commercially the marketing of the protected work.⁶⁵ Given that moral rights do not give rise to a 'commercial exploitation', it could be argued that only the second category of rights is sufficiently trade-related to fall within the scope of Article 207(1) TFEU. Hence in this view, moral rights could be regarded as an example of non-commercial aspects of IP. However, as observed above, the Court in its case law on the CCP has not relied on internal market concepts to define the scope of the EU's external competence in trade matters, but has consistently opted for an interpretation of the CCP in the light of the evolutions in the international trade framework.⁶⁶ In this view, moral rights should be considered to fall outside of the scope of Article 207(1) TFEU because they are not covered by the TRIPS Agreement.⁶⁷

A third perspective is based on an examination of the general objectives and the rationale of the CCP competence. The goals of the EU's trade policy are set out by Article 206 TFEU, which foresees that the EU is to 'contribute, in the common interest, to the harmonious development of world trade, *the progressive abolition of restrictions on international trade* and on foreign direct investment, and the lowering of customs and other barriers'.⁶⁸ Further, Article 207(1) TFEU highlights that the CCP should be based on uniform principles and that it should be conducted in the context of the principles and objectives of the Union's external action. According to Article 205 TFEU, these principles and objectives should be realised in line with Article 21 TEU, which *inter alia* refers to the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade. These guiding provisions indicate that the CCP's overall rationale is to stimulate the world economy by contributing to the progressive abolition of restrictions on international trade.⁶⁹ The wording of these overarching provisions has been understood as implying a duty on the EU to pursue a gradual liberalisation, whilst leaving the EU some leeway as to the choice of methods and the extent of liberalisation. Besides, Article 206 TFEU could also be regarded as imposing a standstill obligation, precluding further restrictions to trade.⁷⁰ Based on these constitutional policy considerations, measures having a 'specific link with international trade' can be understood as measures that actually aim to eliminate or maintain the same degree of liberalisation. Hence the concept 'commercial aspects of IP' depends on the effect of IP provisions on international trade: IP rules causing further restrictions on trade will fall outside of the scope of Article 207 TFEU. This is also in line with the previous

⁶¹ TFEU art 36 (allows derogations to the free movement of goods, including for the protection of industrial and commercial property on the condition it does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States).

⁶² See also Inge Govaere, 'Intellectual Property Protection and Commercial Policy' in Marc Maresceau (ed), *The European Community's Commercial Policy after 1992: The Legal Dimension* (Martijn Nijhoff Publishers 1993).

⁶³ See Opinion 1/94 (n 15); Opinion 2/00 (n 28); Opinion 1/08 (n 36).

⁶⁴ Joined Cases C-92/92 and C-326/92 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH & Leif Emanuel Kraul v EMI Electrola GmbH* [1993] ECR I-5145, paras 22–23, 25.

⁶⁵ *ibid* para 20.

⁶⁶ De Baere and Van Damme (n 33) 320.

⁶⁷ See Dimopoulos and Vantsiouri (n 32) 221.

⁶⁸ (*Emphasis added*).

⁶⁹ In this context, Cremona and Dimopoulos have observed that, since the adoption of the Lisbon Treaty, the EU is bound to contribute to trade liberalisation (ie the progressive abolition of trade restrictions). See Marise Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty' (2006) EUI Working Paper LAW L2006/30, 29 <<http://cadmus.eui.eu/handle/1814/6293>> accessed 4 January 2016; Angelos Dimopoulos, 'The Effects of the Lisbon Treaty on the Principles and Objectives of the Common Commercial Policy' (2010) 15 EFA Rev 153.

⁷⁰ Dimopoulos, 'Effects Lisbon Treaty' (n 69) 160–161.

case law in the field of the CCP, that established that an EU measure specifically relates to international trade when it is *essentially intended to promote, facilitate or govern trade* and has a *direct and immediate effects on trade*.⁷¹ The question nevertheless arises as to how this should be evaluated.

It is apparent from the *Daiichi Sankyo* judgment that the CJEU endorses the reasoning of the TRIPS Preamble that effectively protecting IP will reduce distortions of international trade. Moreover, Recital 1 of the TRIPS Preamble stresses the need to ensure that measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade. From this perspective, qualifying all TRIPS provisions as 'commercial aspects of IP' is consistent with the CCP's rationale.

However, it should be noted that the basic assumption that the protection of IPRs reduces distortions of trade is controversial.⁷² The argument that the TRIPS provisions are inherently 'trade-related' because diverse levels of IP protection would hinder global trade is contested. Correa states that the idea of IP protection as a manner to reduce barriers to trade contradicts the initial idea of IPRs as barriers to trade as expressed by Article XX (d) General Agreement on Tariffs and Trade (GATT).⁷³ He stressed that IPRs may be used by the right holder to prevent imports or exports of protected subject matter and are therefore not intended to promote free trade, but instead to restrict it.⁷⁴ Moreover, liberalisation typically involves the reduction of government interference in order to eliminate trade barriers, whereas the TRIPS Agreement imposes the obligation for the WTO Member States to enact minimum standards and to restrain trade in IP-infringing goods or products.⁷⁵ Others have observed that TRIPS does not involve the promotion of free trade, but rather aims to harmonise national legal regimes, as the Court previously had concluded in Opinion 1/94.⁷⁶ Furthermore, it is hard to point to the distinctive trade-related characteristics of the TRIPS provisions. Correa and Taubman observed that although the TRIPS Preamble refers to 'trade-related aspects of IPRs', the TRIPS provisions do not specifically concern trade more than the IP provisions in the WIPO conventions upon which they were inspired.⁷⁷ Mylly remarked that the TRIPS Agreement in its Article 6 even explicitly excludes from its scope the exhaustion of IPRs, which is the most clear trade-related aspect of IP protection.⁷⁸ Gervais noted that the wording 'trade-related' was used to give the impression that the subject matter concerned traditional GATT issues, although it is hard to lay the finger on these trade-related aspects.⁷⁹ Then why have these IP provisions been adopted within the framework of the most important forum for international trade?

It is widely accepted that the adoption of the TRIPS Agreement within the WTO-system was the result of a political compromise between developed countries and developing countries.⁸⁰ While the US, the EU and Japan pushed for a new IP agreement within the GATT framework because this would enable effective enforcement of IP and offer a well-established dispute settlement system, most developing countries opposed the adoption of TRIPS within the WTO-system and lobbied for WIPO competence. For this reason, in the beginning of the Uruguay Round, the negotiations focused on international trade in counterfeit goods, which was considered an illegitimate form of cross-border trade. After extensive lobbying activities by US industry groups and effective diplomatic pressure, a majority of the GATT contracting parties became convinced of the link between IPRs and trade and as a result the scope of the negotiations were widened

⁷¹ Opinion 2/00 (n 28) para 40; *Regione autonoma Friuli-Venezia Giulia and ERSA* (n 28) para 75; *Commission v Parliament and Council* (n 28) para 71 (*Emphasis added*).

⁷² Tuomas Mylly, 'Constitutional Functions of the EU's Intellectual Property Treaties' in Josef Drexler, Henning G Ruse-Khan and Souheir Nadde-Phlix (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or for Worse?* (Springer 2014). For a comprehensive overview of the relation between IP protection and economic growth and innovation, see Patricia H Schneider, 'International Trade, Economic Growth and Intellectual Property Rights: A Panel Data Study of Developed and Developing Countries' (2005) 78 *J Dev Econ* 529; and Keith E Maskus, *Private Rights and Public Problems: The Global Economics of Intellectual Property in the 21st Century* (Washington Peterson Institute for International Economics 2012).

⁷³ General Agreement on Tariffs and Trade (adopted 30 October 1947, entered into force 1 January 1948) 55 UNTS 282 (GATT).

⁷⁴ Carlos Correa, *Trade Related Aspects of Intellectual Property Rights, A Commentary on the TRIPS Agreement* (OUP 2007).

⁷⁵ Antony Taubman, *A Practical Guide to Working with TRIPS* (OUP 2011).

⁷⁶ Bernard M Hoekman and Michael M Kosteci, *The Political Economy of the World Trading System* (3rd edn, OUP 2010).

⁷⁷ Taubman (n 75) 35; Correa (n 74) 7.

⁷⁸ Mylly (n 72) 248. The exhaustion of IPRs is the consumption of rights in IP subject matter as a result of the legitimate transfer of the title in the tangible good that incorporates or bears the IP asset in question; WIPO, 'Interface between Exhaustion of Intellectual Property Rights and Competition Law' (1 June 2011) CDIP/4/4 REV./STUDY/INF/2, 4.

⁷⁹ Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (4th edn, Sweet & Maxwell 2003) 11.

⁸⁰ *ibid* 10–26; Peter Yu, 'TRIPS and Its Discontents' (2006) 10 *Marq Intell Prop L Rev* 374; Hoekman and Kosteci (n 76) 372–375; Taubman (n 75) 5; Mylly (n 72) 248.

to include a broad spectrum of IPRs.⁸¹ Hence IP became ‘trade-related’ because the major economic powers defended their IP interests as ‘trade interests’ and managed to capture this in a political agreement within the WTO, but all in all, the actual link between the protection of IP and trade is not so straightforward.⁸² In this regard, the Court’s reasoning that all TRIPS provisions ‘specifically relate to international trade in that they are *essentially intended to promote, facilitate or govern trade* and have *direct and immediate effects on trade*’ could be questioned.⁸³

However, the issue of how the EU definition of ‘commercial aspects of IP’ should be applied remains unresolved. As observed above, an autonomous EU interpretation of ‘commercial aspects of IP’ on the basis of the EU’s constitutional policy considerations would entail a true substantive evaluation of whether an external measure of the EU will actually eliminate trade restrictions, respect the standstill obligations or will increase trade distortions. However, this would boil down to an economic assessment for which the CJEU might not be well equipped. Although the field of competition law is not entirely comparable with the domain of the CCP, as Articles 101 and 102 TFEU are concerned with the private conduct of undertakings and not with state action, it is nevertheless interesting to make the analogy with the role of the Court in the application of Articles 101 and 102 TFEU. In the competition law framework, the CJEU verifies whether agreements between undertakings, decisions by associations, concerted practices or the actions of a dominant undertaking have ‘an appreciable effect on trade between Member States’.⁸⁴ In this context, the Court examines the economic and legal context of the prohibited activity and applies *de minimis* thresholds. However, the scope of Articles 101 and 102 TFEU are confined to the impact of the prohibited activity on the internal market.⁸⁵ In this respect, it is established case law that the CJEU has no jurisdiction over provisions of agreements between undertakings that exclusively relate to trade outside of the EU, because this is excluded from the scope of EU competition law.⁸⁶ Hence the Court will not engage in an economic analysis of the impact of agreements or concerted practices by undertakings on the international trade activity. As they serve another purpose, the concept of the *de minimis* thresholds in EU competition law should be distinguished from the idea of assessing the effect of IP provisions on international trade in the context of Article 207 TFEU. Nevertheless, a comparison between the two helps to illustrate that it is practically unfeasible for the Court to conduct an economic assessment of the impact of a certain act on the international trade arena, whether this act is private or public. Hence, by analogy with Articles 101 and 102 TFEU, Article 207 TFEU should not be understood as requiring the Court to check whether an EU measure affects international trade from an economic perspective.

It is to be concluded that the Court’s pragmatic approach in the *Daiichi Sankyo* case can be justified. Given that over the past twenty years, IP has undeniably become an important aspect of international trade,⁸⁷ demonstrable by the fairly high number of WTO disputes concerning TRIPS,⁸⁸ disconnecting the scope of the CCP from the WTO would be artificial and ineffective. Hence, the Court’s decision is in line with the global political consensus on the TRIPS Agreement as a part of the world trade system. Moreover, when taking into account the explicit references in the TRIPS Preamble to the goal of protecting IPR in order to reduce distortions of international trade, and the express caveat that this should not cause further restrictions on trade, the Court’s decision also respects the constitutionally anchored rationale of the CCP competence. In conclusion, it is submitted that, in the context of Article 207 TFEU, the CJEU can confine its judicial review to a formal evaluation of whether the EU measure specifically relates to international trade in that it contributes to the elimination of trade restrictions or respects the standstill

⁸¹ Correa (n 74) 2–3; Taubman (n 75) 34, 36.

⁸² See eg Gervais (n 79) 10–26; Jagdish Bhagwati, *In Defense of Globalization* (2nd edn, OUP 2007) 183; Taubman (n 75) 5, 25–36; Mylly (n 72) 248.

⁸³ (*Emphasis added*).

⁸⁴ TFEU arts 101 and 102.

⁸⁵ On the basis of the Commission Notice – Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty [2004] OJ C101/81.

⁸⁶ Laura Elizabeth and John J Turner, *Bellamy & Child: European Union Law of Competition* (supp 7th edn, OUP 2013); Nicolas Petit, *Droit Européen de la Concurrence* (Montchrestien 2013); Case C 174/84 *Bulk Oil (Zug) AG v Sun International Limited and Sun Oil Trading Company* [1986] ECR 559, para 44.

⁸⁷ See Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization, Text, Cases and Materials* (3rd edn, CUP 2013).

⁸⁸ There have been 34 disputes on the TRIPS Agreement, see WTO, ‘Dispute Settlement: The Disputes’ <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm> accessed 28 July 2015.

obligation. This should not involve an economic analysis, but a legal assessment of the context and the objectives of the EU agreement and its provisions.

B. Implied Exclusivity Following the Broadcasting Rights Judgment

A second post-Lisbon case involving issues related to the EU's competence in the field of IP is the *Broadcasting Rights* case. It concerned a discussion regarding the nature of the EU's competence to conduct the negotiations on a Convention on the neighbouring rights of broadcasting organisations (the Convention) within the Council of Europe.⁸⁹ The Council and the Representatives of the Governments of the Member States meeting in the Council had adopted a hybrid decision authorising both the Commission and the Member States to participate in the negotiations with regard to those aspects falling within their competence. The Commission objected to this decision, arguing that the EU, on the basis of the *ERTA*-principle as codified by Article 3(2) TFEU, is exclusively competent to negotiate the Convention.⁹⁰ By contrast, the Council and the intervening Member States contended that the field covered by the Convention falls within the shared competence of the EU and the Member States. The Court followed the Commission reasoning and decided that the EU has an implied exclusive competence in the field of neighbouring and related rights, because the content of the negotiations for the Convention falls within an area covered to a large extent by Union rules and because the negotiations may affect the EU rules or alter their scope.⁹¹

The contested hybrid decision was adopted on the basis of Article 218(3) and (4) TFEU. Given that neighbouring rights are a special category of IP rights, it is remarkable that the Commission did not refer to the *Daiichi Sankyo* case to bring the Convention within its CCP competence.⁹² This is all the more so because the TRIPS Agreement in Article 14 also foresees the protection of broadcasting organisations. Therefore, one could argue that, as the Convention at issue was being negotiated within the Council of Europe, the (lack of an) international trade context is an essential factor in determining the applicability of the CCP. This would mean that Article 207(1) TFEU not only covers all WTO-related affairs, but also the bilateral FTA's currently negotiated by the EU. This assumption seems to be confirmed by the Council Decision on the signing of the EU-South Korea Free Trade Agreement, which referred to Article 207 TFEU as one of its legal bases.⁹³

Furthermore, it is noteworthy that the *Broadcasting Rights* case fits in with both the recent line of case law in which the Court yields a broad interpretation of the EU's exclusive external competence,⁹⁴ and with the trend to advance the harmonisation of IP within the EU.⁹⁵ The Court easily dismissed the Council's arguments that the field of the Convention would not be covered by Union rules because it goes beyond the Union *acquis*.⁹⁶ Specific to this case is that the precise content of the envisaged Convention was still unknown. Consequently, applying the *ERTA*-criteria by assessing whether the Convention falls within an area covered to a large extent by Union rules and whether the Convention may affect the EU rules or alter their scope was a complex process. Both the Court and AG Sharpston emphasised that, given the principle of conferral, the Commission bears the burden of proof to demonstrate the scope, nature and content of the envisaged provisions in the Convention in order to establish the EU's exclusive competence. However, the Court and AG Sharpston in the end came to a different conclusion. Whereas the AG decided that the

⁸⁹ Case C-114/12 *European Commission v Council of the European Union (Broadcasting Rights)* EU:C:2014:2151.

⁹⁰ *ibid* paras 59–80.

⁹¹ *ibid* para 102.

⁹² Case C-114/12 *European Commission v Council of the European Union (Broadcasting Rights)* EU:C:2014:224, Opinion of AG Sharpston [47] (in which AG Sharpston observes that no party has argued that the Convention (or part(s) thereof) falls within the scope of Art 207(1) TFEU).

⁹³ Alongside TFEU art 218(5), referral was made to arts 91 and 100(2) (on transport) and art 167(3) (on culture). See (n 42).

⁹⁴ *Broadcasting Rights* (n 89); Case C-66/13 *Green Network SpA v Autorità per l'energia elettrica e il gas* EU:C:2014:2399; Opinion 1/13 [2014] EU:C:2014:2303.

⁹⁵ See eg the Council Regulation (EC) 1257/2012 of 17 December 2012 on implementing enhanced cooperation in the area of the creation of unitary patent protection [2012] OJ L361/1; Council Agreement on a Unified Patent Court [2013] OJ C175/1; Commission, 'The Review of EU Copyright Rules' (3 October 2014) <http://ec.europa.eu/internal_market/copyright/initiatives/index_en.htm> accessed 20 July 2015; Commission, 'European Parliament and EU Council back European Commission Trade Mark Reform Package' (21 April 2015) Press Release IP/15/4823 <http://europa.eu/rapid/press-release_IP-15-4823_en.htm> accessed 20 July 2015. See also Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569; Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others & Karen Murphy v Media Protection Services Ltd* [2011] ECR I-9083; Joined Cases *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) & Airfield NV v Agicoa Belgium BVBA* [2011] ECR I-9363; Case C-607/11 *ITV Broadcasting Ltd and Others v TV Catch Up Ltd* EU:C:2013:147; Case C-466/12 *Nils Svensson and Others v Retriever Sverige AB* EU:C:2014:76.

⁹⁶ *Broadcasting Rights* (n 89) paras 84–86.

Commission did not sufficiently demonstrate that the *ERTA*-criteria were fulfilled, the Court held that the Council was not able to refute the Commission's arguments based upon the preparatory negotiating documents. Taking into account the provisional and general nature of these preparatory documents, the Court showed a far-reaching flexibility in applying the *ERTA*-principle. In Opinion 1/03, the CJEU also established implied EU exclusivity where there was no certainty with regard to the final text of the envisaged convention. However, in Opinion 1/03 at least the purpose and wording of the envisaged convention was clear from the texts resulting from the revision of two pre-existing conventions and from the negotiating directives.⁹⁷ Moreover, in absence of clarity with regards to the final text of the envisaged convention, the Court's decision in that case was based upon an assessment of whether the provisions of an already existing convention would be capable of affecting the internal EU rules.⁹⁸ In the *Broadcasting Rights* case, no comparable pre-existing conventions of the Council of Europe were in place, and the Court expressly noted that the contested hybrid decision provided no details with regard to the content of the negotiations for the future Convention.⁹⁹

Finally it is notable that contrary to the situation in Opinion 1/94, in which the Court had considered the harmonisation achieved in the field of IP to be insufficient to trigger the *ERTA*-effect,¹⁰⁰ the Court now considered the EU Directives governing neighbouring rights to be part of a harmonised legal framework which established a homogeneous protection for broadcasting organisations.¹⁰¹ Therefore, given that the EU has recently engaged in the further harmonisation of patent law and is currently preparing a reform of the internal legislative framework of trademark law and copyright law,¹⁰² it is highly likely that the EU's implied exclusive competence in the field of IP law will be extended accordingly.

C. Interim Conclusions with Regard to the EU's External Competence in the Field of IP

First, it is now established that, by virtue of Article 207(1) TFEU, the EU is exclusively competent to regulate all fields of IP in so far it concerns the TRIPS minimum requirements. Moreover, it can be assumed that IP provisions included in the EU's FTA's have a 'specific link with international trade' because of their trade-related context and objectives, and therefore fall within the exclusive CCP competence.

Second, if there is no such sufficient link with international trade, IP provisions might be found to belong to the EU's sphere of exclusive competence by virtue of Article 3(2) TFEU. It is submitted that the Court, in the post-Lisbon application of the criteria 'an area covered to a large extent' and 'affect Union rules or alter their scope', has opted for a flexible approach.

Although a comprehensive overview of the applicability of Article 207(1) TFEU and Article 3(2) TFEU in the different fields of IP falls outside the scope of this article, it can be concluded that the combination of the explicit and implied exclusive competence for the EU, as introduced by the Lisbon Treaty, entails an extensive role for the EU in the international regulation of IP. As a result, questions arise with regard to the role that is left for the Member States.

III. Reconstructing the Dam: Looking for the Borders

A. Express Constraints on Explicit EU Exclusivity

When considering the scope of the EU's explicit exclusive competence in the field of IP, one should take into account the constitutional borders of the CCP, as provided by Article 207(6) TFEU. This paragraph states:

'The exercise of the competences conferred by this Article in the field of the common commercial policy shall not affect the delimitation of competences between the Union and the Member States, and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation'.

⁹⁷ Opinion 1/03 [2006] ECR I-1145, paras 137, 153.

⁹⁸ *ibid* para 169.

⁹⁹ *Broadcasting Rights* (n 89) paras 76–77.

¹⁰⁰ Opinion 1/94 (n 15) para 103.

¹⁰¹ *Broadcasting Rights* (n 89) para 79.

¹⁰² See (n 95).

This provision should be understood as another confirmation of the principle of conferral and aims to establish parallelism between the internal and external EU powers and to prevent the harmonisation of subject matters ‘through the backdoor’.¹⁰³

The first part of Article 207(6) TFEU stresses that the division of external competences cannot affect the division of internal competences. In the *Daiichi Sankyo* case for example, AG Cruz Villalón pointed to the risk of a ‘deactivation’ of the internal shared competence in the field of IP.¹⁰⁴ This could occur when the EU would exercise its exclusive CCP competence to conclude international agreements, because these agreements would bind the EU institutions and the Member States.¹⁰⁵ As a result, the Member States’ scope of action would be limited and their internal competence would indirectly be affected. Some have observed that Article 207(6) TFEU intends to preclude this so-called reversed pre-emption.¹⁰⁶ In this perspective, the exercise of the EU’s external powers under Article 207(1) TFEU could not lead to an extension of the EU’s internal powers and the Member States could not be prevented from adopting internal measures when the EU has regulated the matter externally.¹⁰⁷ This view corresponds with the Opinion of AG Kokott in the *Vietnam* case, in which she concluded that the former Article 133(6) EC Treaty aimed to establish parallelism between the EU’s internal and external competences by precluding the Union from taking on obligations externally to which it would not be able to give effect internally because of a lack of competence.¹⁰⁸

However, this approach cannot be supported. When taking into account Article 216(2) TFEU and the *Haegeman* case,¹⁰⁹ it is clear that the provisions of agreements concluded by the EU form an integral part of Union law and are binding for the Member States. According to Eeckhout, this binding effect takes place automatically and applies equally to the requirements of implementation. He referred to the *Kupferberg* case¹¹⁰ to argue that the exercise of an exclusive EU competence may compel the Member States to exercise their competence in a particular manner.¹¹¹ When considering this case law, Eeckhout’s perception of the safeguard provision is more convincing. In his perspective, Article 207(6) TFEU should be understood as a precaution not to give an overly expansive interpretation to the already broadly construed scope of the CCP competence. Consequently, AG Cruz Villalón’s assumption that an exclusive external competence cannot exist alongside a shared internal competence is to be rejected. According to Article 2(2) TFEU, the Member States can exercise their shared competence in a particular area to the extent that the Union has not exercised its competence in this area. Hence, the Member States’ internal shared competence will continue to exist, but they will not be able to exercise it when the EU has concluded an international agreement leading to internal harmonisation.

Furthermore, given that the application of Article 207(1) TFEU is subject to different criteria than the application of the internal legal bases in the area of IP, the scope of the EU’s external trade competence cannot be restricted by the limitations imposed on the EU’s shared competence. In this respect, Dimopoulos pointed out that the safeguards in Article 207(6) TFEU cannot lead to a situation in which a shared internal competence would give rise to shared competence in the fields of the CCP.¹¹² This would be irreconcilable with the express exclusive nature of the CCP competence¹¹³ and the established case law with regards to exclusivity in the field of trade with goods.¹¹⁴

The second part of Article 207(6) TFEU contains a prohibition for the EU to regulate externally in areas in which the Treaties preclude EU legislation other than supporting, coordinating or supplementing Member

¹⁰³ See Christian Pitschas, ‘The Treaty of Lisbon and the “New” Common Commercial Policy of the European Union’ (2010) 16 Int TLR 37, 41–42.

¹⁰⁴ *Daiichi Sankyo*, Opinion of AG Cruz Villalón (n 25) para 60.

¹⁰⁵ TFEU art 216(2); Case 181–73 R. & V. *Haegeman v Belgian State* [1974] ECR I-0449.

¹⁰⁶ Marise Cremona, ‘Expanding the Internal Market: An External Regulatory Policy for the EU?’ in Bart Van Voren, Steven Blockmans and Jan Wouters (eds), *The EU’s Role in Global Governance: The Legal Dimension* (OUP 2013).

¹⁰⁷ Ricardo Gosalbo Bono, ‘The Organisation of the External Relations of the European Union in the Treaty of Lisbon’ in Panos Koutrakos (ed), *The European Union’s External Relations a Year after Lisbon*, (CLEER Working Papers 2011/3) 13, 17.

¹⁰⁸ *Vietnam* (n 19) para 142.

¹⁰⁹ *Haegeman* (n 105).

¹¹⁰ Case 104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A. Mainz* [1982] ECR 3641, para 12.

¹¹¹ Eeckhout, ‘Exclusive External Competences’ (n 60) 619–620, 625; see also Frank Hoffmeister, ‘The European Union’s Common Commercial Policy a Year after Lisbon – Sea Change or Business as Usual?’ in Panos Koutrakos (ed), *The European Union’s External Relations a Year after Lisbon*, (CLEER Working Papers 2011/3) 83.

¹¹² Angelos Dimopoulos, ‘The Common Commercial Policy after Lisbon: Establishing Parallelism between Internal and External Economic Policy’ (2008) 4 *Croat Yrbk Euro L & Pol’y* 101.

¹¹³ TFEU art 2.

¹¹⁴ Dimopoulos and Vantsiouri (n 32) 222.

State action. This provision addresses EU external regulatory action with regard to subject matter that is excluded from internal harmonisation by the EU because it falls within the Member States' areas of competence, such as health, culture and tourism.¹¹⁵ It has been argued that, *a contrario*, this implies that, in so far there is no express exclusion of harmonisation, it is possible to adopt external measures leading to internal harmonisation on the basis of Article 207(1) TFEU.¹¹⁶ It has also been observed that in practice this safeguard clause is insignificant.¹¹⁷ When considering the fact that the Court, since the adoption of the Lisbon Treaty, has not once referred to Article 207(6) TFEU, this may be right.

Apart from this express limitation of the EU's external competence, the scope of the CCP competence is also constrained by the scope of the EU's internal market competence. The delineation between these two competences has been the subject of discussion in the recent *Conditional Access Services* case.¹¹⁸ In this case, the Court applied the center of gravity test to ascertain whether Article 207 TFEU or Article 114 TFEU should serve as the legal basis for the European Convention on the legal protection of services based on, or consisting of, conditional access (the Conditional Access Services Convention).¹¹⁹ According to well-established case law, the center of gravity test can be applied when an EU measure has a twofold purpose or a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental. In that case, the measure must be founded on a single legal basis, namely, that required by the main or predominant purpose or component.¹²⁰ In its examination of the question whether the main purpose of the Conditional Access Services Convention concerned the CCP, the Court again referred to the criterion of 'a specific link with international trade'. The Court considered such a specific link to exist, because the signing of the Conditional Access Services Convention aims to extend the application of internal provisions concerning these services to non-EU countries.¹²¹ Although the Court recognised that the Conditional Access Services Convention could affect the internal market policy by approximating the national legislations of its members, it concluded that the predominant aim of the decision to sign the Conditional Access Services Convention is to promote the supply of such services by EU service providers beyond the borders of the Union. Consequently, the signing of the Conditional Access Services Convention falls within the scope of Article 207(1) TFEU.¹²² Hence in this case, the 'specific link with international trade' is established by the particular focus of the Conditional Access Services Convention on the involvement of third countries and the intended effects outside of the EU.

It is notable that although the Court in the *Daiichi Sankyo* case specified that the TRIPS Agreement rather relates to the liberalisation of international trade than to the harmonisation of the laws of the EU Member States, the Court did not apply the center of gravity test as such. Instead, the Court focused its analysis on the scope of the CCP. This can be explained by the different context in which the measure was negotiated. As observed above, Article 207 TFEU is more likely to apply when the international agreement is negotiated in an international trade context.¹²³ In the *Daiichi Sankyo* case for example, the fact that the TRIPS Agreement was part of the WTO system had been determinative for the outcome. Furthermore, it is interesting to observe the total absence of any reference to Article 114 TFEU or Article 207 TFEU in the discussion between the Council and Member States and the Commission in the *Broadcasting Rights* case.¹²⁴ This notwithstanding, the fact is that the EU, by participating in the negotiations of the Convention, aims to improve the functioning of the internal market as well as to promote the interests of broadcasting organisations beyond the EU's borders.

¹¹⁵ Pitschas (n 103) 41, 42; Gosalbo Bono (n 107) 17.

¹¹⁶ Cremona, 'External Regulatory Policy' (n 106) 164.

¹¹⁷ Hoffmeister (n 111) 87.

¹¹⁸ Case C-137/12 *European Commission v Council of the European Union (Conditional Access Services)* EU:C:2013:675.

¹¹⁹ European Convention on the Legal Protection of Services Based on, or Consisting of, Conditional Access [2001] OJ L336/1 (Conditional Access Services Convention).

¹²⁰ Case C-155/91 *Commission of the European Communities v Council of the European Communities* [1993] ECR I-0939, paras 19–21; Case C-36/98 *Kingdom of Spain v Council of the European Union* [2001] ECR I-0779, para 59; Case C-338/01 *Commission of the European Communities v Council of the European Union* [2004] ECR I-4829, para 55; Case C-91/05 *Commission of the European Communities v Council of the European Union* [2008] ECR I-3651, para 73.

¹²¹ *Conditional Access Services* (n 118) para 63.

¹²² *ibid* paras 63–66.

¹²³ See Ankersmit (n 30) 206–207.

¹²⁴ Apart from a reference in *Broadcasting Rights*, Opinion of AG Sharpston (n 92) [47].

B. Implicit Constraints on Implied EU Exclusivity

Article 3(2) TFEU contains no express prohibition similar to Article 207(6) TFEU in order to forbid the EU to conclude alone an agreement which compromises the internal division of competences or which indirectly harmonises the internal regulatory framework when this is precluded by the EU Treaties. However, constraints on the implied exclusive competence are ensured by the criteria to be fulfilled in order to apply Article 3(2) TFEU. These criteria rule out EU exclusivity when the external measure does not concern an area covered 'to a large extent by EU rules' or does not 'affect common EU rules or alter their scope'. The application of the *ERTA*-principle does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully, but that the international commitments fall within an area which is already largely covered by EU rules.¹²⁵ In assessing whether this is the case, the Court must not only take into account the scope of the rules in question but also their nature and content as well as their future development, insofar as that is foreseeable at the time of analysis.¹²⁶ In this respect it is established case law that when both the Union rules and the international agreement lay down minimum standards, implied exclusivity cannot arise, even if the Union rules and the provisions of the agreement cover the same area.¹²⁷

In order to fulfil the criteria 'to affect common EU rules' or 'to alter their scope', a certain degree of internal harmonisation is required. However, the precise degree of harmonisation that is required to trigger the *ERTA*-effect is not clear and can vary. Recent case law in the field of neighbouring rights of broadcasting organisations illustrates the complexity of determining the extent of internal harmonisation required in order to establish external exclusivity. In the *C More Entertainment* case,¹²⁸ the Court decided that under EU secondary law, the right of broadcasting organisations to retransmit their broadcasts, which is limited to the retransmission by wireless means,¹²⁹ is minimum harmonisation, leaving the Member States the possibility to extend the protection of broadcasting organisations to include rebroadcasting by wire or internet. In this context, the Court pointed to Recital 16 of Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, which holds that Member States should be able to provide for more far-reaching protection for owners of rights related to copyright than that required by the provisions in respect of broadcasting and communication to the public. The Court also emphasised that the EU secondary legislation only aims to harmonise copyright and related rights in so far as this is necessary for the smooth functioning of the internal market. Differences between national legislations should be allowed when they do not affect the internal market. Hence, in the *C More Entertainment* case, it was established that there was no full internal harmonisation of the neighbouring rights of broadcasting organisations, as the Member States were allowed to extend the exclusive right foreseen by Article 8(3) Directive 2006/115/EC.

This particular exclusive right for broadcasting organisations has also been the subject of discussion in the *Broadcasting Rights* case, in which Poland and the UK referred to Article 8(3) Directive 2006/115/EC in support of their argument that the EU was not exclusively competent to negotiate the Convention in the framework of the Council of Europe. They argued that the EU has carried out a minimum harmonisation by only regulating the right to retransmission by wireless means while the Convention might also establish an exclusive right of retransmission by wire, in particular through the internet.¹³⁰

Remarkably the Court explicitly stated that it did not concern a situation comparable to that of Opinion 2/91.¹³¹ According to this established case law, EU exclusivity cannot arise when both the internal EU legislation and the intended international agreement lay down minimum requirements, allowing the Member States to adopt more stringent measures. According to the Court, the situation in the *Broadcasting Rights* case was different, because the applicable EU secondary law designates a precise material scope to the right of retransmission by limiting it to rebroadcasting by wireless means.¹³² The Court concluded that when the Convention would introduce a more extensive neighbouring right for broadcasting organisations, the Convention would therefore be capable of altering the scope of the common EU rules on the right of

¹²⁵ Opinion 1/03 (n 97) para 126.

¹²⁶ *ibid*; Opinion 2/91 [1993] ECR I-1061, para 25.

¹²⁷ Opinion 1/03 (n 97) para 127.

¹²⁸ Case C-279/13 *C More Entertainment* EU:C:2015:199.

¹²⁹ Council Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28, art 8(3).

¹³⁰ *Broadcasting Rights* (n 89) para 90.

¹³¹ Opinion 2/91 (n 126).

¹³² *Broadcasting Rights* (n 89) para 91.

retransmission.¹³³ Hence the Court, without expressly indicating whether or not the EU secondary legislation carried out minimum harmonisation and notwithstanding the incertitude as to whether the future Convention would establish minimum or maximum harmonisation, concluded in favour of EU exclusivity on the basis of the *ERTA*-principle. AG Sharpston on the other hand, concluded that Article 8(3) Directive 2006/115/EC foresees minimum harmonisation, which cannot give rise to exclusive EU competence.¹³⁴

When considering that Recital 16 of Directive 2006/115/EC expressly foresees the leeway for Member States to deviate from EU law, AG Sharpston's reasoning seems more convincing. Similar to the rationale of Article 207(6) TFEU with regard to the EU's express exclusive competence, Article 3(2) TFEU should respect the principle of parallelism. Whereas the Court in the *C More Entertainment* case explicitly confirms the nature of Article 8(3) Directive 2006/115/EC as minimum harmonisation, the Court in the *Broadcasting Rights* case refuses to recognise this. In this respect, the Court arguably overstretched the reach of the *ERTA*-criteria in the *Broadcasting Rights* case.

C. Criminal Enforcement of IP: Saved by the Dam or Flooded by the River?

One particularly sensitive area in which the EU could possibly overstep its competence is the domain of criminal enforcement of IP. For example, in the *Vietnam* case regarding the approval of Vietnam's accession to the WTO, AG Kokott opined that the former Article 133(6) EC Treaty required the involvement of the Member States in so far the approval related to Article 61 TRIPS Agreement. This TRIPS provision imposes the obligation to punish IP infringements with criminal procedures and to apply certain designated penalties, such as imprisonment, monetary fines, seizure, forfeiture and the destruction of items. AG Kokott decided in the *Vietnam* case that, as matters of EU law stood at that moment, this went beyond the EU's internal powers with regard to criminal law. Consequently, the principle of parallelism included in Article 133(6) EU Treaty precluded the EU from acting alone.

However, since the adoption of the Lisbon Treaty, Article 83(2) TFEU allows 'the approximation of national criminal laws and minimum rules with regard to the definition of criminal offences and sanctions when this is essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures'. The Commission referred to this as a legal basis for ACTA, which contained a chapter on criminal enforcement of IP.¹³⁵ However, the conclusion of ACTA was rejected by the European Parliament,¹³⁶ *inter alia* because it contained strict enforcement provisions going far beyond the TRIPS standard.¹³⁷ For example, Article 23(1) ACTA contains a broad definition of counterfeiting or piracy 'on a commercial scale', which gives rise to criminal enforcement measures. Acts carried out on 'a commercial scale' would include those acts carried out as commercial activities for direct or indirect economic advantage. This might cover internet users downloading copyrighted files without right holder authorisation and so escaping retail prices.¹³⁸ Besides, many agreed that as internally, the proposal on the so-called 'criminal enforcement directive' was rejected for a lack of EU competence,¹³⁹ the EU, by adopting similar far-going criminal provisions in its external action, would be exceeding its competence.¹⁴⁰ A similar critique was expressed with regards to the criminal enforcement provisions included in the EU-Korea FTA (KFTA).¹⁴¹ Although the KFTA dropped the wide ACTA definition of 'a commercial scale', it still contains criminal enforcement provisions going well beyond internal EU law (*e.g.* liability of legal persons, aiding, and abetting).¹⁴²

It is still not entirely clear how these criminal enforcement provisions relate to Article 83(2) TFEU. In the *Daiichi Sankyo* case, the judgment was silent about that issue. In the *Broadcasting Rights* case, the Member States raised the argument that mixity is required because the Convention would also introduce criminal

¹³³ *ibid* paras 91–93. Another argument of the Court, however less relevant for this article, was that since the judgment in *ITV Broadcasting* (n 95), the exclusive right of communication to the public enjoyed by broadcasting organisations over their broadcasts protected by copyright (*sensu stricto*, excluding neighbouring rights) does include rebroadcasting by means of the internet.

¹³⁴ *Broadcasting Rights*, Opinion of AG Sharpston (n 92) paras 148–149.

¹³⁵ ACTA ch 2, sec 4.

¹³⁶ See European Parliament (n 22).

¹³⁷ ACTA arts 23–26.

¹³⁸ Henning G Ruse-Khan, 'From TRIPS to ACTA: Towards a New 'Gold Standard' in Criminal IP Enforcement?' in Christophe Geiger (ed), *Criminal Enforcement of Intellectual Property: A Blessing or a Curse?* (Edward Elgar Publishing 2012) 16; Christina Eckes, Elaine Fahey and Machiko Kanetake, 'International, European and US Perspectives on the Negotiation and Adoption of the Anti-Counterfeiting Trade Agreement (ACTA)' (2013) 20 *Int TLJ* 20, 24–25.

¹³⁹ Commission, 'Proposal for a European Parliament and Council Directive on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights' COM (2005) 276 final and its 'Amended Version' COM (2006) 168 final (both withdrawn).

¹⁴⁰ European Parliament (n 22) 30.

¹⁴¹ The KFTA was negotiated simultaneously with ACTA (n 42).

¹⁴² Billy M Araujo, 'Intellectual Property and the EU's Deep Trade Agenda' (2013) 16 *JIEL* 439, 470–471.

enforcement provisions. However, the Court declined to look into this sensitive issue because there was no indication that these provisions would actually be part of the Convention. It is interesting to observe that in the *Conditional Access Services* case, the Court accepts that the Conditional Access Services Convention can be adopted on the basis of Article 207 TFEU, although it contains seizure and confiscation measures that could be qualified as having a criminal-law nature.¹⁴³ Hence, criminal law measures such as the seizure and confiscation could be regarded to fall within the scope of the CCP competence when they facilitate trade beyond the EU's borders.¹⁴⁴

However, in the area of IP several questions remain unanswered. First, it is indisputable that the field of IP has been 'subject to harmonisation measures'. But is the degree of harmonisation within the field of IP sufficient to fall within the scope of Article 83(2) TFEU? Secondly, is criminal enforcement essential to ensure the effective implementation of the EU policy in the field of IP? One could argue that ensuring IP enforcement outside of the EU's borders does contribute to the effective implementation of the EU's recent initiatives with regard to IPRs.¹⁴⁵ However, with the failure of ACTA still in mind, the EU is very careful not to repeat its mistakes. During the negotiations of CETA, the Commission has even issued a Factsheet on 'The EU's Free Trade Agreement with Canada and its IPR provisions', in which it was underlined that the ACTA provisions on criminal sanctions have been entirely removed from the CETA text.¹⁴⁶ The consolidated CETA text as released by the Commission indeed does not impose the obligation to adopt criminal enforcement provisions.¹⁴⁷

D. Interim Conclusions with Regard to the Borders of EU External Exclusivity in the Field of IP

On the one hand, explicit EU exclusivity is restricted by the safeguards of Article 207(6) TFEU, securing the internal distribution of competences and ensuring the compliance with Treaty provisions precluding internal harmonisation. However, the above discussion has demonstrated that the precise meaning of this provision is still unclear. Although problems could arise in the field of criminal enforcement of IP, the Court did not touch upon the issue in the *Daiichi Sankyo* case. Therefore, the practical impact of this provision seems insignificant. Furthermore, the EU's external competence should in some cases clear the way for the applicability of other EU competences, such as the internal market competence provided by Article 114 TFEU. This internal market legal basis prioritises on Article 207 TFEU when the external measure predominantly aims to facilitate intra-EU trade rather than to assist trade with third countries by extending the application of internal market provisions beyond the EU's borders.

On the other hand, implied EU exclusivity is limited by the *ERTA*-criteria which require a certain degree of prior EU legislation. As in the area of IP, there is no full harmonisation, the application of Article 3(2) TFEU depends on the Court's evaluation of whether the external measure concerns an area of IP which is 'to a large extent' covered by Union rules and whether the external measure may 'affect EU legislation or alter its scope'. This evaluation should respect the principle of parallelism which lies at the heart of the system of implied exclusivity.

IV. Conclusion: Future as a Mighty River?

It can be concluded that the Court views itself as a true ally of the EU in its quest to push back the Member States' involvement in the international regulatory framework of IP. In neither the *Daiichi Sankyo* case, nor in the *Broadcasting Rights* case, did the Court show constraint in establishing external exclusivity for the Union with regard to IP matters. This recent case law not only established that the EU is the prime external actor in relation to the TRIPS Agreement and with regard to the future Convention on neighbouring rights of broadcasting organisations, it also enables us to draw some conclusions on the future role of the EU in the international regulation of IP.

¹⁴³ *Conditional Access Services* (n 118) para 72.

¹⁴⁴ See Larik (n 30) 796.

¹⁴⁵ See Commission, 'Trade, Growth and Intellectual Property – Strategy for the Protection and Enforcement of Intellectual Property Rights in Third Countries' (Communication) COM (2014) 389 final; Commission, 'Digital Agenda in the Europe 2020 Strategy' <<http://ec.europa.eu/digital-agenda/en/digital-agenda-europe-2020-strategy>> accessed 20 July 2015.

¹⁴⁶ Commission, 'The EU's Free Trade Agreement with Canada and its Intellectual Property Rights Provisions' (18 October 2013) <http://trade.ec.europa.eu/doclib/docs/2012/august/tradoc_149866.pdf> accessed 20 July 2015.

¹⁴⁷ Comprehensive Economic and Trade Agreement (CETA) (not yet in force) <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 20 July 2015.

Firstly, all IP measures with 'a specific link with trade' will fall within the exclusive sphere of the CCP competence. In this respect, not only the aim and content of the envisaged external measure will be determinative, but the context of the measure has proven to be equally important. Given their obvious trade-related character, it is submitted that the IP chapters of the bilateral trade agreements that are currently being negotiated by the EU (e.g. CETA and TTIP) will fall within the scope of Article 207(1) TFEU. It is expected that the constitutional safeguards for Member State participation in Article 207(6) TFEU will play a rather immaterial role in the field of IP. This is because, on the one hand, the EU has shown caution with regard to the notorious criminal enforcement provisions of ACTA and, on the other hand, because the post-Lisbon case law of the Court has not made any reference to this provision.

Secondly, in so far IP provisions are not trade-related and will hence not fall within the CCP competence, Article 3(2) TFEU can trigger implied EU exclusivity. In that event, the nature of the EU's competence depends on the degree of internal harmonisation. Whilst a fully integrated Union market with regards to the different IPRs remains a work in progress, the growing internal harmonisation in the areas of trade marks, patents and copyrights and related rights is expected to bring about an increasing EU exclusivity. In this respect, the Court's flexible approach in relation to the *ERTA*-principle raises questions concerning the constraints on the EU's implied exclusive competence. Illustrative is a combined reading of the *Broadcasting Rights* case and *C More Entertainment* case with regard to the specific field of neighbouring rights. While internally, the Court clearly rejected an interpretation of EU law leading to maximum harmonisation in the field of neighbouring rights of broadcasting organisations, externally, the issue of minimum harmonisation was circumvented and implied EU exclusivity was established without certainty as to the degree of harmonisation envisaged by the future Convention on neighbouring rights for broadcasting organisations.

This leads to the conclusion that, opposite to the situation in Opinion 1/94 over twenty years ago, the combination of Article 207(1) TFEU and Article 3(2) TFEU effectuates a broad exclusive competence for the EU in the area of IP. Although under current EU law the EU legislators opted to translate the shared competence with regard to IP into a legislative framework that allows the Member States to conduct a particular national policy with regard to several aspects of IP, it becomes hard to think of fields of IP law where the EU would not be able to act alone on the external plane. Therefore, it is highly likely that in the future, the mighty river will crush the dams and flood the Member States' landscape.

Competing Interests

The author declares that they have no competing interests.

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