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No mixed feelings: The post-Lisbon Common Commercial Policy in *Daiichi Sankyo* and *Commission* v. *Council (Conditional Access Convention)*

Case C-414/11, *Daiichi Sankyo Co. Ltd and Sanofi-Aventis Deutschland GmbH* v. *DEMO Anonimos Viomichaniki kai Emporiki Etairia Farmakon*, Judgment of the Court (Grand Chamber) of 18 July 2013, EU:C:2013:520, and Case C-137/12, *European Commission* v. *Council of the European Union (European Convention on the legal protection of services based on, or consisting of, conditional access)*, Judgment of the Court (Grand Chamber) of 22 October 2013, EU:C:2013:675.

1. Introduction

In Opinion 1/94, the Court of Justice could be said to have had "mixed feelings" about the hitherto widely interpreted scope of the Common Commercial Policy (CCP). Following the historic breakthrough of the "Blair House Accord" between the EU and the United States, the way was paved in the early 1990s for the successful conclusion of the Uruguay Round, crowned by the establishment of the WTO. For the nature and scope of the CCP, however, this watershed in global economic governance came at a price. In Opinion 1/94, the ECJ concluded that the EU did not have the requisite power to conclude the new agreements that accompanied the founding of the WTO addressing trade in services (GATS) and trade-related aspects of intellectual property rights (TRIPs) on its own, but also needed the Member States alongside it.[1] Hence, these agreements were concluded as so-called "mixed agreements", i.e. having both the Union and the Member States as their parties.

This marked a break with a string of case law in which the CCP had been interpreted as covering a wide range of issues under the Union's exclusive competence,[2] which could be seen as a judicial endorsement of the EU as a "power in trade and through trade".[3] With two recent Grand Chamber judgments confirming changes brought about by the Lisbon Treaty regarding the scope of EU trade policy, this trend seems to be reversed again. In *Daiichi*

1. Opinion 1/94, *WTO,* EU:C:1994:384.
2. See Eeckhout, *EU External Relations Law*, 2nd ed. (OUP, 2011), pp. 11–25.
3. Meunier and Nicolaïdis, "The European Union as a trade power" in Hill and Smith (Eds.), *International Relations and the European Union*, 2nd ed. (OUP, 2011), p. 277.

Sankyo and *Commission* v. *Council (Conditional Access Convention)*, the Court exhibited no "mixed feelings" as to what the post-Lisbon CCP encompasses, i.e., the entire TRIPs and most of the GATS.

Beyond the immediately visible significance of these judgments as endorsing the wide scope of the post-Lisbon CCP, they raise another fundamental question: to what extent does this qualify the continued necessity to have the Member States present in the international economic governance arena? While these judgments may not signify the "end of mixity" – at any rate outside of the trade realm – do these two judgments represent the beginning of the end of a transitional period started by Opinion 1/94, cementing a new chapter in the history of the CCP?

Hence, while both cases raise a number of salient issues relevant for EU law,[4] the analysis presented here will assess the two cases through this lens, which is important in both political and constitutional terms. Politically, these judgments impact on the necessity of "mixity" in a range of trade-related contexts,[5] including the Transatlantic Trade and Investment Partnership (TTIP) with the United States and the Comprehensive Trade and Economic Agreement (CETA) with Canada. Constitutionally, they have implications for the continued presence of the Member States on the international stage alongside the Union.

2. Background

In terms of factual backgrounds as well the legal remedies sought, the two cases under discussion are rather different. *Daiichi Sankyo* was a preliminary reference in a dispute regarding intellectual property rights before a Greek court (the *Polimeles Protodikio Athinon*). The litigants in this case were three pharmaceutical companies. The patent holder Daiichi Sankyo, a global pharmaceutical company headquartered in Japan, and its licensee and

4. For a focus on the patent law aspect of *Daiichi Sankyo*, see 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)", 36 *European Intellectual Property Review* (2014), 202–206; and Dimopoulos and Vantsiouri, "Of TRIPS and Traps: The interpretative jurisdiction of the Court of Justice of the European Union over patent law", 39 EL Rev. (2014), 210–233.

5. See Gstöhl and Hanf, "The EU's post-Lisbon Free Trade Agreements: Commercial interests in a changing constitutional context", 20 ELJ (2014), 739, who note that the EU's "'new generation' FTAs, which cover not only trade in industrial goods, but also areas such as agriculture, non-tariff barriers to trade, services, public procurement, investment, intellectual property rights or competition policy and may establish a dispute settlement mechanism, are normally mixed agreements."

distributor Sanofi-Aventis Deutschland GmbH sought to prevent DEMO Anonimos, a Greek pharmaceutical manufacturer, from selling the latter's generic medicinal products, which include an active ingredient by the name of levofloxacin hemihydrate. For the latter, Daiichi Sankyo claims patent protection by virtue of a supplementary protection certificate (SPC) in Greece.[6] The dispute raises legal questions as to the interpretation of certain provisions of the TRIPs Agreement and, moreover, as to the proper judicial forum for providing such an interpretation, i.e., the Member State court or the ECJ. The second question depends on whether this part of TRIPs has come to be covered by the CCP or is still part of an area in which the Member States retain "primary competence",[7] including the power to "accord direct effect" to these provisions in their national legal order.[8]

Commission v. *Council (Conditional Access Convention)* concerned an action for annulment of the Council Decision on the signing on behalf of the European Union of an international agreement, viz. the European Convention on the legal protection of services based on, or consisting of, conditional access (hereinafter: Conditional Access Convention).[9] This convention was elaborated in the framework of the Council of Europe, was formally adopted in January 2001 and entered into force two and a half years later.[10] The aim of the Convention is to combat, including through criminalization, the "illicit reception of encrypted services"[11] through the use of "illicit devices",[12] acts commonly known as "piracy" of for-pay television, radio or Internet content. Before the contested decision was adopted, the Convention had been signed by a total of twelve countries and ratified by nine.[13] At that time, five Member States (Bulgaria, Cyprus, France, the Netherlands, and Romania) and Croatia (an EU Member State since 1 July 2013) were party to the Convention, while Finland ratified it in May 2013.[14] The EU's accession to the Convention,

6. *Daiichi Sankyo*, paras. 23–28.
7. Ibid., para 31.
8. Ibid., para 32.
9. Council Decision 2011/853/EU of 29 Nov. 2011 on the signing, on behalf of the Union, of the European Convention on the legal protection of services based on, or consisting of, conditional access, O.J. 2011, L 336/1.
10. *Commission* v. *Council (Conditional Access Convention)*, paras. 8–9.
11. Explanatory Report on the Convention, para 10, as quoted in *Commission* v. *Council (Conditional Access Convention)*, para 10.
12. Convention on the legal protection of services based on, or consisting of, conditional access, Art. 4(2), as quoted in *Commission* v. *Council (Conditional Access Convention)*, para 12.
13. See the page on the status of the Conditional Access Convention of the website of the Council of Europe Treaty Office <conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=178&CM=&DF=&CL=ENG> (last visited 30 Nov. 2014).
14. Ibid.

which contains rules similar to internal EU legislation, notably Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access,[15] in force since 1998, was seen as desirable from the Commission's point of view, as it "may help give new impetus to ratification by other countries and thus extend the protection of relevant service providers outside the EU."[16] However, when it came to identifying the proper legal basis for the Union instrument for joining the Convention, this turned into an inter-institutional legal basis dispute, pitting the Commission against the Council. The Commission had proposed using the CCP (Art. 207(4) TFEU) to this end.[17] The Decision eventually adopted by the Council, by contrast, uses Article 114 TFEU on the approximation of laws between the Member States as the legal basis.

3. Judgments and Opinions

3.1. *Daiichi Sankyo*

In the judgment, after quickly striking down an objection to admissibility by DEMO on the grounds of the action being devoid of purpose, the ECJ turned to answering the three preliminary questions. The first one concerned the question of competence and thus scope of the CCP. While the parties and intervening governments referred in their arguments to the existing body of case law on mixed agreements,[18] the Commission relied mainly on a textual argument, more particularly the wording of Article 207(1) TFEU. Following the Lisbon reform, this provision now explicitly includes "commercial aspects of intellectual property" as part of the CCP, and therefore qualified the relevance of earlier case law in the Commission's view.[19] Instead, according to the Commission, the TRIPs Agreement, relating "as a whole"[20] to

15. Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access, O.J. 1998, L 320/54.

16. Commission, Second report on the implementation of Directive 98/84, Brussels, 30 Sept. 2008 COM(2008)593 final, p. 7.

17. Commission, Proposal for a Council Decision concerning the signing of the European Convention on the legal protection of services based on, or consisting of, conditional access, Brussels, 15 Dec. 2010 COM(2010)753 final.

18. *Daiichi Sankyo*, para 42. These parties refer in particular to Joined Cases C-300 & 392/98, *Dior and Others*, EU:C:2000:688; Case C-431/05, *Merck Genéricos*, EU:C:2007:496 (regarding the TRIPs agreement as falling in an area of shared competence); and Case C-240/09, *Lesoochranárske zoskupenie*, EU:C:2011:125 (regarding competence delimitation in mixed agreements).

19. *Daiichi Sankyo*, para 43.

20. Ibid., para 43.

"commercial aspects of intellectual property", consequently falls fully within the CCP. Disagreeing with that position, the intervening governments argued that by contrast "the majority of the rules in the TRIPs Agreement",[21] including Article 27 on patentability, the interpretation of which was at issue here, relate only indirectly to international trade, and thus continue to fall under the shared competence of the internal market.

The Court noted that the current Article 207(1) on the scope of the CCP "differs significantly from the provisions it essentially replaced",[22] which were Article 133(1), 133(5)(1), 133(6)(2) and 133(7) EC; and before that, Article 113 EEC, which did not mention "commercial aspects of intellectual property" at all. Hence, given this "significant development of primary law",[23] the Court took a fresh look at the question of the division of competences between the Union and its Member States. Consequently, hitherto defining decisions such as Opinion 1/94 and *Merck Genéricos* were no longer considered "material"[24] by the Court in order to determine the scope of the CCP.

Turning to the concept of "commercial aspects of intellectual property", the Court noted that Union acts, including the conclusion of international agreements, need to have more than mere "implications for international trade" to be covered by the CCP.[25] Instead, and recalling the pre-existing body of case law on legal basis determination (also known as the "centre of gravity" test) as regards the CCP, "a European Union act falls within the Common Commercial Policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade".[26] Consequently, "of the rules adopted by the European Union in the field of intellectual property, only those with a specific link to international trade are capable of falling within the concept of 'commercial aspects of intellectual property' in Article 207(1) TFEU and hence the field of the Common Commercial Policy."[27] Subsequently, the Court declared that this "is the case" as regards the rules contained in the TRIPs Agreement, as they all appear to have such a "specific link with international trade".[28] To illustrate this conclusion, the Court referred to the

21. Ibid., para 44.
22. Ibid., para 46.
23. Ibid., para 48.
24. Ibid., para 48.
25. Ibid., para 51.
26. Ibid., para 51, referring to Opinion 2/00, *Cartagena Protocol*, EU:C:2001:664; Case C-347/03, *Regione autonoma Friuli-Venezia Giulia and ERSA*, EU:C:2005:285; and Case C-411/06, *Commission* v. *Parliament and Council (Waste Shipments),* EU:C:2009:518.
27. *Daiichi Sankyo*, para 52.
28. Ibid., para 53.

fact that under the WTO's Dispute Settlement Understanding, cross-suspension of concessions are allowed, which applies also fully to TRIPs.[29]

In response to the arguments of some of the intervening governments contesting the link with international trade, in particular as regards Part II of the TRIPs containing Article 27, the Court stressed that their line of reasoning fails to take proper account of the objective of the TRIPs Agreement. This objective, the ECJ recalled, is "to strengthen and harmonize the protection of intellectual property on a worldwide scale",[30] which entails furthermore "effective and adequate protection of intellectual property rights" so as to "reduce distortions of international trade".[31] Part II, according to the Court, "contributes to attaining that objective by setting out, for each of the principal categories of intellectual property rights, rules which must be applied by every member of the WTO."[32]

While "it remains altogether open to the European Union" to legislate on intellectual property rights as part of the rules on the internal market, the Court stressed that "acts adopted on that basis and intended to have validity specifically for the European Union will have to comply with the rules concerning the availability, scope and use of intellectual property rights in the TRIPs Agreement, as those rules are still, as previously, intended to standardize certain rules on the subject at world level and thereby to facilitate international trade."[33] Agreeing with the Commission, the Court determined that "the rules on patentable subject-matter in Article 27 of the TRIPs Agreement" fall within the CCP, and that this is nothing other than a reflection of "the fact that the context of those rules is the liberalization of international trade, not the harmonization of the laws of the Member States of the European Union."[34]

Having concluded that Article 27 TRIPs (and in fact, TRIPs at large) now falls under the CCP, the Court saw no need to answer the second part of the first question referred to it, i.e., whether it is for national courts to decide whether to give it direct effect.[35] The implied answer here, though, would be that they could not do so any more.

The Court then turned to the two other questions posed by the referring court, which concern the interpretation of the TRIPs provisions in question:

29. Ibid., para 54.
30. Ibid., para 58; referring back to Case C-89/99, *Schieving-Nijstad and Others*, EU:C:2001:438, para 36.
31. *Daiichi Sankyo*, para 58.
32. Ibid.
33. Ibid., para 59.
34. Ibid., para 60.
35. Ibid., para 61.

firstly, on the patentability, as well as the scope of protection by virtue of such a patent, of chemical and pharmaceutical products under Article 27 TRIPs; and secondly, on whether Article 27 combined with the transitional provisions contained in Article 70 TRIPs entails protection of both the process of manufacture as well as of the pharmaceutical product as such in the specific context of this case, in which the initial patent granted under Greek law only covered the process, not the product, even though both had been applied for.

Regarding the first question, the Court answered in the affirmative, siding with Daiichi Sankyo, the Commission and the governments that submitted written observations. According to the ECJ, Article 27 TRIPs allows for the patentability of pharmaceutical products, certain specific exclusions provided for in the TRIPs notwithstanding, and provided that no derogation to these exceptions is applicable.[36] As to the scope of protection this entails, the Court noted that this issue is addressed elsewhere in the TRIPs. Since it considered the order of reference requesting an interpretation of these provisions as useful for the resolution of the dispute, the Court refrained from elaborating on the second part of this question.[37]

Regarding the final question referred to the Court, which concerns the extension of protection originally granted only to the process of manufacture to the product by virtue of TRIPs provisions, the Court answered in the negative, siding with DEMO and the Commission. The intervening governments were divided over this question.[38] Based on the information received, the Court found that the scope of the patent protection remained limited to the process in the particular context of the case.[39]

The Court's ruling in *Daiichi Sankyo* departed markedly from the conclusions drawn by Advocate General Cruz Villalón in his Opinion as regards the scope of the CCP. Highlighting at the outset his awareness "of the extraordinary interpretative difficulty"[40] the case entails, the Advocate General sought to find a middle ground between the Commission's emphasis on the new language of Article 207(1) TFEU and the Member States' insistence on the wide scope of the TRIPs to the effect of exceeding mere "commercial aspects" and hence also covering matters which continue to fall into a shared competence area. For the Advocate General, "the Member States and the Commission are both correct".[41] In providing a concise summary, it is

36. Ibid., paras 64–68.
37. Ibid., para 69.
38. Ibid., para 71.
39. Ibid., para 78.
40. Opinion in *Daiichi Sankyo*, EU:C:2013:49, para 5.
41. Ibid., para 55.

difficult to do justice to the inner dialectics of the Advocate General's Opinion and the ensuing narrated struggle between, on the one hand, the "functional"[42] and, on the other, the "'topographic' or even 'compartmentalized' interpretation of the wording of Article 207(1) TFEU",[43] resulting in what appears to be "an irreconcilable contradiction".[44]

Instead of the clear-cut, and arguably much more accessible, conclusion the Court drew in its decision, the Advocate General proposed a more nuanced way to resolve this contradiction based on "the respective consequences, in terms of effectiveness in each case, which arise when opting for either of the opposing approaches", with a view to providing "the best possible interpretation of the legislative provisions on which each of those approaches is based".[45] Following what has been aptly described as a "a very complex and cautiously inwardly oriented approach",[46] the Advocate General concluded that, "as European Union law now stands, Article 27 of the TRIPs Agreement does not regulate subject-matter which falls within the commercial aspects of intellectual property within the meaning of Article 207(1) TFEU".[47] Consequently, regarding the power to interpret these provisions, "the case law of the Court which links the scope of the Court's jurisdiction to interpret provisions set out in international treaties to the substantive competence for the subject-matter in question continues to be valid."[48]

The remainder of the Advocate General's Opinion could be described as an attempt at damage control, should the Court, as it eventually would, choose not to follow the Advocate General regarding the first question. In particular, the Advocate General focused on the question of direct effect, which the Court did not address explicitly, restating earlier case law that militates in favour of a general rule excluding direct effect of provisions of the WTO agreements.[49] Applying this to Articles 27 and 70 TRIPs, he argued against its direct effect in EU law,[50] noting also the very divided national judicial approaches within the Member States to this question.[51]

Regarding the other questions relating to the patentability and scope of protection of the pharmaceutical product in question, the Advocate General

42. Ibid., para 69.
43. Ibid., para 68.
44. Ibid., para 70.
45. Ibid., para 72.
46. Ankersmit, "The scope of the Common Commercial Policy after Lisbon: The *Daiichi Sankyo* and *Conditional Access Services* Grand Chamber Judgments", 41 LIEI (2014), 198.
47. Opinion in *Daiichi Sankyo*, para 81.
48. Ibid., para 81.
49. Ibid., para 86; referring to Joined Cases 21/72 to 24/72, *International Fruit Company and Others*, EU:C:1972:115.
50. Opinion in *Daiichi Sankyo*, paras. 83–89 and 104.
51. Ibid., paras. 90–99.

concludes that the TRIPs provisions at issue do not grant what he called an "'automatic extension' of a patent on a process to a patent on a pharmaceutical product claimed by Daiichi Sankyo."[52]

Before closing, the Advocate General cautioned to limit the temporal effects of a ruling of the Court against his recommendation for the sake of legal certainty in view of "the diversity and enormous quantity of litigation, largely resolved",[53] in this area. Hence, he recommended that the Court's decision "should apply only from the date of publication of the judgment".[54] The Court did not respond to this request in its judgment.

3.2. Commission *v.* Council *(Conditional Access Convention)*

The Court's judgment in *Commission* v. *Council* regarding the proper legal basis of the Conditional Access Convention, delivered three months after *Daiichi Sankyo*, equally found in favour of an expanded scope of the CCP post-Lisbon, but this time in the area of services, and outside the WTO context. In the judgment, the Court decided to annul the contested decision for want of the correct legal basis, which should have been Article 207(4) TFEU, i.e., agreements concluded within the framework of the CCP.

As to the main arguments of the parties, the Commission, supported by the European Parliament, argued that the CCP represents the correct legal basis given that the primary aim of the Convention is, firstly, "to ensure adequate protection of the services concerned on the markets of those contracting parties which do not belong to the European Union in order to facilitate and promote the supply of those services by EU service providers in those markets under viable economic conditions."[55] Approximation of laws (Art. 114 TFEU), the legal basis chosen by the Council, was not an aim in itself but merely a means for achieving this overall objective.[56] Secondly, according to the Commission, "the Convention is primarily concerned with the supply of conditional access services between the European Union and other European countries" with a view to "extending to those other countries the protection against acts of piracy introduced by" existing EU legislation.[57] Thirdly, the Convention "is directly aimed at eliminating obstacles to the trade in protected services by prohibiting all commercial activity which makes 'hacking' or

52. Ibid., para 113.
53. Ibid., para 121.
54. Ibid., para 121.
55. *Commission* v. *Council (Conditional Access Convention)*, para 37.
56. Ibid., para 38.
57. Ibid., para 42.

other forms of electronic piracy possible",[58] thus having a direct and immediate effect in terms of trade promotion and facilitation.

The Council, supported by a number of Member States, defended its decision choosing Article 114 TFEU as the legal basis with the following main arguments. According to them, the Convention "intended to approximate the legislation of the contracting parties, including the legislation of the Member States of the European Union",[59] and hence regarded such harmonization as an end in itself rather than a vehicle for trade-related objectives.[60] The Council also argued that the fact that the Convention covered supply of the services in question between the EU and third countries "in no way means that it is intended to apply more to those services than to those supplied within the European Union",[61] its effects on external trade in services being only "indirect and secondary".[62]

After noting that the other legal basis mentioned in the contested decision, Article 218(5) TFEU on international agreements concluded by the Union, was not contested by the parties,[63] the Court started by recalling its settled case law on the choice of the correct legal basis in EU law, i.e., that such a choice "must rest on objective factors that are amenable to judicial review", including "the aim and content of that measure".[64] This case law also provides that in case of a multi-purposes measure, the predominant purpose determines the legal basis.[65]

Quoting the *Daiichi Sankyo* judgment, the Court reiterated that "an EU act falls within [the CCP] if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade".[66] Having noted the similarity between the Convention and pre-existing internal EU legislation, and referring to the Explanatory Report on the Convention and the explanatory memorandum accompanying the proposal for the contested decision, the Court concluded that signing the Convention "is thus supposed to help extend the application of provisions similar to those of Directive 98/84 beyond the borders of the European Union and to establish a law on conditional access services which is

58. Ibid., para 43.
59. Ibid., para 45.
60. Ibid., para 47.
61. Ibid., para 49.
62. Ibid., para 50.
63. Ibid., para 51.
64. Ibid., para 52; referring in particular to Case C-411/06, *Commission* v. *Parliament and Council (Waste Shipments)*; and Case C-130/10, *Parliament* v. *Council*, EU:C:2012:472.
65. *Commission* v. *Council (Conditional Access Convention)*, para 53.
66. Ibid., para 57, referring to *Daiichi Sankyo*, para 51, and pointing to the further case law noted there.

applicable throughout the European continent".[67] Hence, the Court saw a direct link to international trade and thus the CCP as the primary objective of the decision.[68]

Responding to the arguments of the Council and Member States relying on the part of the Convention that explicitly addresses approximation of legislation, the Court pointed to the disconnection clause in Article 11(4) of the Convention, according to which the Member States are to continue to apply EU rules in this field, and which have already materialized in the form of Directive 98/84. Consequently, the added value, if you will, of the Convention resides for the ECJ not in improving "the functioning of the internal market, but to extend legal protection of the relevant services beyond the territory of the European Union and thereby to promote international trade in those services".[69] Moreover, contrary to the Council's position, the ban on exports of illicit devices to the EU was seen by the Court not as a measure solely aimed at defending the internal market, but rather "concerns the defence of the European Union's global interests and falls, by its very nature, within the ambit of the Common Commercial Policy".[70] Other parts of the Convention, such as those on seizures and confiscations, which can take the form of criminal law measures, were seen by the Court as being "purely incidental to the primary objective of the contested decision."[71]

The Court also dismissed arguments raised by the Council during the hearing based on Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice and Protocol No. 22 on the position of Denmark annexed to the EU Treaties. The Court emphasized that these cannot have "any effect whatsoever on the question of the correct legal basis".[72]

The ECJ concluded that in view of the act's primary objective having "a specific connection to the Common Commercial Policy",[73] Article 207(4) TFEU, together with the uncontested Article 218(5) TFEU, would have been the correct legal basis. The Court noted that "the signing of the Convention on behalf of the European Union falls within the exclusive competence of the European Union, pursuant to Article 3(1)(e) TFEU."[74] Before pronouncing

67. *Commission* v. *Council (Conditional Access Convention)*, para 63.
68. Ibid., para 65.
69. Ibid., para 67.
70. Ibid., para 69, referring back to *Opinion 1/75 (Local Cost Standard)*, EU:C:1975:145; Opinion 1/94, *WTO*; and Case C-94/03, *Commission* v. *Council*, *(Rotterdam Convention)* [2006] ECR I-1.
71. *Commission* v. *Council (Conditional Access Convention)*, para 71.
72. Ibid., para 73.
73. Ibid., para 76.
74. Ibid., para 76.

the annulment of the contested decision, the Court noted that it would maintain the latter's effects until the adoption of a new decision using the correct legal basis in order to avoid uncertainty as to the Union's signature of the Convention.[75]

Unlike *Daiichi Sankyo*, the Court in this case followed the recommendations of the Advocate General. Advocate General Kokott emphasized in her Opinion the inappropriateness of the use of Article 114 TFEU in the area of EU external action, given that the "provision contributes to the achievement of the objectives set out in Article 26 TFEU and thus has the aim of establishing and ensuring the functioning of the internal market" and is hence "intended to allow action by the Parliament and the Council within the Union".[76] As to the actual primary purpose of the Convention, she considered its emphasis to be "less on establishing uniform rules in the European internal market than on attempting 'to export' the Union's internal *acquis* to third countries",[77] i.e., as "a contribution to 'external harmonization' in relation to third countries".[78] As regards the implications this would have for the internal market, the Advocate General described them as mere "knock-on effects of the Convention".[79]

Instead, she regarded the CCP as the proper legal basis, being quite capable of covering such "external harmonization", seeing that the "object of many modern trade agreements is precisely this kind of harmonization: those agreements provide for the creation of uniform legal standards – if appropriate in the form of minimum standards – for certain products, activities or sectors with a view to facilitating cross-border trade."[80]

Contrary to the Court, the Advocate General also addressed the Commission's second plea in law, i.e., the infringement of the Union's exclusive competence due to the Council regarding this Convention as a mixed agreement.[81] In addition to detecting such an infringement due to the Union's exclusive competence in the CCP (Art. 3(1)(e) TFEU), she also made an alternative, *ERTA*-type argument based on Article 3(2) TFEU, i.e. exclusive competence for the conclusion of an international agreement "in so far as its conclusion may affect common rules or alter their scope". This led to a

75. Ibid., paras. 78–81.

76. Opinion in *Commission* v. *Council (Conditional Access Convention)*, EU:C:2013:441, para 43.

77. Ibid., para 49.

78. Ibid.

79. Ibid., para 58.

80. Ibid., para 67.

81. Ibid., para 93, referring to the wording of Recital 6 in the preamble to the contested decision, according to which the Union would have no external competence covering Arts. 6 and 8 of the Convention on seizure and confiscation.

reflection on the *ERTA* doctrine and the case law defining it in view of the new Article 3(2) TFEU introduced by the Lisbon reform.[82] According to the Advocate General, this represents a codification of the doctrine, and hence "interpretation and application of the third variant of Article 3(2) TFEU should have regard to previous case law",[83] in particular those cases ruling that the Union had gained exclusive competence in areas that are "already covered to a large extent by Community [sic] rules."[84] In view of Directive 98/84, the Advocate General deemed this to be the case, concluding that also from this alternative perspective, the Union would enjoy exclusive competence.[85]

4. Analysis

The two Grand Chamber judgments are relevant for several dimensions of EU law, including the internal market, approximation of laws, patent law, audiovisual services and judicial cooperation, and of course the Common Commercial Policy. The meta-issue, certainly from the point of view of EU constitutional and external relations law, is how they affect the relationship between the Union and the Member States on the international (economic) stage. This clear turn in the case law of the ECJ, in the wake of the Lisbon reform and diverting from Opinion 1/94, will tip the balance in favour of the EU, with the Commission as its designated trade representative. Beyond constitutional considerations, this is also highly salient from a policy perspective, seeing that the question of "mixity" is still unresolved in high-profile trade agreements in the making (above all TTIP and CETA).

4.1. *A more comprehensive trade policy: Clarity over caution*

The two decisions, together with the pre-Lisbon Opinion 1/08, which already established that trade in services was now fully part of the CCP (except for transport),[86] contrast starkly with the string of case law starting with Opinion 1/94 on the conclusion of the Uruguay Round agreements. This puts in question the future relevance of what until now were defining judgments in

82. Opinion in *Commission* v. *Council (Conditional Access Convention)*, para 112; referring to Case 22/70, *Commission* v. *Council (ERTA)*, EU:C:1971:32 and Opinion 1/03, *Lugano Convention*, EU:C:2006:81.

83. Opinion in *Commission* v. *Council (Conditional Access Convention)*, para 113.

84. Ibid., para 113; referring earlier (at para 110) to Opinion 2/91, *ILO*, EU:C:1993:106; Case C-467/98, *Commission* v. *Denmark (Open Skies)*, EU:C:2002:625; and Opinion 1/03, *Lugano Convention*.

85. Opinion in *Commission* v. *Council (Conditional Access Convention)*, para 123.

86. Opinion 1/08,*GATS*, EU:C:2009:739.

this area,[87] including also *Hermès*,[88] *Dior*[89] and *Merck Genéricos*.[90] Giving full effect to the textual changes brought about by the Lisbon reform, and by applying the scope of the CCP more broadly and in a more clear-cut manner, the decisions annotated here can also be seen as linking back to the Court's earlier case law before the advent of the WTO.[91]

In doing so, the Court chose clarity over caution, and Treaty reform over path dependency. This is particularly true for *Daiichi Sankyo*, if one compares the back-and-forth of the Advocate General's Opinion with the straightforward answer provided by the Court. The scope of the CCP has been widened to include "commercial aspects of intellectual property rights" – an unequivocal pronouncement that can appear sweeping only in a historical, if not nostalgic, sense. This could not have blindsided the Member States altogether, as the Court rightly points to their capacity as "Masters of the Treaties". Hence, being "the authors of the FEU Treaty", they "could not have been unaware that the terms thus used in that provision correspond almost literally to the very title of the TRIPs Agreement."[92]

In the *Conditional Access Convention* case, the Court also points straight to what it considers to be the main rationale behind the Convention, which signals early on how it will conclude the judgment. Based on the Convention's wording and accompanying documents, such as the explanatory report which sets out the EU's perspective, the ECJ considers the Convention to be principally aimed at extending norms already present in the EU to the outside world, as a form of what Advocate General Kokott aptly calls "external harmonization".[93] It is a measure aimed at "the harmonious development of world trade",[94] and more generally pursuing "the development of international law".[95] What it is not about, and cannot be about due to this same pre-existing EU legislation and the disconnection clause, is introducing new rules within the EU.

Regarding Advocate General Cruz Villalón's own "mixed feelings" and notes of caution from prominent Member State courts such as the

87. Hoffmeister, "Aktuelle Rechtsfragen in der Praxis der europäischen Außenhandelspolitik", 16 *Zeitschrift für europarechtliche Studien* (2013), 389.

88. Case C-53/96, *Hermès*, EU:C:1998:292.

89. Joined Cases C-300 & 392/98, *Dior and Others*, EU:C:2000:688.

90. Case C-431/05, *Merck Genéricos.*

91. Such landmark judgments would include Opinion 1/75, EU:C:1975:145 and Case 45/86, *Commission* v. *Council (Generalized tariff preferences)*, EU:C:1987:163. See also Ankersmit, op. cit. *supra* note 46, 206–207.

92. *Daiichi Sankyo*, para 55.

93. Opinion in *Commission* v. *Council (Conditional Access Convention)*, para 49.

94. Art. 206 TFEU.

95. Art. 3(5) TEU.

Bundesverfassungsgericht, which praised mixity as a model,[96] it must be stressed that it would be overreaching to interpret safeguards in the EU Treaties on conferral,[97] or "constitutional identity",[98] as meaning that the Member States "were not really serious", so to say, when they, as Masters of the Treaties, explicitly expanded the scope of the CCP to include "the commercial aspects of intellectual property", and "foreign direct investment" for that matter. The textual change in the EU Treaties that they effected was an obvious and undeniable one, by which competence in this area has been conferred on the Union, and which it may now exercise to the fullest extent.

For the *Bundesverfassungsgericht*, this should not come as a surprise either. In its 2009 *Lisbon* judgment, it anticipated that the post-Lisbon scope of the CCP would entail a "shift of competences" by which the Member States would not only lose "their competence for concluding international trade agreements" (such as the Conditional Access Convention), but which could result, down the line, in reducing "the status of the Member States' membership in the World Trade Organization to a merely formal one".[99]

The unequivocal language employed by the Court, grounded in post-Lisbon Treaty terms, in stating that the TRIPs in its entirety fell under the CCP, and that CCP alone represents the proper legal basis for the Conditional Access Convention is a remarkable development. It certainly leads to more clarity and simplicity in delimiting the competences and legal basis questions in this field, finally leading the CCP out of its pre-Lisbon existence as a "policy of bits and pieces".[100] It raises, however, more fundamental questions as to the future of mixity and the international role of the Member States in international economic governance.

4.2. *Whither the Member States, whither mixity?*

Based on the observation that both judgments judicially cement a wide interpretation of the scope of the CCP following the Lisbon reform, we also have to look further as to what this entails for the structure of the system of EU

96. Judgment of 30 June 2009, BVerfGE 123, para 376, using the English translation provided by the German Court under: <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html> (last visited 21 Feb. 2015), in which it noted that ultimately the expanding external relations powers of the EU, fuelled by Lisbon, "would also come into conflict with constitutional foundations".

97. Art. 207(6) TFEU regarding the CCP; and generally Art. 5(2) TEU.

98. Art. 4(2) TEU.

99. Judgment of 30 June 2009, BVerfGE 123., para 374.

100. Cremona, "A policy of bits and pieces? The Common Commercial Policy after Nice", 4 CYELS (2001), 61–91.

external relations, at any rate in the international economic sphere. This system has traditionally been marked by what Hillion aptly termed the "polyphonic nature of the Union's external action",[101] and by what Dashwood calls "bipolarity".[102] The former describes the fact that the EU and the Member States act concurrently on the international stage, with none fully eclipsing the other, while the latter describes the continuing schism between the Common Foreign and Security Policy (CFSP) and the other external policies of the EU. While "bipolarity" has very much survived the "collapse of the pillar structure"[103] caused by Lisbon, the two judgments reviewed here have to be seen as a curtailment of external relations "polyphony" in the EU's contributions to international economic governance.

The fact that the entirety of the TRIPs and GATS (with the exception of transport services)[104] has come to be covered by the CCP, and thus an exclusive EU competence, results in "an increasing loss of visibility and powers on the international plain for Member States".[105] However, it also decreases the necessity for mixity as such, as now the whole TRIPs and the vast majority of GATS have become so-called "false mixed agreements".[106] These are agreements to which both the Union and the Member States are parties, but for which this is not really necessary, as the EU could easily have concluded them on its own. In this vein, it is worth noting that Advocate General Kokott summarized the Commission's view in *Commission* v. *Council (Conditional Access Convention)* as presuming that "the Council had intended *artificially* to create a mixed agreement in order to allow the Member States an international presence alongside the European Union."[107] Whether this was really the Member States' "intention" or a sincere attempt at preserving "conferral" remains open to question, but what matters for legal

101. Hillion, "Mixity and coherence in EU External Relations: The significance of the 'duty of cooperation'" in Hillion and Koutrakos (Eds.), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing, 2010), p. 87.

102. Dashwood, "The continuing bipolarity of EU external action" in Govaere et al. (Eds.), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff, 2014), pp. 3–16.

103. Van Elsuwege, "EU external action after the collapse of the pillar structure. In search of a new balance between delimitation and consistency", 47 CML Rev. (2010), 987–1019; see also Case C-130/10, *Parliament* v. *Council*.

104. Art. 207(5) TFEU.

105. Ankersmit, op. cit. *supra* note 46, 208.

106. Schermers, "Typology of mixed agreements" in O'Keeffe and Schermers (Eds.), *Mixed Agreements* (Kluwer Law and Taxation, 1983), p. 27; Rosas, "Mixed Union — mixed agreements" in Koskenniemi (Ed.), *International Law Aspects of the European Union* (Kluwer Law International, 1998), pp. 130–131.

107. Opinion in *Commission* v. *Council (Conditional Access Convention)*, para 34 (emphasis added).

purposes is that through its judgment the Court confirmed that the Convention would indeed have been an "artificial" or "false" mixed agreement if the Member States had been allowed as parties alongside the Union.

While from the point of view of international law, the Member States continue to appear as fully-fledged parties to mixed international economic agreements together with the EU, under EU law, as confirmed by this recent case law, they move closer towards becoming a taciturn entourage of the Union. This is what the *Bundesverfassungsgericht* called "a merely formal" but no longer substantive membership in international organizations such as the WTO.[108] The less competence the Member States retain in areas within the scope of activities of the WTO, the more their continued presence there must then be justified as being relevant to their "constitutional identity" – as an aspect that is "not open to integration".[109] This could be described as the opposite of de Gaulle's "empty chair" policy – a policy of holding on to a seat at the table, while no longer being allowed to raise one's hand to vote.

In this respect, a remarkable development can be observed within the membership of the Conditional Access Convention. Regardless of whether the Member States could or could not be forced out of international organizations or agreements, some seem to leave voluntarily once the EU arrives. At the time of the judgment in *Commission v. Council (Conditional Access Convention)*, seven Member States were already a party to the Convention, with Finland having ratified it only five months before the ECJ's ruling. Since the judgment, three have already "thrown in the towel", so to say. In 2014, Bulgaria, Croatia and Cyprus denounced the Convention, leaving at the time of writing only four EU Member States as parties.[110] It cannot be said with absolute certainty whether this was caused in all three cases by the judgment, but the timing would suggest such an interpretation of events. If this trend continues, the remaining Member States may also choose to give up the policy of holding on to their seats and leave the Conditional Access Convention, and possibly other international agreements over the subject matter of which they have lost all power to act internationally. But this does not mean a loss of power altogether. They simply retreat into the EU's internal space and exercise their – significant – decision-making powers in the Council and bodies such as the Trade Committee.[111]

108. Judgment of 30 June 2009, BVerfGE 123, cited *supra* note 96, para 374.

109. Ibid., para 239; note also para 375: "The Treaty of Lisbon may at any rate not force the Member States to waive their member status."

110. See the page on the status of the Conditional Access Convention of the website of the Council of Europe Treaty Office, cited *supra* note 13.

111. Art. 207(3) TFEU; see on the Member States' powers over the CCP within the Union, Hahn and Danieli, "You'll never walk alone: The European Union and its Member States in the

As a matter of policy, and beyond the WTO context and the particular case of the Conditional Access Convention, this new case law is of relevance for the many trade agreements that the EU is currently negotiating, including most prominently TTIP and CETA. As the debate on their "mixed" nature continues within the EU, again pitting the Commission against the Member States (and their parliaments),[112] the two judgments do not resolve this question. Given the width of coverage of such comprehensive agreements, grey areas remain, while provisions on transport (services) and "political dialogue" would continue to justify mixity.[113]

However, the present judgments certainly make such agreements "less mixed". In *Commission v. Council (Conditional Access Convention)*, this is particularly true given that the Court seems to have accepted Advocate General Kokott's definition of "modern" international trade agreements as providers "for the creation of uniform legal standards – if appropriate in the form of minimum standards – for certain products, activities or sectors with a view to facilitating cross-border trade."[114] Moreover, the Court considered in the judgment that "criminal" or "law enforcement" measures concerning the seizure and confiscation of illicit devices are part and parcel of the CCP given that they serve the purpose of facilitating trade beyond the borders of the EU.

Even to the extent that such agreements will remain mixed, the Court has confirmed that the scope of the Union's competence was expanded significantly by Lisbon *vis-à-vis* what it still "shares" with the Member States. In this regard, it should be recalled that the Member States are not entirely free to act as soon as they find themselves outside the Union's exclusive competence and within the sphere of shared competence. Here, they remain constrained by the duty of sincere cooperation, which obliges them to "facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives."[115] In mixed agreements, this reflects the general Union interest to implement them in their

WTO" in Bungenberg and Herrmann (Eds.), *Common Commercial Policy after Lisbon* (*European Yearbook of International Economic Law Special Issu*e, 2013), p. 51.

112. See e.g. European Commission, Letter from Vice-President Maroš Šefčovič thanking the 20 chambers that are signatories for their Opinion of 25 June 2014 on the role of national Parliaments in concluding free trade agreements (FTAs), Brussels, 16.10.2014 C (2014)7557 final, available at: <ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/slovenia/own_initiative/oi_role_of_national_parliaments_in_free_trade_agreements/oi_role_of_national_parliaments_in_free_trade_agreements_assembly_reply_en.pdf> (last accessed 29 Nov. 2014).

113. Gstöhl and Hanf, op. cit. *supra* note 5, 379.

114. Opinion in *Commission* v. *Council (Conditional Access Convention)*, para 67.

115. Art. 4(3)(3) TEU.

entirety, including areas of Member State competence.[116] Hence, even if the Member States stay clear of encroaching upon the expanded exclusive competence that is the CCP as confirmed by the two Grand Chamber judgments, whatever the Member States do in what remains of their shared competence in mixed trade agreements, they will need to exercise it in a loyal way.

4.3. *From "single dissenting voice" to "sole organ"*

Lastly, the widened post-Lisbon scope of the exclusive CCP leaves the Commission in a stronger position as the Union's external representative. During the hearing for *Daiichi Sankyo*, the Portuguese representative called the Commission "the single dissenting voice".[117] With this voice having prevailed in both judgments, the Commission is confirmed as the "single voice" of the European Union in international economic governance.

Consequently, instead of being one of the several voices making up the EU's external relations marked by mixity and "polyphony", the Commission as the Union's negotiator and representative in the CCP becomes more reminiscent of what in the United States is called the "sole organ" in foreign relations. This term stems from a decision of the United States Supreme Court from 1936, which stressed "that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations. …"[118]

According to the Court's reasoning in both *Daiichi Sankyo* and *Commission v. Council (Conditional Access Convention)*, we are not dealing with the authority of the Commission to act internationally "by an exertion of legislative power" in terms of "common rules" according to the *ERTA* doctrine. Instead, these are considered cases of "a priori exclusivity",[119] lending "plenary and exclusive power" to the Commission as the sole representative of the Union. When comparing the European Economic

116. Case C-13/00, *Commission* v. *Ireland (Berne Convention)*, EU:C:2002:184.

117. As cited in the Opinion in *Daiichi Sankyo*, para 43.

118. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), p. 320.

119. Van Vooren and Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press, 2014), p. 101; and earlier Dashwood, "The relationship between the Member States and the European Union/European Community", 41 CML Rev. (2004), 369. Dashwood and Heliskoski, "The classic authorities revisited" in Dashwood and Hillion (Eds.), *The General Law of EC External Relations* (Sweet & Maxwell, 2000), 16 use the term "pre-emptive exclusivity".

Community to the U.S. in 1986, Eric Stein noted "there is no evidence that an organ equipped with centralized diplomacy and other requisite instrumentalities will emerge in the foreseeable future in Europe".[120] Today, this observation must be qualified within the wide ambit of matters falling under the post-Lisbon CCP, where the pre-existing practice of letting the Commission represent the Member States has now been enshrined in the Treaties and confirmed by the ECJ.

5. Conclusion

The combined effect of the judgments annotated represents a sea change in the area of the CCP. Each fully endorsed the expanded boundaries of exclusive Union competence based on the changes introduced by the Lisbon reform, ending two decades of mixed feelings in the relations of the EU and its Member States within the WTO and other trade-related areas following Opinion 1/94.

For its part, *Daiichi Sankyo* placed the entirety of the TRIPs Agreement under the CCP, thereby qualifying much of the case law regulating the relationship between the EU and its Member States acting alongside each other on the international stage. *Commission* v. *Council (Conditional Access Convention)*, moreover, confirms the CCP as the sole and correct legal basis for concluding an agreement that in the past may have been deemed a matter of harmonization within the internal market, as the Court embraced a modern, widely defined notion of international trade. Taken together, these judgments simplify the legal structure of EU external relations in the area of trade, albeit at the expense of the Member States' international presence – or at least scope of action while retaining nominal international actorness – to the advantage of the Commission as the "sole organ" speaking for the Union and defending "the European Union's global interests"[121] in international economic governance.

The two judgments certainly do not herald the complete phasing out of mixed agreements any time soon. Beyond the CCP, mixity will doubtlessly remain a viable and necessary *modus operandi* for the Union and its Member States. However, following these rulings, and in view of the withdrawal of Member States from "false mixed agreements" such as the Conditional

120. Stein, "Towards a European foreign policy? The European foreign affairs system from the perspective of the United States constitution" in Cappelletti, Seccombe and Weiler (Eds.), *Integration Through Law: Europe and the American Federal Experience*, Volume I, Book 3 (Walter de Gruyter, 1986), p. 82.

121. *Commission* v. *Council (Conditional Access Convention)*, para 69.

Access Convention, it may become the exception rather than the rule, at least to the extent that the non-CCP part of EU external action has been noticeably reduced.

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