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Reconciling Economic and Non-economic Interests in the Legal Regulation of International Trade: Lessons from the European Community?

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ABSTRACT

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RECONCILING ECONOMIC AND NON-ECONOMIC INTERESTS IN THE LEGAL REGULATION OF INTERNATIONAL TRADE: LESSONS FROM THE EUROPEAN COMMUNITY?

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This thesis explores the potential reconciliation of economic and non-economic interests in the legal regulation of international trade, focusing in particular upon the pursuit of human rights and environmental protection. The European Community has been faced with balancing the pursuit of economic and non-economic interests since the early 1970s. Consequently, it is interesting to consider whether anything can be learnt from the Community approach and experience, which may be applied in the context of international trade.

The thesis examines first the development of these interests within the European Community, and subsequently explores the Community's external competence, and the manifestation (and implications) of clauses relating to human rights and the environment in the Community's agreements with third states. Having explored the Community's approach, the focus moves on to the current protection of the environment and human rights in the context of the World Trade Organisation, and the question of whether lessons from the European Community may be applied in this context.

This research has been carried out through doctrinal analysis of primary sources including relevant case law, secondary legislation and preparatory and policy documents. In addition, there has been a systematic analysis of the form and content of human rights and environmental commitments in agreements concluded by the Community with third states. Finally, relevant literature has been reviewed and considered.

Existing literature has not attempted to consider all of these issues together. Yet by systematically working through these issues, comparing and contrasting the development of human rights and environmental protection in the Community, analysing the similarities and substantial differences, and applying that to the international context, an indication of potential future direction for reconciliation of these interests by the international community may be obtained.

Contents

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Introduction

The objectives of this thesis are to explore the potential reconciliation of economic and non-economic interests in the legal regulation of international trade. To this end it examines the extent to which lessons may be drawn from the experience of the European Community concerning this issue, including in its relations with third states. The actions of the European Community, as an economically powerful and politically influential organisation, may be significant in the international progress towards balancing and resolving the potential conflict between economic growth and trade liberalisation on the one hand, and the protection of non-economic interests on the other.

The Community has developed internal policies pursuing the reconciliation, and integration, of economic and non-economic interests and has subsequently sought to export this integrative approach by including the protection of certain non-economic interests as elements of its cooperation with third states. In practice, the establishment of a consistent internal stance in this field is essential for credible external pursuit of the Community's agenda. It is crucial to recognise that consistency, particularly in the external sphere, does not equate to uniformity. Similarly, the reconciliation of economic and non-economic interests is not static, but dynamic: it evolves over time, and differs also according to context.[1]

This research focuses upon the protection of human rights and the environment. There are several reasons for this. Primarily, human rights and the environment were the most celebrated and pursued non-economic interests of the late twentieth century and, although their importance remains undisputed, they have proved controversial. Their significance is demonstrated on a global scale, not least by the prominence given to the principle (and pursuit) of sustainable development. The Community adopted "sustainable development" as a guiding principle in the 1990s[2] and appears with that to have adopted the Brundtland[3] definition of the concept. Although the content and scope of this concept remain

[1] See Chapter 3 for analysis of the application of the Community's policy in relation to different third states.
[2] See Chapter One.
[3] World Commission on Environment and Development "Our Common Future" 1987 (Hereinafter referred to as The Brundtland Report), was the report of an independent body established by the UN in 1983. It articulated what has become the most commonly accepted definition of sustainable development, which

controversial, the Brundtland Commission Report clearly embraces both the environment and humans and their needs.[4] Sustainable development is defined therein as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[5] The foreword to the report emphasises that to have concentrated on environmental problems only would have been erroneous since the environment is inherently inter-related with human actions, and that to attempt to focus exclusively upon the environment creates, in certain contexts, a connotation of naivety.[6] The report subsequently dismisses the purely physical concept of sustainable development on the grounds that the protection of this may not be achieved without consideration of issues such as *access* to resources.[7] Yet in considering sustainable development it is crucial to note that it does not prioritise any interest over the others, but instead requires consideration of each in relation to development issues.[8]

To consider the environment and basic needs together does not explain why a comparison between human rights and the environment should be made. The Brundtland Report, however, states as a pre-requisite to the fulfilment of everyone's needs that everyone has "the opportunity to satisfy their aspirations for a better life." The fulfilment of aspirations may not easily be separated in practice from the enjoyment of fundamental human rights.

The Community has itself recently explicitly recognised the relationship between human rights and the environment in sustainable development:

> "Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development."[9]

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sought to integrate apparently conflicting interests, and identify a common goal for these.

[4] It has, however, been argued that sustainable development is a purely physical concept see Wetlesen "A Global Ethic of Sustainability?" in Lafferty and Langhelle (eds) *Towards Sustainable Development: On the Goals of Development and the Conditions of Sustainability.*

[5] The Brundtland Report, at p. 43 (Consideration known as "Social equity").

[6] *Ibidem* at p. xi.

[7] *Ibidem* at p. 43.

[8] For discussion of "sustainable development" see: Wetlesen, *supra* note 4; Sands "Sustainable Development: Treaty, Custom and the Cross-fertilization of International Law" in Boyle and Freestone, *International Law and Sustainable Development*; Lowe "Sustainable Development and Unsustainable Arguments" in Boyle and Freestone; Lee "Global Sustainable Development: Its Intellectual and Historical Roots" in Lee, Holland and McNeill *Global Sustainable Development in the 21st Century"* Holland "Sustainable Development: The Contested Vision" in Lee, Holland and McNeill.

[9] Article 9 Cotonou Convention, signed 23 June 2000, at:

The link between the environment and human rights is also reflected in the inclusion of "the environment" in the Charter of Fundamental Rights for the European Union.[10] Although there is growing acceptance of the "right to the environment" this thesis does not explore this view in detail, but instead focuses upon comparison of the approaches adopted for environmental and human rights protection, linking them where necessary or helpful. This reflects both the fact that the Community has pursued each of these through different means and with different levels of intensity, and that this differential approach is also apparent in the context of international law. Consequently, the thesis seeks to explore the reason for, and implications of, the different approaches, and whether anything can be learnt from either approach for the other interest. While valuable in its own right, the concept of the "right to the environment" blurs this particular distinction to some extent.

One question which might be asked is why it matters what the European Community does in this field. It matters because the Community is an economically and politically powerful actor, actively seeking to pursue these interests in its external relations, thus actively seeking perhaps to influence other states to pursue these interests. It also matters because the European Community has, since the early 1970s, been addressing this issue. Yet the reconciliation of these issues is of interest not only to the European Community, the global community is also currently grappling with these issues. Consequently, what progress the European Community has made must be of interest to the wider international community.

A strong consistent stance (both internal and external) from the Community, given its international political and economic status, could be crucial in determining the direction to be pursued by the international community in respect of this apparent conflict of interests. At the very least, if these interests can be reconciled by the Community, it will demonstrate that they are not inherently in conflict. This would suggest that they *could* also be reconciled globally, although not necessarily to the same effect.

There is no doubt that the objectives which the Community has chosen to pursue in this respect have legal force: the Community has created binding legal obligations in relation to both human rights and the environment. At the same time, however, the Community has

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http://www.europa.eu.int/comm/development/cotonou/agreement_en.htm

[10] Article 37, it should be noted that "environment" is not included therein as a *right*.

sought to apply discretion to its policy, which does not always sit easily with its legal requirements. This research seeks to tease out the effects of Community action in these fields with a view to establishing what the Community can do, and the implications of this for the international legal context.

In addressing these issues three initial questions are explored in the first part of this thesis. The first question, addressed in Chapter 1, is what has been the internal approach of the Community towards the protection of these interests (and their place within its legal order)? This chapter traces the development of human rights and environmental protection in the European Community through treaty provision, the contribution of the Court of Justice and secondary legislation. In considering the contribution of the ECJ, the role of the national courts cannot be ignored. The significance of the relationship between the ECJ and the national courts, and between EC Law and national law, has repercussions for any attempt to compare the development of human rights protection in the Community, with this potential process in the WTO. The chapter continues by examining the enforcement and protection of non-economic interests in the Community and assesses the balance which has been struck between economic and non-economic interests. It appears (despite the rhetoric) that the mechanisms for enforcement of both environmental and human rights are not yet altogether satisfactory.

The second question, explored in Chapter 2, concerns the nature and extent of the Community's competence to pursue these interests externally. This chapter reviews the basis of Community competence generally, with particular consideration given to the development of implied powers, and analysis of the relationship between concurrent and "complementary"[11] powers. It then explores external Community competence in relation to the environment and human rights and the effect of international agreements concluded by the Community. In this context real differences may be seen in the respective competencies and these do not *prima facie* sit entirely easily with the manifestation of exercise of competence in these fields in the Community's relations with third states.

[11] Although not generally recognised as a term of art the notion of "complementary" powers arises from the expression of Community competence in relation to development cooperation (Article 177 ex 130u EC). "Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster...." The notion of complementarity also arises in relation to Public Health Article 152(1) ex 129(1).

The third question concerns how the Community has pursued these interests externally. Consequently, Chapter 3 examines the development and substance of clauses protecting human rights and the environment in the Community's external agreements, and compares the relative force given to each interest in the Community's relations with third states. This presents a curious paradox when compared with the nature and extent of the Community's internal competence and action. The manifestation of these clauses is not the whole story, however, and this chapter also explores questions concerning their application and potential difficulties regarding their enforcement.

Examination of these "Community" questions leads into the fourth, crucial, question: how does Community action in this sphere compare with what is happening in the World Trade Organisation (WTO), where the relationship between economic and non-economic interests is currently being developed. The second part of this thesis therefore explores the current balance between the protection of economic and non-economic interests in the WTO. In the WTO, the differences between the approach to environmental protection and to the debate surrounding "human rights" issues are even more pronounced than in the Community. Consequently more detailed examination will be made of each of these individually, before drawing conclusions on an appropriate international approach.

The fourth chapter analyses the protection of the environment under (primarily) the General Agreement on Tariffs and Trade (GATT), and compares the balance achieved under the original GATT dispute settlement process with that under the WTO. This raises the question of whether the rulings of the dispute settlement panels, and appellate body, are consistent with what might have been the intention of the member states in formulating the GATT public policy exceptions. This is particularly significant given the developing normativity of panel findings. There has been a perceptible shift in rhetoric of WTO panels with regard to the environment, notably in relation to extra-territorial action. This shift, and its practical implications are examined. Although this shift has given rise to a success in principle, of an environmental measure as an exception to the rules of the GATT, on the facts this has not yet been born out to allow an "environmental" measure to stand.[12] The approach of the WTO and the dispute settlement panels and appellate body are compared to

[12] See discussion of the *Shrimp Turtle* dispute *infra.*

that of the ECJ in the resolution of disputes – analysing the application of different tests in each jurisdiction.

The fifth chapter explores the relationship between international human rights law and international trade law. It examines the two levels upon which this relationship has developed – on the one hand in relation to labour standards (or, more recently, labour rights) and on the other hand, exploring the relationship between international human rights law *per se* and the WTO. This chapter explores the significance of the centrality of "labour standards" to the "human rights"-international trade dialogue, contrasted with the EU approach.[13] It continues to highlight, in particular, the incoherence in international law, which leads into exploration of the international law framework for the international trading system which is raised in the concluding chapter.

In these conclusions some consideration is given to the potential roles of both the WTO and the Community, in the development of international law, and additionally in the normative process towards reconciling economic and non-economic interests. The suggestion that international reconciliation of these interests could be facilitated by adopting a different theoretical approach to international trade is briefly considered, as is whether such a development could contribute towards resolving some of the incoherence between different international legal systems.

Assessing the potential role of the WTO requires consideration of the different bases for the respective approaches of the ECJ and WTO, and whether lessons from the ECJ could mitigate against the legitimacy questions highlighted in relation to the WTO's balancing of economic and non-economic interests. In considering the question of the role (or appropriateness) of the WTO in developing a balance between economic and non-economic interests, it is interesting to return to the question of what motivates the Community's considerable action and achievements in this field. To what extent is this transferred into its external policy and, potentially, international law? Does this give us any insight into how the WTO may act?

[13] It is submitted that the development of labour standards in the EC occurred originally as a means of removing competitive distortions, rather than as a "rights" issue, and has only relatively recently grown into a "rights" issue. In contrast, the issue of "labour standards", and "labour rights" in the WTO context has developed very much as a genuinely "rights based" issue, rather than a means of levelling the economic playing field. Consequently, this thesis focuses on the WTO debate but does not explore the development of

A factor of fundamental importance to any comparison between the EC and WTO approaches concerns the very basis of each organisation. While each has a fundamental objective of using liberal trade as a means of maintaining international security and enhancing welfare, the EC has developed a much deeper level of integration. In this there is apparent a very tangible, developing, polity. The comparison between environment and human rights in the EC permits the identification of the importance of this polity. The EC has developed a level of governance that is absent from the WTO. This polity and level of governance are dependent upon a consensus as to fundamental values, which give a legitimacy to decision-making that is otherwise impossible.

This research has been carried out through doctrinal analysis of primary sources. Relevant case law, principally from the European Court of Justice and the World Trade Organisation Dispute Settlement Panels and Appellate Body is analysed and, in addition, there has been a systematic analysis of the form and content of clauses in agreements concluded by the Community with third states. This examination covers the main types of agreements concluded by the Community and includes a geographical spread. This has permitted the impact of strategic issues upon the operation of the policy to be drawn out. Within this examination comparison is made not only of the form and content of the clauses in different types of agreements, but also of the form and content of clauses relating to the different non-economic interests, with particular regard to their respective force. Relevant secondary legislation of the European Community in relation to the development of non-economic interests has also been examined, as have relevant preparatory and policy documents of the Community's different Committees and Institutions, including the Committee of the Regions and the Economic and Social Committee. Finally, relevant literature has also been reviewed and considered.

Existing relevant literature has not attempted to consider all of these issues together: there has been extensive comment on the development of human rights in the European Community, and also on the development of environmental protection. There has been great discussion of the issue of environmental protection before the WTO, and the question of labour rights. There has even been some comparison of labour rights and environment

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social rights in the EC in any detail.

and the WTO. There has not, however, been any research which attempts to compare the protection of human rights and environmental protection in the Community context, and apply that to the international context.[14] It is submitted that by systematically working through these issues, comparing and contrasting their development in the Community, analysing why there are certain similarities, but substantial differences, and applying that to the international context, an indication of potential future direction for reconciliation of these interests in the international Community may be gleaned.

[14] The account herein of the development of the Community's human rights and environmental policies does not seek to provide a comprehensive analysis of relevant legislation, rather it analyses the general policy development, its underlying values and implications.

Part I: The Development of the Protection of Non-economic Interests by the European Community

Chapter 1

The Development of Non-Economic European Community Interests

Introduction

The European Community (Community) has developed from its original economic focus to now recognise, and protect, certain non-economic concerns which received little or no consideration during the early period of European integration. The development of these interests raises certain questions including, fundamentally, how these are to be balanced against the Community's original economic concerns, particularly where these come into conflict (or are perceived to conflict).

This chapter examines the development of the protection of human rights and the environment within the European Community, and the extent to which these have been successfully integrated into its more traditional policies. As a related it issue examines how the Community is balancing economic and non-economic interests where they are perceived to come into conflict.[1]

The Protection of Human Rights in the European Community

The Treaty of Rome

At the time of the conclusion of the Treaty of Rome "human rights" were generally understood to include only those which would now be viewed as "fundamental" – civil and political rights. The socio-economic rights now included within the standard understanding of human rights developed later.[2] This distinction explains to some extent the belief that: "the essentially economic character of the Communities....makes the possibility of their

[1] It is worth considering that there is no inherent conflict between these interests: their inter-dependence is particularly apparent in relation to the long-term, however short-term conflict may arise.
[2] They were internationally recognised in the 1966 International Covenant of Economic, Social and Cultural

encroaching upon fundamental human values, such as life, personal liberty, freedom of opinion, conscience etc, very unlikely."[3]

The distinction, however, has always been blurred: for example as in relation to the right to property, itself a classic liberal value. This right was not referred to in the Treaty of Rome, nor indeed in the European Convention of Human Rights (ECHR).[4] Yet it has been the subject matter of many cases before the European Court of Justice (ECJ).[5] The question of the inclusion of fundamental rights within the Treaty did arise but was ultimately rejected. Mendelson has suggested that if it is accepted that classic human rights *limit* state action whereas socio-economic right *demand* state action,[6] there is recognition of "socio-economic rights" in the Treaty of Rome, for example in Articles 117, 118 and 119.[7] All of these, however, were included in the treaty on economic grounds, to ensure the proper functioning of the market, rather than with the intention of conferring rights *per se*. Without this consideration, it appears unlikely that they would have been included. This is a crucial factor in the analysis of the Community's developing approach to fundamental rights. The other key provisions which confer rights, concerning the four freedoms,[8] are conditional upon the status of the individual, that s/he is a Community national, and are therefore not generally viewed as fundamental human rights. Thus, although certain rights were conferred in the Treaty, they could not be described as human or even fundamental rights provisions.

The role of the Court of Justice in the development of human rights in the Community has been greatly discussed.[9] In its early cases the Court was exploring and defining the limits of

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Rights, prior to which they had been recognised in the 1961 European Social Charter.

[3] Toth, "The Individual and European Law" 24 ICLQ (1975) 659.

[4] It was added, subject to many qualifications, in the First Protocol.

[5] *Inter alia* Case 44/79 *Hauer* v. *Rheinland Pfalz* [1979] ECR 3927, [1980] 3 CMLR 42; Case 5/88 *Wachauf* v. *Germany* [1989] ECR 2609, [1991] 1 CMLR 328.

[6] Mendelson "The European Court of Justice and Human Rights" YEL (1982) 125.

[7] Now articles 136, 137 and 141 EC.

[8] Goods, Services, Persons, Capital.

[9] See *inter alia*, Mendelson "The European Court of Justice and Human Rights" YEL (1982) 125; Lawson R "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg" in Lawson and de Blois (eds) *The Dynamics of the Protection of Fundamental Rights in Europe: Essays in Honour of Henry G Schermers Vol III*; Dauses, M.: "The Protection of Fundamental Rights in the Community Legal Order" [1985] 10 ELRev 389; Schermers, H.G., "The European Communities Bound by Fundamental Human Rights" (1990) 27 CMLRev 249-258; Coppel and O' Neill: "The European Court of Justice: Taking Rights Seriously?" (1992) 29 CMLRev 669-692; Weiler and Lockhart: " "Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence - Part I" (1995) 32 CMLRev 51-95, and Part II (1995) 32 CMLRev 579-627; Jacobs, F: "Human Rights in the European Union" Emiliou and O'Keefe, 1997; Witte, Bruno de "The Role of the ECJ

its power. Human rights had recently been expressly omitted from the Treaty and judicial activism at that time in that field would have been rash, if not fatal to the authority of the Court.

In the first attempt to bring "fundamental rights" before it[10] both the Court and the Advocate-General avoided consideration of the rights question and confined themselves to interpretation of the Treaty. The applicant sought to rely on rights under the (West) German Grundgesetz[11] to have decisions taken by the High Authority annulled. He described these rights, which exist under the Constitutions of "virtually all" the Member States, as "fundamental". The Court, however, refused to allow reliance upon these rights and ruled that its competence only allowed it to apply Community law in annulling a decision. This approach was confirmed in *Geitling.*[12]

In *Humblet,*[13] in 1960, the Court recognised the need for "effective enforcement" of rights conferred by Community law, but emphasised the separation of powers and the responsibility of the Member States for enforcement. Thus the Court held it had no power to annul a national measure.

In *Sgarlata,*[14] the applicant attempted to overturn a Community regulation on the basis of 'fundamental principles shared by all the Member States'. The Court, however, simply invoked the supremacy of Community law to refuse to annul the regulation. This created a risk that a national constitutional court would refuse to apply Community law on the grounds that it was constitutionally unlawful, which would have had serious implications for the uniformity and supremacy of Community law. The Court began to address the concern of the national courts in *Stauder,*[15] when it acknowledged that fundamental human rights were principles of Community law. On the facts, however, it ruled that the relevant breach occurred at national law.

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in Human Rights" in Alston (ed) *The EU and Human Rights*; Spielmann D "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities" in Alston (ed) *The EU and Human Rights*.

[10] Case 1/58 *Stork* v. *High Authority* [1959] ECR 7.

[11] To freely develop his own personality and to choose his own trade or occupation.

[12] Joined Cases 36-38, 40/59 *Geitling* v. *High Authority* [1959] ECR 7.

[13] Case 6/60 *Humblet* v. *Belgium* [1960] ECR 559.

[14] Case 40/64 *Sgarlata and Others* v. *Commission* [1965] ECR 215.

[15] Case 29/69 *Stauder* v. *City of Ulm* [1969] ECR 419.

In *Internationale Handellsgesellschaft*,[16] the Court finally confirmed that respect for human rights was "an integral part of the general principles of law protected by the Court of Justice", and must be protected within the "framework of the structure and objectives of the Community." This finding was a direct response to the risk that the German constitutional court would refuse to apply Community law in the face of a breach of its constitutional principles.[17]

In the face of such a blatant threat to the unity of the Community legal system and the supremacy of Community law, the Court had little option but to capitulate, reassuring the uneasy national constitutional courts that their rights would not be limited or restricted by Community law. Consequently, it framed the rights to be protected in terms of those "inspired by the constitutional traditions common to the Member States." The Court may be described as activist in its assertion of the principle of protection of fundamental rights. It could simply have applied Community law as written, without referring to fundamental or human rights, requiring the Member States themselves to resolve any friction between Community law and their other obligations. But this would have cost the Court both supremacy of Community law and the uniformity of application of Community law. Significantly, therefore, the Court's undertakings with respect to fundamental rights are directly related to the Community's unique legal system and so distinguish the Community from other international legal systems, including the WTO.

Thus, the initial enunciation of the Community's relationship with fundamental rights was clearly a move to reassure the Member States that their fundamental rights would not be limited by the Community. Consequently, it is submitted that the stance of the Court was anything but activist, being merely compliant with the wishes of the national courts. The Constitutional courts essentially implicitly reminded the ECJ that the Member State governments could not confer upon the Community competence which they did not themselves possess. They had no competence to transfer any power which could give rise to a violation of their constitutional rights. Consequently, the Community must be bound by the fundamental rights which bind the Member States themselves. Rather than the Court

[16] Case 11/70 *Internationale Handellsgesellschaft* v. *Einfuhr und Vorratstelle für Futtermittel und Getreide* [1970] ECR 1125.

[17] Similarly, the Italian Court reserved the right to declare the Treaty incompatible with the Constitution in the event of Community legislation breaching the Italian Constitutional order *Frontini* v. *Ministero delle Finanz Giurisprudenza Constitutionale* [1974] CMLR 372.

asserting a Community competence over fundamental rights, the Court recognised the restrictions on Community action: that it is bound to respect the shared principles of the Member States, and cannot act in a way which would breach these. Thus the Court recognised the limitations of Community competence. The question which followed was how far could this lead?

The Court was explicit at this point that fundamental rights were secondary to the achievement of economic integration, and could not bring into question the validity of a Community act, as this would question the legal basis of the Community itself.[18]

In subsequent cases the Court and its Advocates-General expanded the sources from which Community protected "fundamental rights" would be drawn.[19] The Court was, for a long time, however, ambiguous concerning the status of international conventions, referring to them as "providing guidance".[20] In *National Panasonic,*[21] there was a change in emphasis: the Court recognised that fundamental rights were an integral part of the general principles of Community law, which it would ensure, in accordance with international treaties to which the Member States were signatories. This could reflect the adoption by the Institutions of the Joint Declaration on Human Rights in 1977.[22]

This was not without its problems however, central to which were those of the relationship between the Community and the ECHR,[23] and the question of what falls within the scope of Community law and under the jurisdiction of the Court. The Court initially declared that it was not competent to deal with matters falling within the jurisdiction of the national

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[18] *Internationale Handelsgesellschaft, supra* note 16 at para.3.
[19] For example Advocate-General Warner in Case 17/74 *Sadolin & Holmblad A/S, members of the Transocean Marine Paint Association* v. *Commission* [1974] ECR 1063,recognised the shared principles of the Member States; principles of international law were recognised by the Court in Case 41/74 *Van Duyn* v. *Home Office* [1974] ECR 1337.
[20] See *inter alia,* Case 4/73 *Firma J. Nold* v. *Commission* [1974] ECR 491; and Case 44/79 *Hauer* v. *Rheinland-Pfalz* [1979] ECR 1207.
[21] Case 136/79 *National Panasonic (UK) Ltd* v. *Commission* [1980] ECR 2057, [1980] 3 CMLR 169.
[22] OJ [1977] C103/1.
[23] See *inter alia* Lawson R "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg" in Lawson and de Blois (eds) *The Dynamics of the Protection of Fundamental Rights in Europe: Essays in Honour of Henry G Schermers Vol III* 1994 Dordrecht/London Nijhoff; Spielmann D "Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies and Complementarities" Alston (Ed) *The EU and Human Rights.*

legislator.[24] This position, as will be seen, was to be the subject of subtle yet significant evolution over the following years.

The Single European Act

The Single European Act (SEA)[25] introduced the first explicit reference to human rights in the Community Treaties:

> "Determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice. ... "[26]

It continued with reference to the Community's commitment to the international human rights standards endorsed by its members. This significant commitment was reaffirmed by the Community Foreign Ministers when they met later that same year.[27]

During this period the Court was faced with the questions left unresolved by its ruling that it was not competent to rule on matters falling within the jurisdiction of the national legislators.[28] In *Demirel* it ruled that it had no power to rule on matters falling outside the scope of Community law.[29] This is significant because whereas *Cinéthèque* could be interpreted as meaning that a matter which fell within the scope of both national and Community law would be outwith the jurisdiction of the Court, *Demirel* suggests that it would be subject to the review of the ECJ. This was explicitly confirmed by the Court in *Grogan* when it ruled that if a national rule has effects upon an area of Community law, and requires justification under Community law, that matter is a matter within the ECJ's jurisdiction.[30]

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[24] Joined Cases 60 and 61/84 *Cinéthèque SA and Others* v. *Fédération Nationale des Cinémas français* [1985] ECR 2605 .
[25] OJ 1987 L169/1.
[26] Preamble.
[27] Statement of 21 July 1986, meeting in the framework of European Political Co-operation.
[28] *Supra* note 24.
[29] Case 12/*86 Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719.at paragraph 28.
[30] Case 159/90 *Society for the Protection of the Unborn Children (Ireland) Ltd (SPUC)* v. *Stephen Grogan and Others* [1991] ECR I-4685.

Significantly, the Court subsequently declared itself bound not merely to respect the principles and rights arising from the ECHR, but also to review the acts of national legislatures in accordance with the ECHR when implementing Community law which itself protects a fundamental right. Thus the Court would ensure the respect of such rights by the Member States.[31]

The implementation of Community law by Member States thus falls within the scope of Community law. In *ERT,*[32] the Court addressed the next question: whether *derogation* from Community law will be held to be within the scope of Community law, and held that it would.[33] This is undoubtedly an extension of the Court's jurisdiction, and a departure from *Cinéthèque*.[34] This departure was confirmed in *Familiapress,*[35] where the Court held that the mandatory requirement of press diversity (justifying a derogation from Community law) had to be interpreted in light of general principles of Community law, including human rights.

These developments are consistent with the provisions of the SEA, as well as with the Court's position that it would act in the pursuit of Community law, and that where Community law impinges on matters concerning the ECHR, this must be respected as part of the Community's legal order. Yet despite the developments of *Wachauf*[36] and *ERT,*[37] there was no conclusive answer to the question of what falls within the scope of Community law, raising concern about the Court's apparent expansion of its jurisdiction.

The Treaty of European Union

In the preamble to the Treaty of European Union (TEU) the Member States confirmed their "attachment to the principles of liberty, democracy and respect for human rights and

[31] Case 5/88 *Wachauf* v. *Germany* [1989] ECR 2609, [1991] 1 CMLR 328. This was recently confirmed by the ECJ, in relation to agricultural policy, in *Karlsson* where the Court held that fundamental rights must also be protected by the Member States in their implementation of Community law. Case C-292/97 *Karlsson* [2000] ECR I-2737 at paragraph 37.
[32] Case 260/89 *Elliniki Radiophonia Tileorassi AE* v. *Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1992] ECR I-2925.
[33] The derogation in question was from Community provisions on freedom of provision of services.
[34] *Supra* note 24.
[35] Case C-368/95 *Vereinigte Familiapress Zeitungsverlags-und Vertriebs GmbH* v. *Heinrich Bauer Verlag*, [1997] ECR I-3689.
[36] *Supra* note 31.
[37] *Supra* note 32.

fundamental freedoms and the rule of law". The most significant provision of the TEU in relation to human rights was Article F (2) which stated that:

> "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms... and as they result from the constitutional traditions common to the Member States, as general principles of Community Law."

Thus the TEU, while introducing a general provision on human rights paid little attention to the developing, wider understanding of human rights, which includes, *inter alia*, social rights. In this respect it may be said to be a step back from the SEA.

Article J1 (now Art. 11) provided that one objective of the *Union* was: "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms." The means of pursuit of these objectives, joint actions and common positions, are exclusively within the framework of the Union. The general provision on human rights is also placed within the EU rather than the EC Treaty, and, significantly, is excluded from the jurisdiction of the Court.[38] There is no provision for independent action by the Community within this context. This exclusion demonstrates a lack of political will to bring human rights protection to the same level as the achievement (and enforcement) of the (economic) objectives of the Treaty.

A different picture is presented in the context of development cooperation, which was stated to be indivisible from the promotion of respect for human rights and, with regard to which, it was explicitly provided that Community policy must contribute to the objective of respect for human rights.[39]

Thus the TEU empowered the Community to make respect for human rights a condition of an agreement within the context of development cooperation. Outwith this specific context, however, there appeared to be no conferred power. This is consistent with the reservation of foreign policy to the (inter-governmental) Union. It is also consistent with the view of

[38] Article L (now Art. 46) TEU.
[39] Articles 130w (now 179) 130x (now 180) and 130y (now 181) EC give the Community the competence to adopt measures necessary to the attainment of the objectives, where necessary in co-operation with other third

human rights within the Community as reflecting principles and standards the Community was bound to uphold.

At the same time the Court finally clarified to some extent what falls "within the scope of" Community law. In *Konstantinidis* Advocate-General Jacobs suggested that the scope of Community law in this respect was very wide indeed: that any fundamental rights violation should be able to be opposed by a "*civis europeus*" under Community law.[40] The Court, however, adopted a strict reading of the extent of the Community's competence and ruled accordingly, resisting the temptation to widen the application of the general principle of fundamental rights protection, as invited to do so by the Advocate General.[41]

The Court revisited the question of the extent of the "scope of Community law" in *Kremzow,*[42] and confirmed the unacceptability within the Community of measures which are incompatible with the ECHR. It continued, repeating its ruling from *Grogan,* that where a matter falls within Community law the Court will (in the context of a preliminary ruling) give the national court interpretative guidance necessary to assess compatibility of the relevant national measure with human rights. It stated however that it has no such jurisdiction with regard to national legislation outwith the scope of Community law. The Court concluded by refusing to interpret the ECHR as the matter was not, in this case, genuinely within the scope of Community law.

The Court thus considers it to be its responsibility to ensure both its own and the Member States' respect of the principles and provisions of the ECHR within the scope of Community law. It has endeavoured, however, to reassure the Member States that it is doing this only in the pursuit of Community law, and that national law will not be interfered with where a matter does not impinge on Community law.

The Court also, during this period, ruled that the Community itself had no competency to accede to the ECHR.[43]

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countries.

[40] Case 1168/91 *Konstantinidis* v. *Stadt Altensteigstandesamt* [1993] ECR I-1191 at paragraph 46.

[41] See below for further discussion on this issue.

[42] Case C-299/95 *Kremzow* v. *Austria* [1997] I ECR 2629.

[43] See Chapter 2 for discussion of Opinion 2/94 *Re the Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759.

The Treaty of Amsterdam

The Treaty of Amsterdam brought significant developments in this field, although no amendment to the Treaty regarding accession to the ECHR. Firstly, the Preamble reverts to some extent to the concerns of the SEA, referring once again to the European Social Charter as well as to the Community Charter of Fundamental Social Rights of Workers. Secondly, Article 6 declares that:

> "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States"

and Article 7 confirms this by providing for the possibility of a determination by the Council of a "serious and persistent" breach of fundamental rights by a Member State" and for the *suspension* of rights deriving from the application of the Treaty where such a determination is made. Additionally, Article 49 imposes respect for the Principles enshrined in Article 6(1) as a pre-condition for any state wishing to accede to the Union. Article 46(d) confers jurisdiction upon the ECJ with respect to actions of the Community institutions in relation to Article 6(2), thereby enhancing both the Court's role in respect of human rights, but also, significantly, clarifying the obligation upon the institutions to respect these standards, and removing what had been a lacuna.

The Treaty also makes provision for Community action, Article 13 for example provides that: "... Council ... *may take appropriate action* to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"

Further possibilities for action arise under Articles 2 and 3 in relation to positive discrimination to promote the equality of men and women, *for the achievement of all its objectives*.[44] It should be noted that these last provisions are only *facilitative* of the adoption of relevant legislation. The Community has now acted upon Art.13 in the

[44] This again reflects perhaps a desire to integrate Community policies and objectives.

adoption of the Race Directive[45] and the Framework Directive on equal treatment in employment and occupation.[46]

Treaty of Nice

The most significant development in relation to human rights within the Treaty of Nice (ToN) is the extension of the powers of the Union in relation to the breach of fundamental rights by a Member State. Whereas under Amsterdam this provision had referred to a "persistent and serious breach" of fundamental rights, Article 7 ToN, permits the Council to act if there is a "clear risk of a serious breach by Member State of principles mentioned in Article 6(1)." This provision closes the lacuna in Union rights protection which was found to exist when the far right Freedom Party in Austria became part of the Government, and the Union found itself powerless to do anything to *prevent* Austria committing a breach of fundamental rights – they could only act in the event that a breach were committed.[47]

A second significant development of Nice arises under the new title of "Economic, financial and technical cooperation with third countries". Article 181(a)(1) provides that Community policy will contribute to the general objective of developing and consolidating democracy and the rule of law and to the objective of respecting human rights and fundamental freedoms. This is significant because it creates a new general objective in relations with third states. Previously, such an objective existed only in relation to development cooperation. The impact this has upon Community competence will be seen below.

The other significant development of Nice was the approval by the Member States of the Charter of Fundamental Rights for the European Union, which had been solemnly proclaimed by the Commission, the Council and the Parliament.[48] Formally, the Charter is declaratory of the rights already existing and protected within the European Union.[49] There are, however, some new substantive rights within the Charter: including the prohibition of

[45] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. [2000] OJ L180/22.
[46] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.
[47] This particular event has also been attributed with having added urgency to the adoption of the Race Directive *supra* note 45. See Whitty, Murphy and Livingstone *Civil Liberties Law: The Human Rights Act Era* at p.396.
[48] See [2000] OJ C364/1.
[49] The sources from which these were to be drawn were specified as: the ECHR, the common constitutional traditions of the Member States, the provisions of the European Social Charter and the Community Charter of Fundamental Social Rights of Workers: Conclusions of the Cologne European Council, June 1999.

discrimination on grounds of sexual orientation,[50] which, although provided for under Amsterdam, had not yet (at that time) been acted upon by the EC. Similarly, there is a prohibition on reproductive human cloning,[51] which is altogether new. Another notable feature of the Charter is that it includes recognition of some interest in environmental protection. Perhaps significantly, however, this is not formulated as a right.[52] This genuinely declaratory provision is significant for its very inclusion in this context, rather than its substance.

Article 51(1) of the Charter provides that it is addressed to the institutions and bodies of the Union and to the Member states only when they are implementing Union law. One question which this could raise is whether it applies to the Member States also when they seek to derogate from Community law. The Court has, of course, as has been seen, held the Member States to be bound, in such circumstances, by fundamental rights.[53] Or does the wording of Article 51 indicate that perhaps such fundamental rights standards are to have a narrower scope with regard to the distinction between Community and national jurisdiction? This difficulty in relation to respective jurisdictions of the Community and Member States, and the scope of Community law has recently been observed, albeit in a different context (implementation of the Race Directive) by Lustgarten.[54] The directive was adopted under Article 13 EC, the applicability of which is limited to being within the powers conferred upon the Community. The directive, however, extends in its application to bodies such as the police in carrying out their operations: this looks like an encroachment onto national competence in relation to the maintenance of public order and criminal justice, and therefore goes beyond the extent of Art. 13 EC, which is problematic.

One question arising from Articles 51 and 52 (concerning the scope of the rights guaranteed), has been highlighted by both McDonagh[55] and Eeckhout[56]: that is whether incorporation of the Charter could have the unintended effect of expanding the competence

[50] Article 21.
[51] Article 3, Right to Integrity of the Person.
[52] Article 37: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."
[53] *ERT supra* note 32 and *Familiapress supra* note 35.
[54] Lustgarten, L "The Future of Stop and Search" Crim. LR 2002, 603-618 at p 609-610.
[55] European Convention Working Group II, Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR, Working document I, Contribution by Bobby McDonagh 24 June 2002.
[56] Eeckhout "The EU Charter of Fundamental Rights and the Federal Question" 39 CMLRev (2002) 945.

of the EU in relation to fundamental rights. Article 51(1) binds the EU to "promote the application" of the Charter rights. This would be a significant development, as until the Charter is adopted it is submitted that the Community is, rather, bound not to infringe such rights in its activities. Article 51(2), on the other hand, states that the Charter creates no new tasks or powers for the EU. Thus there remains some confusion as to the nature of the Community's obligation in relation to fundamental rights. *Prima facie*, the Charter simply seems to suggest that the Community's power to "promote" fundamental rights already existed: but this is by no means generally accepted as being the case.

On the other hand, Article 53 provides that the Charter is not intended to have the effect of limiting or detrimentally affecting fundamental rights protection as provided for "in their respected fields of application" by *inter alia* Union law, international law, and the Member States' constitutions. This suggests that the Charter is not intended to extend the ECJ's jurisdiction. It has, however, been suggested that Article 53 could detrimentally affect the operation of supremacy of EC law.[57]

The approval of the Charter by the Member States was significant in another respect: while approving the proclamation of the Charter, the Member States did not accord the Charter binding legal status. This has left it in a somewhat ambiguous position, with the ECJ, the CFI and the Advocates-General dancing around it, and giving it differing degrees of respect. Consequently, the fundamental question hanging over the Charter, is what is the extent of its legal effect?[58]

The Finnish Government, before the outset of the 2000 IGC,[59] recalled the Presidency Conclusions of the Cologne European Council, that:

> "... at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby

[57] Liisberg, J. "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community law?" (2001) CMLRev. 1171. See Eeckhout *ibidem* at 954-956 for discussion of the drafting history of Article 51 and the consequent ambiguity as to its extent. See also De Burca, "The Drafting of the EU Charter of Fundamental Rights" (2001) 26 ELRev. 126.

[58] See *inter alia* Lenaerts and De Smijder "A Bill of Rights for the European Union" (2001) 38 CMLRev 273, Liisberg, *ibidem;* Menendez, "Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights for the European Union" JCMS 40 (2002) 471.

[59] IGC-2000 Contribution from the Finnish Government: Background and Objectives in the IGC 2000, CONFER 4723/2000.

made more evident."

The Finnish Government observed that this left the question of whether and how the charter should be integrated into the Treaties to be decided following the drafting of the Charter, and also that the question of accession to the ECHR remains relevant. These questions are fundamentally inter-related. Schermers, in 1998,[60] argued against an EU Bill of Rights on the grounds that it would create a division in the human rights provisions of citizens of EU member and non-member states.[61] The Union would have to address such disparity in the event that the rights included in the Charter went beyond fundamental human rights and included those rights currently only enjoyed by member-state nationals. Toth, in contrast, argued that the Community *should* develop its own bill of rights, and that at the same time the Member States of the Community should withdraw from the ECHR.[62] There were always problems with this particular approach, not least that it would damage the protection of human rights across the wider Europe.

De Witte likened the proposals (a bill of rights and accession to the ECHR) to:

> "two Loch Ness monsters of Human Rights Protection: attractive to some and repulsive to others but intriguing to all, and yet ever so elusive".[63]

As de Witte and others have observed, the adoption of a Bill of Rights, or, now, Charter, is of greater constitutional than human rights significance.[64]

The creation of the Charter has not assuaged the debate on the Community's accession to the ECHR. In its discussion paper the Secretariat makes it clear that the development of the Charter and accession to the ECHR are complementary rather than being alternatives. The Convention and Charter should support and strengthen each other rather than creating divergence in the protection of fundamental rights in the EU.[65] This responds to the

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[60] Schermers, Henry "The New European Court of Human Rights" 35 CMLRev (1998) 3-8.
[61] Arguably this would not be an automatic consequence of the creation of an EU bill of rights, depending on its substance.
[62] A. Toth "The European Union and Human Rights: The Way Forward" (1997) 34 CMLRev. 491.
[63] Bruno de Witte "The Role of the ECJ in Human Rights" in Alston (ed.) *The EU and Human Rights* p. 889.
[64] See for example "Human Rights in the EU: The Charter of Fundamental Rights" House of Commons Research Paper 00/32.
[65] CONV 116/02 Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR Secretariat's Discussion paper 18

concern raised during the drafting of the Charter, that a legally binding charter may undermine the ECHR system, which of course would have serious implications for the wider Europe.

Numerous parties contributed to the debate in the preparation of the draft charter, with differing views as to whether it should be binding or merely declaratory. It was argued that a legally binding charter would put human rights on a firmer footing within the Community and possibly facilitate their development as a policy objective of the Community, raising comparisons to the underlying objective of environmental protection.[66] The European Parliament was broadly in favour of a binding charter, but the European Council, the Commission, most representatives of national Parliaments and the Council of Europe raised concerns about an integrated charter. It was decided at Nice that the Charter would not, at this time, be legally binding. This does not exclude reliance upon it in a similar manner to the ECHR. Being declaratory, however, it will not substantively add to the human rights protected in the Community. The question of the status of the Charter is to be revisited at the 2004 Inter Governmental Conference.

The Charter has been referred to by both the Court of First Instance[67] and certain Advocates-General,[68] but not the ECJ.

Tizzano AG, in the *BECTU* case argued that although the Charter has no binding effect, it can be used as "a point of reference" confirming the existence of a right in the Community

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June 2002, at p. 17.

[66] House of Commons Research Paper 00/32 at p. 19.

[67] Case T-112/98 *Mannesmannröhren-Werke* v. *Commission* [2001] ECR II-729, Case T-54/99 *max.mobil Telekommunikation Service* v. *Commission* [2002] ECR II-313; Case T-177/01 *Jégo Quéré* v. *Commission*, Order of the Court of First Instance, May 3rd 2002 nyr; Case T-211/02 *Tideland Signal* v. *Commission* Order of the Court of First Instance, 27 September 2002, nyr; Case T-377/00 *Philip Morris International* v. *Commission*, Judgment of 15th January 2003 nyr.

[68] See for example AG Geelhoed in Case C-313/99 *Mulligan and Others* v. *Minister of Agriculture and Food, Ireland and the Attorney General*, [2002] ECR I-5719, at para. 28: "I also note that Article 17 of the Charter of Fundamental Rights of the European Union recognises the principle of respect of the right to property. As Community law currently stands, however, the Charter does not have any binding effect." Opinion of AG Tizzano in Case C-173/99 *BECTU* v. *Secretary of State for Trade and Industry* [2001] ECR-I 4881; Opinion of AG Mischo (20 September 2001) in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture trading as Marine Harvest McConnell and Hydro Seafood GSP Ltd* v. *the Scottish Ministers*, 29 September 2001, at para. 126 and also in Cases C-122 and 125/99P *D and Sweden* v. *Council* [2001] ECR I-4319; Opinion of AG Jacobs in Case C-377/98 *Netherlands* v. *European Parliament and Council of the European Union*, [2001] ECR I-7079 at para. 197; Opinion of AG Léger in Case C-353/99 P *Council of the European Union* v. *Heidi Hautala* [2001] ECR I-9565.

context.[69]. This is a view expressed also by AG Mischo in *Marine Harvest McCConnel*, Jacobs in *Netherlands* v. *European Parliament*[70] and Leger in *Hautala*[71]. AG Alber in *Samuel Sidney Evans*[72] recognised the Charter as a "standard of comparison, at least insofar as it reflects general principles of Community law".

Initially, in *Mannesmannroehren-Werke*[73] the Court of First Instance rejected the argument of the plaintiff who had attempted to invoke the Charter, on the basis that the contested measure was adopted prior to the proclamation of the Charter, and therefore the Charter could have no bearing upon it.[74] In *max.mobil Telekommunikation Service*[75] the CFI did, however, recognise the significance of the Charter, when it described Articles 41 and 47 as being declaratory of general principles of law common to the Member States. In *Jégo Quéré,*[76] the CFI went further still when it relied upon Article 47 to justify a shift away from the narrow test for *locus standi* which had previously been developed by the Court. Such a development has subsequently been rejected by the ECJ,[77] which held that a change in the test for *locus standi* would require treaty amendment.[78]

There has not yet been any discussion before the Courts concerning the potential effect of Article 37 (environmental protection). Article 36, however, provides for the Union's respect for access to services of economic interest, for the purpose of promoting "the social and territorial cohesion of the Union". The Advocate-General in *GEMO*[79] referred to Article 36, and to the importance reflected in it of "services of economic interest". This is the only indicator we have at present as to how these particular provisions, which are not framed in terms of rights, may be considered before the court. It appears that Article 37 may be used to reinforce the importance of environmental protection, its integration with other policies, and that it is ensured in any actions of the Union.

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[69] *ibidem* at paragraph 28.
[70] *Supra* note 68.
[71] *Supra* note 68, at paragraphs 80-83.
[72] Case C-63/01 *Samuel Sidney Evans* v. *Secretary of State for the Environment, Transport and the Regions and Motor Insurers' Bureau*, Opinion of 24 October 2002, *nyr*.
[73] *Supra* note 67.
[74] *Supra* note 67 at para. 15-16.
[75] *Supra* note 67.
[76] *Supra* note 67.
[77] Case C-50/00P *Union de Pequeños Agricultores* v. *Council* Judgment of 25 July 2002, *nyr*.
[78] See below for discussion of the impact of this judgment in relation to the protection of non-economic interests in EC law.

Despite the eager anticipation which accompanied it,[80] the Charter currently adds little to human rights protection within the Community. The rulings of the Court have already made it quite clear that, within the scope of Community law, it will ensure that fundamental rights obligations are fulfilled. The Charter does not in itself add the internal clarity or consistency necessary for the Community to demonstrate that it is itself applying the standards it seeks to impose through its external pursuit of human rights protection.

Although the Charter was intended to be declaratory of rights recognised and protected within the Union there are certain rights included within it which are not protected in other contexts. The *D* case[81] concerned what could have been viewed as discrimination on grounds of sexual orientation, as it dealt with the non-payment of a family relocation allowance towards the unmarried (registered) partner of a Council official. The allowance was payable only to a "spouse". The Court and Advocate-General rejected the argument that this was discrimination on grounds of sexual orientation, and dealt with the matter solely on the basis of the definition of "marriage", holding that this extended only to "marriage" in the "traditional sense": regardless of the fact that a same sex partner may not meet this condition.[82]

Where it is established that a right "declared" in the Charter is not in fact protected within the European Union this could damage the credibility of the Union's human rights protection, as that could weaken the perception of the overall scheme of human rights protection in the EU.

Future Developments: The Draft Constitution of the European Union

The draft constitution[83] includes "fundamental rights" as a value of the Union[84], and includes as objectives of the Union, the protection of the "common values".[85] This may

[79] Case C-126/01 *GEMO* Opinion of Advocate-General Jacobs 30 April 2002 *nyr.*
[80] Lenaerts and De Smijter "A 'Bill of Rights' for the European Union" (2001) 38 C.M.L.Rev. at 273. See also, "The E.U. Charter of Fundamental Rights Still Under Discussion" (2001) 38 C.M.L.Rev. at 1 (editorial).
[81] Case C-122/99P *D and Sweden* v. *Council* [2001] ECR I- 4319.
[82] For further comment on the D case see Caracciolo di Torella and Reid "The Changing Shape of the European Family and Fundamental Rights" ELRev 27 (2002) 80-90.
[83] Preliminary Draft Constitutional Treaty, 28 October 2002, CONV 369/02, http://register.consilium.eu.int/pdf/en/02/cv00/00369en2.pdf
[84] Article 2.
[85] Article 3.

constitute a qualitative shift in the protection and status of fundamental rights in the Union, removing some of the current ambiguity.

The Significance of the Role of the Court of Justice

The role of the ECJ in the development of fundamental rights protection in Europe must not be understated, yet through the 1990s there is some evidence of judicial restraint, in terms of the development of Community law and the protection offered by the Court to fundamental rights. This may be seen in *Opinion 2/94,*[86] *Konstantinidis,*[87] and although it was scarcely restraint – in the strict response of the Court in *Kremzow.*[88] It is also apparent in relation to the scope of Community law generally, for example in the Court's judgments in the *Tobacco advertising Directive*[89] case, and in *UPA.*[90] It is submitted that while this restraint contrasts with what is perceived to be the Court's earlier more active role, it is entirely consistent with the Court's recognition of the limitations on the Community's actions, with respect to fundamental rights.

On the other hand, Advocate General Jacobs in *Schmidberger*[91] recently addressed the relationship between the fundamental Community right of free movement of goods, and fundamental rights. As Jacobs observed, Schmidberger differs from the earlier cases involving the relationship between the fundamental freedoms and fundamental rights. In *ERT*, for example, the issue concerned a derogation from the Treaty, and the Court held that such a derogation must comply with fundamental rights. In *Schmidberger*, however, Austria invoked fundamental rights as the reason for the derogation from the Treaty.[92] This is, therefore, a case of some significance. Jacobs also, significantly, referred to the fact that the relevant national fundamental rights, are also included in the Charter, as well as in the ECHR, and continued that Community law (concerning free movement of goods) cannot prevent a Member State from pursuing an objective "which the Community itself is bound

[86] *Opinion 2/94 on the Accession of the European Community to the European Convention on Human Rights* [1996] ECR I-1759.
[87] *Supra* note 40.
[88] *Supra* note 42.
[89] Case C-376/98 *Germany* v. *Parliament and Council* [2000] ECR I-8419.
[90] *Supra* note 77, although, strictly, UPA also concerned protection of fundamental rights – being again concerned with the right to an effective remedy (Art.47 of the Charter) which manifested itself in relation to the appropriate interpretation to be given to Article 230(4) EC.
[91] Case C-112/00 *Eugen Schmidberger Internationale Transporte Planzuge* v. *Republik Österreich* Opinion of Advocate General Jacobs, of 11 July 2002 *nyr.*
[92] Opinion of AG Jacobs, *ibidem* at paragraph 92-94.

to pursue".[93] This in itself is significant and by no means uncontroversial.[94] Although it is consistent with Article 51(1) of the Charter. This Opinion is not entirely unprecedented: there is some recent evidence of the Court giving priority to the moral rather than the economic issues in relation to a particular provision.[95]

What can, perhaps be discerned in the Court's enthusiasm and subsequent reservation in relation to fundamental rights, is a recognition of relevant legislation, which removes the need to rely upon "fundamental rights" as a principle, but which should provide alternative grounds of action, for example the Framework Directive on Equality.

In short, the Courts' response to fundamental rights appears to have been influenced by national courts and legislative developments. Rather than viewing the Court's rulings as being activist, and the acquisition of a competence, it is submitted that they are more accurately viewed, in fact, as a recognition of 'legality under the Member States' constitutions' as a restriction upon Community competence (notwithstanding the Court's rejection, on principle, of the suggestion that national constitutional law has primacy over the EC Treaty).[96]

Internal Community Human Rights Protection

In contrast to the proliferation of environmental legislation, both internal and external, there is no equivalent internal Community human rights legislation. This is consistent with the distinction according to which the pursuit of human rights protection is not a Community objective *per se* but the protection of human rights underpins Community activities and policies. Much of the internal debate in the Community centred on the question of Community accession to the ECHR. Accession was originally proposed by the Commission in 1979. In 1994 the Court ruled that, because there was no general Community competence in relation to fundamental rights, accession would not be possible without amendment to the Treaty.[97] It has been suggested that this is not an altogether

[93] *Ibidem* at paragraph 102.
[94] See Chapter 2 for discussion of the extent of the Community's competence re fundamental rights.
[95] In Case C-50/96 *Deutsche Telekom* v. *Schröder* [2000] ECR I-743, for example the Court focused on the individual's dignity as a human right, rather than on the economic issues relevant to non-discrimination.
[96] Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
[97] *Opinion 2/94 supra* note 86.

convincing argument, and that the key issue concerns the constitutional implications of accession.[98] It may be asked, however, where competence could have been found for accession by the Community, even in the absence of constitutional considerations. The debate did not end there however. Attempts were made at the 1997 Inter-Governmental Conference, to amend the Treaty accordingly, but these were unsuccessful. The debate on protection of fundamental rights within the Community has moved on to focus on the development of the Charter of Fundamental Rights for the European Union.[99] Yet, it has been emphasised that adoption of the Charter should be viewed as complementary to the possibility of accession rather than an alternative to it.[100]

The extension in Amsterdam to bring the actions of the institutions in relation to fundamental rights within the jurisdiction of the Court has been significant. Certain difficulties remain, however. One of these relates to the classification of rights: which rights does the Community wish to enforce in its external relations? The second relates to standing to enforce these rights both externally and within the Community.[101]

The Classification of "Rights" in the European Community

A significant weakness of the Community's protection of rights to date has been the lack of definition as to what is intended, and the diversity of terms used.

As seen above, the development of the protection of *"human rights"* occurred gradually as part of the general development of the protection of *"rights"* in the Court. The ECJ has recognised its role in the protection of "human",[102] "moral",[103] "individual",[104] "constitutional",[105] "community"[106] and "fundamental personal human rights."[107] Each of the rights referred to by these varied terms has also, however, been defined as "fundamental rights". The reason for this is probably largely political, and rooted in the history of the

[98] See Eeckhout *supra* note 56 at p. 982-983, Weiler and Fries "A Human Rights Policy for the European Community and Union: The Question of Competences" in Alston et al (eds) *The EU and Human Rights;* Burrows "Question of Community Accession to the European Convention Determined" (1997) ELRev. 58.
[99] [2000] OJ C64/01.
[100] See Working Group on "Incorporation of the Charter/Accession to the ECHR".
[101] See below for discussion.
[102] *ERT*, *supra* note 32.
[103] *Konstantinidis*, *supra* note 40.
[104] Judgment of the Court Case 118/75 *The State* v. *Watson and Belman* [1976] ECR 1207.
[105] Judgment of the Court, Case 44/79 *Hauer* v. *Rheinland-Pfalz* [1979] ECR 3927.
[106] Advocate-General in *Hauer*, *ibidem*.

status of rights in the Community. It cannot be explained by the Court's general reluctance to adopt the terminology of other jurisdictions, but probably rather the reverse: the adoption of rights' terminology from other contexts, without the clear establishment of distinctions between rights. This development raises certain questions: namely which "rights" are referred to in any particular instance? To whom do they apply?

These questions have special significance in this context in that the nature of the "right" being developed may affect the competence of the Community to act in that particular field. Thus the Community has, *prima facie,* a more obvious role (and one which was earlier accepted) in relation to economic than to civil and political rights. This is consistently reflected in legal comment.[108] On the other hand, Article 13 now provides explicit Community competence in relation to the protection of rights to equality and non-discrimination.[109]

The nature of rights conferred can also affect (rightly or wrongly) both the manner in which they are applied and who may benefit from them. The global descriptor of "fundamental" belies the fact that some individuals resident in the Community benefit from "fundamental" rights not available to others, such as that to free movement. These may be dependent upon factors such as Union citizenship or Community nationality, whereas other "fundamental" rights apply to all residents and workers of the Community, for example the right to equal pay. Analysis of the terminology used by the Court allows the development of a means of classification. Thus: those rights given by the Treaty to Community nationals/ Union citizens can be described as "citizens' rights". Rights such as that to equal pay which apply to everyone regardless of nationality or citizenship can be described as "Community rights". Those recognised in international law as "human rights" can be so described. Finally, "fundamental rights" can continue to be used to describe any of these collectively, where the distinction is not significant.

The distinction between the development of *citizens'* rights for Community nationals, and fundamental *human* rights for all of mankind, is reinforced by the inclusion of rights

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[107] Case 149/77 *Defrenne* v. *SABENA (no.3)* [1978] ECR 1380.
[108] See for example, Mendelson *"The European Court of Justice and Human Rights"* YEL (1982) 125; Toth *"The Individual and European Law"* 24 ICLQ (1975) 659.
[109] See text accompanying notes 45 and 46.

relating to Union citizenship within Title I of the TEU.[110] This again reflects the economic foundations of the Community, and the fact that rights' protection, like environmental protection, tended to arise as a by product of the process of economic integration and the achievement of a Single European Market, rather than as a direct result of concern for human rights.

This must be qualified, however, with recognition of the fact that the drive towards rights of "Union Citizenship" reflects in addition to economic concerns a desire to give citizens of the Union something more in the way of political rights. The exercise of rights of citizenship is, however, still explicitly tied to the exercise of rights of free movement.[111] Thus there is still some confusion over the objectives and direction of the Community, with many concerns pulling in different directions. There can be little doubt, however, that those who gain least are ultimately the group perceived to have least to offer the Community economically, third country nationals.[112]

It is particularly important that the Community address the question of which rights it will protect, and for whom, since, all other considerations aside, the status of third country nationals within the Community is inevitably of particular importance to third states. If the Community's human rights policy in relation to third states is to have credibility it must, itself, be seen to be upholding all the rights it seeks to protect in those third states. This is one question which the European Union Charter may answer, particularly in view of the fact that it was one of the issues raised in the development of the Charter.[113]

There can be little doubt that as the Community seeks to increase its external activities in relation to fundamental rights, its internal application and enforcement of these will become more important in this field, including, potentially, as third states seek to use the protection

[110] Which is subject to the jurisdiction of the ECJ.
[111] See Eeckhout *supra* note 56; Davies "Citizenship of the Union … Rights for All" (2002) 27 ELRev 121. The response of the UK Government to the proposal that this position may change suggests this is far from accidental. Reverse discrimination, for example, may not yet be challenged on the basis of rights of citizenship.
[112] Peers "'Social Advantages' and Discrimination in Employment: Case Law Confirmed and Clarified" (1997) ELRev 157; Hoogenboom "Integration into Society and Free Movement of Non-EC Nationals" http://www.ejil.org/journal/Vol3/No1/art2.html; Weiler "Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique" http://www.ejil.org/journal/Vol3/No1/art4.html; Peers "Undercutting Integration: Developments in Union Policy on Third Country Nationals" (1997) 22 ELRev 76-84.
[113] See House of Commons Research Paper 00/32, at p. 15.

of fundamental rights as their own tool. With or without such a development, the treatment of third country nationals is a vital part of the general picture of "human" rights protection that the Community and Union are creating.

Human Rights in the European Community: Conclusions

The current position in relation to human rights is that the Community demands and ensures the respect of human rights, as expressed in international conventions and the shared constitutional principles of the Member States in matters arising under Community law. It is now a condition of entry to the EU that a state respect fundamental rights and principles and ensure them. In the event that a member state seriously violates this requirement or poses a threat of serious violation, the privileges of its membership of the EU may be suspended. In none of this, until the Charter, do "human rights" become more than a set of principles underlying Community action, the pursuit of "human rights" has not, outside the context of development cooperation and economic and technical cooperation, become an objective of the European Community. In this respect the ambiguity regarding the legal status and effect of the Charter accrues a crucial importance. Yet, the Charter is intended not to create new rights, and explicitly states that it does not create new obligations or powers for the Community. As the Charter does not yet have binding legal effect, we must assess the Community's competence on the basis of existing provisions. This is consistent with the approach of the Court to the substantive content of the Charter. The Charter suggests there is already a Community competence to promote fundamental rights, yet, as we have seen: this appears only to exist in certain explicitly provided for contexts. This has left the status of human rights and the external competence of the Community in this field open.[114] In contrast the position in relation to environmental protection is clearer.

The Protection of the Environment in the European Community

The Treaty of Rome

As was the case with human rights there was no reference to environmental protection in the Treaty of Rome. Again similarly, it could not be said that environmental protection had no

[114] See Chapter 2.

impact or role in Community policy during the life of that version of the treaty.[115] In 1972, at the Paris Summit, the heads of state and government of the then six member states and the applicant countries, decided that the Community should pursue an environmental policy. In a declaration which dismissed any suggestion that the development of such a policy would require treaty amendment they stated:

> "…. Economic expansion is not an end in itself: its first aim should be to enable disparities in living conditions to be reduced… It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment so that progress may really be put at the service of mankind."[116]

This rather lengthy section is worth quoting in full, as it appears to be an early articulation of the principle of sustainable development. The first Community Action Programme on the environment was published in 1973 and declared that, despite the fact that the Treaty had not been amended, the task of the Community required action in relation to various environmental issues.[117]

The fact that the Treaty had not been amended, however, raised questions and doubts as to the legality of Community environmental measures, given their lack of clear legal base. The first Action Programme was succeeded by a second in 1977[118] and four subsequent programmes, the most recent of which was adopted in 2002.[119]

Alongside the developing views and policies of the Member States, the Community institutions were also involved in the development of environmental protection. The Commission acknowledged in 1980 that environmental protection was a potential limitation

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[115] For discussion of the development of EC Environmental law and Policy see Scott J. *EC Environmental Law*; Chalmers D "Inhabitants in the field of European Community Environmental Law" Columbia Journal of European Law (5) 1998-1999, at p. 39 (also in Craig and De Burca, The Evolution of EU Law); McGillivray and Holder "Locating EC Environmental Law" YEL (20) 2001.

[116] EC Commission, Sixth General Report (EC Brussels, 1972), see also the Declaration of the Heads of State and Government of 19/20 October 1972 at the Paris Summit about collaboration in environmental policy [1972] EC Bulletin (no 10) 21.

[117] [1973] OJ C112/1.

[118] Second Environmental Action Programme, [1977] OJ C139/1; Third Environmental Action Programme [1983] OJ C46/1; Fourth, [1987] OJ C 328/1; Fifth [1993] OJ C138/1.

[119] Sixth Environmental Action Programme "Our future; Our Choice" [2002] OJ L 242.

on Article 30.[120] The European Parliament established an environmental committee in 1973 and included a title on the Environment in its Draft Act of European Union in 1984. The powers of the Parliament, however, were severely limited during this period and the resources of the Commission to deal with the environment were stretched. Outside actors did not participate in the development of Community environmental law at that stage. Consequently, Community environmental law was reactive rather than proactive: responding to crises rather than developing itself as a coherent entity.[121]

Between 1967 and 1986 the Community adopted over one hundred and fifty pieces of environmental legislation. These were based upon Articles 100 and 235 EC.[122] The adoption of legislation under both these provisions required unanimity, thus the Member States could remain confident that they would not lose power involuntarily, despite the fact that this was legislation for which they had not, explicitly, given the Community competence. The existence of "Community policy", and the non-exercise of the veto by the Member States in this field led the Community to be seen as the natural forum for developing environmental protection: consequently the Community became involved in international developments and activities.

As with the protection of fundamental rights the approach of the ECJ was to be crucial in the determination of the development of Community environmental policy, this became particularly apparent through the 1980s. In 1976, in *Handerskwekerij Bier,*[123] the Court ruled for the first time on an explicitly environmental issue.[124] In 1985, the Court ruled that environmental protection was "one of the Community's essential objectives"[125] although this was not stated in the Treaty. This appears, *prima facie*, to be a clear example of judicial activism, yet in view of the 1972 Declaration, any other stance would have been in conflict with the expressed intentions of the Member States.

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[120] [1980] OJ L256/2.
[121] For a comprehensive discussion of the actors involved in the development of European Environmental Law see Chalmers *supra* note 115.
[122] The Wild Birds Directive [1979] OJ L103/1 was notable in being adopted under Article 235 alone.
[123] Case 21/76 *Handerskwekerij J.G. Bier* v. *Mines de Potasse d'Alsace S.A.*[1976] ECR 1735.
[124] Concerning the proper interpretation of "where the harmful event took place" in the Convention on Jurisdiction and the enforcement of judgments in Civil and Commercial matters, concluded at Brussels on 27 September 1968.
[125] Case 240/83 *Procureur de la République* v. *Association de Défence des Bruleurs de l'Huiles Usagées* [1985] ECR 531 at paragraph 13.

By the late 1970s, however, there was a realisation that there was a need for three things: firstly, a clear legal basis for environmental legislation; secondly, that Article 2 EEC should be amended to reflect the need for sustainable growth, rather than "continuous expansion"; and thirdly, that all Community policies should take the environment into account (an early enunciation of the principle of environmental integration).[126] Without these amendments the development of an autonomous environmental policy would be impossible, it would remain reactive rather than proactive: subservient to the single market and economic forces, regardless of the 1972 declaration.[127] It was thus recognised and accepted at a fairly early stage that environmental protection impacted upon the objectives of the Treaty, despite not being a Community objective *per se.*

The Single European Act

In the Single European Act (SEA) the Member States, having recognised the growing importance of environmental protection, and its role in Community policy, introduced a title on the environment.[128] This laid out the principles of Community environmental policy which already applied in the Community Action Programmes, giving them the authority they were previously lacking as a consequence of the absence of a clear legal base. Article 130s conferred concurrent power upon the Community to act in this field, with unanimity in Council. Article 100a, however, both provided for the adoption of measures according to the cooperation procedure, and for decisions by qualified majority (with only a few exceptions under Article 100a(2). The divergence between Article 130s and 100a led to a tendency of the Commission (and Parliament) to propose measures on the basis of Article 100a.[129] Significantly, the precursor of the principle of environmental integration was laid down, in the requirement that environmental consequences be considered in the development of other Community policies.[130] An additional significant introduction was qualified majority voting for certain elements of environmental legislation, notably that concerning standards for traded products.

[126] These ideas were expounded by Konrad Moltke, founding Director of the institute for European Environmental Policy in 1977 and before the House of Lords Committee in (1979-1980).
[127] Only incidences of market failure were addressed by European "environmental" legislation, as it was only these which were within the scope of Community law. Thus, unfair competition arising from disparate environmental standards would be resolved, yet the expansion of activity causing environmental degradation was outside the scope of European Community action, and therefore was not addressed.
[128] Articles 130r-130t (now Articles 174-176).
[129] See Case C-300/89 *Commission* v. *Council* [1991] ECR 2867.
[130] Article 130r (2).

The SEA thus gave a clear legal basis for both discrete environmental legislation, and its integration into the Community's other policies. The third requirement of environmental policy identified by Moltke at the end of the 1970s[131] had not been addressed however: no satisfactory replacement had been found for the Article 2 task of "continuous expansion".

The Treaty of European Union

The first major development of the TEU was the achievement of the amendment of the Community task of "continuous expansion". The new task of the Community was to achieve "sustainable and non-inflationary growth respecting the environment.... the raising of the standard of living and quality of life...."[132]

"Continuous expansion", was thus tempered and the new task became something approaching, although not quite, "sustainable development" *per se*. The concept of sustainable development had gathered credibility and strength following the Brundtland Commission report in 1987.[133] It had been defined therein as "development which meets the needs of the present without compromising the ability of future generations to meet their own needs." To have included this as the Community task, however, would have required a compromise of economic and monetary interests which proved unattainable at that time. A second significant change was the adoption of qualified majority voting as the norm for the adoption of environmental legislation, whether according to the co-decision or cooperation procedures. The third significant development was in Article 130r(2) EC which provided that "Community policy on the environment shall aim at a high level of protection" and that "Environmental protection requirements *must be integrated* into the definition and implementation of other Community policies".[134]

Furthermore, Article 100a(4) EC provided that a Member State may rely on national environmental legislation, provided this had been notified to the Commission, on the grounds of major needs as referred to in Article 36 (now 30) EC. This raised the question of whether Member States may introduce new, more stringent standards, or only continue to apply such standards as existed pre-harmonisation.[135] Macrory and Hessian assert that as a

[131] *Supra* note 126.
[132] Art. 2 EC.
[133] *Supra* note 3 (Introduction).
[134] Emphasis added.
[135] See Macrory "The Amsterdam Treaty: An Environmental Perspective" in O'Keefe and Twomey, *Legal issues of the Amsterdam Treaty,* at pp. 179-180.

consequence of its lack of definition,[136] the difficulty in reconciling economic and non-economic goals, and the questions it leaves concerning competence, the TEU "tends to compound rather than resolve difficulties inherent in designing a comprehensive and consistent Community policy concerning the environment."[137]

The weight given to "sustainable" growth in the TEU enabled the Commission to name the Community's Fifth Action Programme on the Environment "Towards Sustainability", demonstrating a clear direction in the Commission's priorities. It has been noted, however, that certain of the official languages of the Community lack a consistent, equivalent translation of "sustainable". Thus in German, for example, the different treaties (EC, TEU and EEA) each use a different word for "sustainable". Notably, in Article 2 EC, the word used is "beständig", which is closer in meaning to the traditional intention of the article, continuous economic growth, than to the new broader intention of sustainability.[138] Such differences demonstrate the work which had to be done to achieve the compromise necessary to bring sustainability into the Treaty. The Sixth Action programme[139] continues the pursuit of the fifth Action Programme targets.[140]

The Treaty of Amsterdam

The Treaty of Amsterdam (ToA) consolidates the Maastricht approach to environmental protection, including the promotion of a high level of environmental protection and improvement of the quality of the environment as a new Community task.[141] In addition, the concept of sustainable development was finally explicitly introduced into the treaties.[142] However, there is no definition of sustainable development, and the concept remains, as Macrory observes, of greater political than legal significance.[143]

The fact that the task of sustainable and non-inflationary growth is maintained in Article 2 but no longer linked to the requirement to respect the environment may well be explained

[136] See also MacGillivray and Holder *supra* note 115.
[137] Macrory and Hessian "Maastricht and the Environmental Policy of the Community: Legal Issues of a New Environmental Policy" in O'Keefe and Twomey, *Legal issues of the Maastricht Treaty,* at p. 151.
[138] Haigh. N "Introducing the Concept of Sustainable Development into the Treaties of the European Union", in *The Transition to Sustainability: The Politics of Agenda 21 in Europe,* O'Riordan, T and Voisey, H (eds), Earthscan Publications Ltd, London, 1998.
[139] *Supra* note 119.
[140] See http://www.europa.eu.int/comm/environment/newprg/index.htm.
[141] Article 2 EC.
[142] See Preamble and Art. 6 TEU.
[143] *Supra* note 135.

by the inclusion of the principle of environmental integration in Article 6 ToA, rather than Article 130r(2) EC, as it was under the TEU.

Notwithstanding that the legal effect of the duty of integration remains unchanged, it is politically significant that it has been moved out of the Title on Environment and into the general provisions of the Treaty. This gives it more prominence and places it central to the Community's objectives. A further potentially significant change is that it refers to "all *activities and policies*",[144] whereas under Maastricht the duty referred only to the *policies* of the Community.

It has been suggested that the significance of the duty of environmental integration is tempered to some extent by the fact that there are a growing number of similar duties within the Treaty.[145] With respect to human health, for example, the requirement under Maastricht that "Health protection requirements shall form a constituent part of the Community's other policies"[146] has been developed in Amsterdam in the same manner as that of environmental integration. The requirement is now that "a high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities".[147] Similar obligations now exist in the context of employment[148] and consumer protection[149] and already existed in relation to the Community's industrial objectives.[150] Measures adopted under Article 175 (ex 130s) must now be adopted pursuant to co-decision procedure, but those measures which had previously required *unanimity* continue to do so. The duty of integration is supported following Amsterdam, by Declaration 12, which provides that the Commission consider the environmental impact of its proposals, and the principle of sustainable growth, and that the Member States also consider these in implementing Community policies. Following all the effort to move from the concept of growth to development, it seems disappointing at this point to see a return to "sustainable growth".

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[144] Emphasis added.
[145] Macrory "The Amsterdam Treaty: An Environmental Perspective" in "*Legal Issues of the Amsterdam Treaty*". See also McGillivray and Holder *supra* note 115.
[146] Article 129(1) EC.
[147] Article 152(1) EC.
[148] Article 127 (ex 109p) EC .
[149] Article 153(2) (ex 129a) EC.
[150] Article 157(3) (ex130) EC.

The ToA also explicitly permits Member States to derogate from harmonised EC standards, to introduce more stringent provisions on the basis of scientific evidence.[151] This is in contrast to the position under the TEU when such measures could only be applied in relation to standards adopted by qualified majority voting, by the Member States which had not supported them. Measures adopted by both the Council and the Commission may now be derogated from.

Treaty of Nice

The Treaty of Nice introduced no substantive changes to environmental protection within the Community. In the Charter of Fundamental Rights there is, however, as seen above, a potentially significant development: Article 37 includes provision relating to the place of environmental protection within the Union, but does not provide for it as a right.

Finally, the Draft Constitution for the EU provides for " a high level of environmental protection as a Community objective".[152]

Enlargement

As regards enlargement, "environment" is covered in Chapter 22 of the negotiations. Clearly transposition of the EC acquis includes the environmental acquis, and the priority objectives for the candidate states include transposition of the framework legislation, obligations arising from international conventions, reduction of global and trans-boundary pollution, nature protection legislation and measures ensuring the functioning of the internal market. In addition, the integration of environmental protection requirements is to be "envisaged", to promote sustainable development.[153]

Environmental Protection in the EC: Conclusion

There can be little doubt from the nature of its development that environmental policy has been mainstreamed into Community law, and is now central to the governance of the EC.

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[151] Article 95(5) EC, this evidence should be specific to the member state concerned. The derogation must be approved by the Commission, who must assess whether to amend the existing harmonisation measure (Art. 95(8) EC).

[152] Article 3.

[153] See http://www.europa.eu.int/comm/enlargement/negotiations/chapters/chap22/index.htm with regard to most states (except Bulgaria and Romania) this chapter of negotiations is now closed. Current reports of candidate countries compliance with the environmental acquis are at: http://europa.eu.int/comm/enlargement/report2002/index.htm

Yet can it be said that there is a coherent concept of the European environment, and that all aspects of this receive the same degree of protection? McGillivray and Holder suggest not.[154] There can be little doubt that the European concept of "environment" reflects the manner in which it was developed – that is, through its relationship to economic interests. McGillivray and Holder assert that the "environment" in EC law is essentially "anthropocentric ... [its] focus ... is on protecting the health of humans and certain "useful" or valued animals... rather than protecting the environment for its own sake".[155] Yet increasingly there appears to be a move towards a broader conception of environment: founded upon the concept of "shared commons": this can be seen in particular in the judgment of the Court in *Lappel Bank*[156] in relation to wild bird species. It can also be seen in the content of the Sixth Action Programme, which focuses upon four areas: climate change, biodiversity, environment and health, and sustainable management of resources and wastes.[157]

Community environmental policy and action is clearly based upon three principles: sustainability, integration, and the precautionary principle. While these have not been developed as a coherent body, there have been a number of initiatives to develop each of these. The operation of these principles in developing Community environmental legislation is governed by subsidiarity.

Subsidiarity

The significance of subsidiarity in this field is demonstrated in the 1997 Council Resolution on the drafting, implementation and enforcement of Community environmental law.[158] The Resolution refers to the shared responsibility in the implementation and enforcement of Community environmental policy. In the 2000 proposal for a Directive on public access to environmental information[159] the Commission considers subsidiarity and explains the rationale for a Community dimension to environmental policy. This is based upon both the trans-frontier nature of environmental problems and the fulfilment of the Community's international commitments. The principle of proportionality has also been built squarely into environmental protection as has been seen above in relation to Article 95 EC, yet, there

[154] McGillivray and Holder *supra* note 115.
[155] *Ibidem* at p. 4.
[156] Case C-44/95 *R* v. *Secretary of State for the Environment, ex p. RSPB* [1996] ECR I-3805.
[157] See Notaro and Poli "Environmental Law 2001-2002" YEL 21 (2002) *forthcoming*.
[158] OJ [1997] C321/1.

has been some indication of a move away from the application of a stringent proportionality test.[160]

Sustainable Development Strategy

The sustainable development strategy was adopted at the Gothenburg Summit in June 2001.[161] This recognised that economic growth and social cohesion are inter-dependent with environmental protection. Essentially the strategy requires that all future major legislative proposals must include an assessment of economic, environmental and social costs. It also highlights the need for pricing of goods to reflect environmental and social externalities, as a means by which to change consumers' behaviour. The 2001 Council also highlighted the need to develop a global strategy, to which the Commission responded in 2002.[162] This is essentially the external half of the Community's policy and follows the internal strategy's elements of sustainable development: the interrelationship between economic, social and environmental development, but emphasises the requirement for greater coherence in EU policies and improved governance at all levels.[163] To this end the Union undertakes to ensure consistency in its international undertakings, to use its bilateral and multilateral relations to underpin sustainable development and to support closer cooperation between the WTO and international environmental bodies and the ILO. Among its priorities, the Communication identifies a need for better governance at all levels. The EU approach to governance is based upon "openness, participation, accountability, effectiveness and coherence", which are stated to apply to internal and external action alike. Included in its list for action is the improvement of the global capacity to enforce ILO Conventions on labour standards: encouraging the ILO to promote social governance.

Central to the Unions' plans is therefore the recognition of the need to build upon existing international structures, including the ILO and UNEP, to ensure sustainable development, and the need to develop global governance to facilitate this. The development of global governance may prove difficult as it requires both a common vision of what constitutes good governance, and a political will to achieve that.

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[159] COM (2000) 402 final.
[160] Case C-379/98 *PreussenElektra AG* v. *Schleswag* AG [2001] ECR I-2099.
[161] COM (2001) 264 final "A sustainable Europe for a better world: a European Union strategy for sustainable development".
[162] COM (2002) 82 final "Towards a global partnership for sustainable development".

Duty of Integration

The 1997 Resolution[164] also notes the particular challenges implicit in environmental protection which should be recognised in its development,[165] and the factors which distinguish it from other fields, including the dynamic nature of the environment, the relationship between scientific and technical development and the environment, the different levels of public action impacting upon the environment and that the environment is generally represented by universal rather than private interests.[166] The Resolution prevails upon the Commission and Member States to ensure, in the drafting of legislation, the coherence of Community and national legislation, and in particular coherence with international environmental instruments, recalling the duty of integration of environmental interests in Community actions and policies. This may be a direct response to the situations which have arisen in which the Commission has approved funding to projects which have not complied fully with Community or Member State environmental requirements and yet which have escaped challenge as a consequence of gaps in the procedure for judicial review.[167] The possibility that this was under consideration is supported by Article 25.[168]

In addition, the Commission has published an amended proposal for a Council directive on the effect of certain plans and programmes on the environment.[169] In 1998 the Commission, in response to a request from the Council, proposed a strategy for integrating "environment" into EU policies.[170] The Commission recognises in this the challenge implicit in developing its policies in such a way as meets all its objectives. It then identified this as being the challenge of sustainable development, which it rightly recalls is not purely environmental but concerns also social development.[171]

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[163] *Ibidem* at 3.
[164] *Supra* note 158.
[165] *Ibid.* Article 1.
[166] Article 3.
[167] See *Greenpeace infra.*
[168] The Council "STRESSES the importance that, in order to settle environmental disputes more efficiently (i.e. more speedily and at low cost) and with greater ease for citizens and national authorities alike, all Member States consider appropriate mechanisms at the appropriate levels to deal with complaints of citizens and NGOs regarding non-compliance with environmental legislation and make available information regarding the opportunities for complaints to be dealt with at the Member State level."
[169] OJ [1999] C83/13.
[170] COM (1998) 333 final.
[171] This has subsequently been followed by soft law sectoral measures, e.g Council Resolution in a strategy for integrating environmental aspects and sustainable development into energy policy. Council Document Env 185 adopted, 30 April 2001.

The critical factor identified by the Commission (in this context) for the successful integration of environment into other EU policy, is partnership: both inter-institutional and with and among the Member States. Notably, for its achievement, the decision making procedure now requires a new cooperation, as policies can no longer be sectorally developed.[172] The Cologne Report on *Environmental Integration, Mainstreaming of Environmental Policy* recognised that there are many sectors in which the environment has not yet been successfully integrated: including transport, energy, industry, internal market or development cooperation.[173]

On the adoption of the report Commissioner Bjerregaard recognised the enormous challenge facing the Community, and in particular the Council, in the pursuit of environmental integration.[174] Advocate General Léger has described integration as "a mechanism whereby the linkages between the social, economic and environmental spheres may be acted upon."[175]

The perceived need to focus on integration in the development process comes despite the existence of measures pursuing precisely that aim and has been followed by further measures and opinions on that same subject.[176]

The Precautionary Principle

A further difficulty in achieving a global consensus may even arise in the establishment of common principles: the Community's environment policy is based upon the precautionary

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[172] The document then focuses on two particular individual policy area: Agenda 21 (which will be discussed in Chapter 3) and the Kyoto Protocol (which will be considered in Part 2) which are viewed as being particularly urgent.

[173] SEC (99)777.

[174] *Ibidem.*

[175] Case C-371/98 *R* v. *of State for the Secretary Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd* [2000] ECR I-9235.

[176] See for example, COM (95) 294 final Proposal for a Council Regulation on environmental measures in developing countries in the context of sustainable development; Council Regulation (EC) No 722/97 of 22 April 1997 on environmental measures in developing countries in the context of sustainable development OJ [1997] L108/1; Proposal for a Council Regulation (EC) on measures to promote the full integration of the environmental dimension in the development process of developing countries OJ [1999] C47/06 (the amended proposal, Community preparatory acts 500PC0055 was delivered on 21/02/2000); The Communication from the Commission to the Council and the European Parliament - Integrating environmental and sustainable development into economic and development co-operation policy - Elements of a Comprehensive Strategy COM (2000) 264 final lists the legal texts on Integration of Environment and Sustainable Development into EC Economic and Development Co-operation (Annex I), and into Selected EC Economic and Development Co-operation Policy Documents Since 1992 (Annex 2).

principle, yet this has caused problems at international level.[177] Internally, the Commission has issued a Communication on the Precautionary Principle,[178] to provide guidance on the application of the principle,[179] which has caused internal as well as external problems.[180] The principle is applied to protect human health and the environment, and essentially means that the mere fact that there is no certainty over the nature of threats to these interests, should not be used to prevent action being taken to protect those interests. Thus the precautionary principle, which may be invoked without certainty as to the nature of risk, can be distinguished from a policy of prevention, which may be invoked where risks are known and established.[181] The Communication emphasises, however, that the precautionary principle cannot be used to justify arbitrary decisions: as well as the identification of possible adverse effects, available scientific data must be evaluated with due regard to the extent of scientific uncertainty. Exercise of the precautionary principle essentially requires an assessment of acceptable risk, but its application requires consideration of proportionality and non-discrimination, as well as the costs and benefits of inaction. These do not necessarily combine to provide the best level of environmental or health protection.

The Development of Secondary Community Environmental Legislation

The Community's environmental policy has been developed according to the framework laid down under the action programmes and literally hundreds of measures have been adopted. The shift from harmonisation measures[182] intended to create "level playing field" and thus ensure the proper functioning of the market, to primarily environmental measures[183] has been gradual but finally achieved. The recent wave of integrative proposals and measures (ranging from agriculture to the development process in developing countries, and development policy itself)[184] is of particular interest here.

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[177] European Communities-Measures affecting Meat and Meat Products (Beef Hormones), Report of the Panel WT.DS26/R; Report of the Appellate Body WT/DS26/EB/R. See below for discussion.
[178] COM (2000) 1 final.
[179] See Notaro and Poli, *supra* note 157.
[180] For an overview of the principle see Fisher "Is the Precautionary Principle Justicable?" JEnvL (2001) 315.
[181] See Fisher, *supra* note 180 at 318.
[182] Concerning, for example, product standard regulation.
[183] See for example Wild Birds Directive *supra* note 122.
[184] *Infra.*

Legal Basis for Measures Including an Environmental Element

The implications of the choice of legal basis for a measure are significant. As the integration duty demonstrates, environmental protection is an inherent element of different Community policies and activities, rather than being exclusively a discrete policy in itself. Under the TEU many areas of environmental policy were governed by qualified majority voting and the cooperation procedure under Article 130s. Others, however, were governed by the co-decision procedure under Article 189b, in accordance with Article 100a. These different legislative procedures have provoked inter-institutional disputes, as to the appropriate legal basis for individual measures.[185]

The Court ruled in *Commission* v. *Council* that measures pursuing mixed aims, one of which is the environment, may be based upon Article 100a rather than 130s EC,[186] consequently permitting the adoption of legislation by qualified majority voting rather than by unanimity. Thus the ECJ has ruled that the selection of the legal basis for any measure having an environmental impact requires a judgment to be made as to the primary purpose of the measure.[187] The Court, however, has also ruled that it may be necessary to adopt a measure on the basis of both objectives pursued.[188] The ToA has alleviated this problem by replacing the cooperation procedure with the co-decision procedure for the majority of environmental measures.

A significant development concerns the increasing use of soft law initiatives in relation to environmental protection.[189] The importance of this should not be underestimated as it indicates a shift towards a consensus as to underlying environmental objectives, seen not only in relation to economic interests.[190]

The Status of Human Rights and Environmental Protection in the Community

Non-economic interests in the Single European Act

The development of both human rights and environmental protection were both initially

[185] See Case C-300/89 *Commission* v. *Council* [1991] ECR I-2867, Case C-70/89 *European Parliament* v. *Council* [1991] ECR I-4529, Case C-155/91 *Commission* v. *Council* [1993] ECR I-939, Case C-233/94 *Germany* v. *Parliament and Council* [1997] ECR I-2405.
[186] Case C-300/89 *Commission* v. *Council* [1991] I ECR 2867.
[187] *Ibidem.*
[188] Case 165/87 *Commission* v. *Council* [1987] ECR 5545.
[189] Holder and McGillivray *supra* note 115; Notaro and Poli *supra* note 157.
[190] See Chalmers "Inhabitants in the field of EC Environmental Law" Craig & de Burca, *Evolution of EU Law.*

driven by economic issues. In the case of environmental protection, it was the distortive market impact of varying national environmental standards. In relation to human rights, it was a realisation that there was no absolute dividing line between the operation of Community policy and the fundamental rights upheld by the Member States.

The Court of Justice ruled during this period that "the protection of the environment is a mandatory requirement which may limit the application of Article 30 [now 28] of the Treaty", thus recognising that the environment may take precedence over economic objectives.[191] The Court consolidated this approach in the *Belgian Waste Case*[192] in 1992 when it declared that the principle in Article 130r (now 174) EC, that "environmental damage should as a priority be rectified at source" could be invoked to limit the free movement of waste for its disposal.[193]

Thus in relation to the environment the Community was actively developing a policy by this stage. With respect to human rights, however, the position was more ambiguous. An intention to promote democracy on the basis of human rights was stated, but this cannot in itself be described as creating a Community policy whose objective is to protect those rights. The commitment to international human rights standards already endorsed by the Member States is significant for its very inclusion, if not its substantive input. The Member States governments were certainly not going as far in this as to confer power on the Community to act in relation to human rights, other than to uphold the rights and standards they themselves required.[194] They were entrenching their position, just as their national Constitutional courts had done before.[195] Consequently this provision imposes an obligation upon the Community, rather than creating the possibility for the Community to develop a policy *per se*.

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[191] Case 302/86 *Commission* v. *Denmark* [1988] ECR 4067.
[192] Case C-2/90 *Commission* v. *Belgium* [1992] ECR I-4431.
[193] *Ibidem,* at para. 34. This was even more significant as the measure in question *appeared* to be directly discriminatory ("mandatory requirements" were introduced in the context of indirectly applicable measures (see Case 120/78 *Rewe-Zentrale AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis de Dijon*) and it had been thought that they could not justify a directly discriminatory measure, which would only be justifiable by reference to Article 36 (now 30) EC). The Court, however, held that the measure was not discriminatory since the specific nature of the products (waste) meant that they were not similar (at paragraph 36).
[194] In this respect a distinction may be drawn between the protection of certain social and employment rights, and non-discrimination on grounds of nationality which were protected under the Treaty, and general human rights protection which was not protected.

Developments Since the Single European Act

Following the TEU the difference in approach to the protection of human rights as a Community issue on the one hand, and environmental protection on the other, was becoming more apparent. The rhetoric in relation to each was increased, and clearly both were of increasing importance to the Member States, yet quite different directions were being pursued. Environmental protection was being pursued and developed as an objective in its own right, whereas the broad commitment to human rights was consolidated as being the obligation to ensure their observance as they exist within the member states. Only within the narrow context of development cooperation was any power conferred for pursuit of human rights protection as a Community objective, and that power operated outside the Community context.

Human Rights and Environmental Protection: Contrasting Approaches

The differences in approach to the protection of human rights and the environment, apparent in the Treaty since the Single European Act, are borne out in the longstanding development of secondary environmental legislation, and the lack of secondary human rights legislation dealing with the internal Community context.[196] Recently, however, there is a sense of a change in this in the development of the Charter of Fundamental Rights for the European Union,[197] and also in the enactment of secondary legislation under Article 13 EC.[198]

Enforcement of non-economic Community interests: striking a balance with the Community's economic objectives

It is with respect to the enjoyment of non-economic rights and interests in the Community that the differences in their form and substance become crucial. The approach taken to human rights has been relatively straightforward: the Community's role, in the development of which the Court was pivotal, is to ensure the observance, within the Member States, of existing fundamental rights standards.

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[195] *Internationale Handelsgesellschaft supra* note 16 and *Frontini supra* note 17.
[196] There is considerable secondary legislation relating to the protection of human rights in third countries which will be examined in Chapter Three.
[197] *Supra* note 48.
[198] *Supra* notes 45 and 46.

Until very recently, there was no development of an autonomous set of standards, and there is no objective to develop such standards *per se* for the Community.[199] This analysis relies upon a distinction being observed between social rights (and consequent Community standards) and more traditional civil and political rights. This distinction relies in turn upon a recognition of the purpose and limitations of social rights protection within the Community. Generally it is dependent upon the individuals' status as a worker or Community national. The purpose of such rights was, originally, to level the economic playing field, rather than serve any moral or ethical function. Human rights standards underlie the action of the Community and influence Community policy and its form. Although currently the Community is not, strictly, bound by any set of human rights provisions (it is a party to none) it is an underlying principle of its action that it *observes* existing standards binding upon the Member States, and ensures them within the Member States. The Charter complicates this analysis, for it is an autonomous EU "human rights" document. Although formally it is merely declaratory of existing rights, in fact, as seen above, not all its rights are derived from other sources. Eeckhout observes that this is necessary as without new rights only "lowest common denominator" rights protection could be developed.[200] Traditionally, within the Community context there were no measures pursuing civil and political human rights as an end in themselves, and the Court ruled in *Opinion 2/94*[201] that there was no general power for the Community in the field of human rights. Consequently, there could be no question of contradictory Community objectives.

The questions which arose concerned the occasions on which measures within the scope of Community law may have the subsidiary effect of preventing the enjoyment of human rights: or in which the enjoyment of fundamental rights encroached upon, and prevented, the enjoyment of Community fundamental rights – for example the right to protest may interfere with the free movement of goods.[202] The significant issue here is how has the Court handled the instances in which "conflict" has potentially arisen? What test has the Court applied in order to balance these interests? These cases have tended to deal with this interference by balancing the free movement of goods with the public policy/public security

[199] But note recent enactment of Race and Equal treatment directives, supra notes 45 and 46 and adoption of Charter, *supra* note 48.
[200] Eeckhout *supra* note 56.
[201] Opinion 2/94 *Re the Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759.
[202] See *R* v *Chief Constable of Sussex, ex p. International Traders' Ferry* [1999] 2 AC 418 , Case C-263/95 *Commission* v. *France* [1997] ECR I-6959.

mandatory requirement, rather than in terms of fundamental rights. Where a breach of human rights occurs, but does not concern an issue of Community law *per se*, the Court has been explicit that that was outwith its jurisdiction.[203]

A most significant recent development concerns *Schmidberger*[204] in which Advocate General Jacobs asserted that the rights of freedom of assembly and protest, as national constitutional rights and fundamental rights protected in the Community, can constitute a mandatory requirement, justifying a restriction on the free movement of goods. If followed by the Court this will represent a breakthrough in the relationship between fundamental rights and economic interests.

In contrast, the existence of "environmental policy" potentially shifts the balance to some extent in the relationship to be drawn between the "conflicting" interests. Since the 1970s there have been occasions on which economic and environmental objectives have come into conflict. The Court has traditionally taken an activist approach to this, giving precedence to environmental protection over economic objectives even before environmental policy or objectives were developed.[205]

It may be argued that the duty of integration of environmental protection now means that it overrides all other areas of policy. Only the position of the integration duty at the head of the Treaty supports this, however, in the face of similar or identical obligations in relation to other areas. As yet the legal power of this duty remains untested and there remains no guidance as to which of the Community's objectives should have precedence in the event of a conflict. The Court has recognised the duty of integration as justifying the adoption of measures including an environmental dimension on the basis of non-environmental provisions of the Treaty.[206] It remains to be seen, however, as Macrory observes,[207] whether the duty may be used to prevent or annul Community measures which allegedly fail the environmental integration duty.[208]

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[203] Case C-299/95 *Kremzow* v. *Austria* [1997] I ECR 2629.
[204] *Supra* note 91.
[205] See, for example, the *Belgian Waste* Case, *supra* note 192.
[206] *Supra* note 186.
[207] Macrory *supra* note 145.
[208] The relevance of this question is demonstrated by the *Greenpeace* case, which will be examined below.

Balancing non-economic and economic interests

Arguably, the requirement that pursuit of the objectives of the single market must now respect the Community's environmental policy, means that economic objectives *cannot* take precedence: but this is a rather static view and gives no consideration to issues of, for example, proportionality in how and whether a balance should be drawn. Perhaps some guidance may be acquired from cases resolved in the context of the Common Agricultural Policy.[209] The Court has been explicit, in this context, that where a conflict between competing objectives arises, the Institutions must not give effect to one to the exclusion of pursuit of the other,[210] although it may give temporary priority to one, where necessary in light of specific circumstances.[211]

From this approach it appears unlikely that the Court will give absolute priority to environmental interests over other concerns. How this can work in practice, however, is difficult to assess. It is disappointing that this issue was not addressed in the negotiation of the ToA, particularly as it is a question which had been raised before the ECJ.[212] The ECJ has recently revisited this issue in *Preussen Elektra.*[213] This case concerned a German scheme supporting the purchase of electricity from renewable energy sources and raises various points: including the ability of a Member State to enact national schemes promoting the use of renewable sources of energy. This particular scheme, however, favoured German sources and thus restricted the operation of a Community electricity market. Consequently, the question arose as to whether this discriminatory scheme could be justified, as it appeared to breach Article 28 EC. Advocate-General Jacobs submitted that the measure was a discriminatory quantitative restriction, under Article 28, and that even if it were possible to justify a discriminatory measure, this one would fail the proportionality test. Jacobs refused to apply the Court's "*Belgian Waste*" approach on the grounds that it was faulty. The Court has, traditionally, formally ruled out the possibility of relying on mandatory requirements to

[209] Cases 80 &81/77 *Ramel* [1978] ECR 927 The Court held that "the objectives of free movement and of the common agricultural policy should not be set against the other nor in order of precedence, but on the contrary combined".
[210] Case 197/80 *Ludwigshafener Walzmuhle Erling KG* v. *Community* [1981] ECR 3211 at para. 41.
[211] Case 203/86 *Spain* v. *Council* [1988] ECR 4563 at para. 10; Case 29/77 *Roquette Freres* v. *France* [1977] ECR 1835.
[212] See, *inter alia,* Case C302/86 *Commission* v. *Denmark* [1988] ECR 4067 (hereafter the *Danish Bottles* Case); *Belgian Waste* case *supra* note 192. See also Art. 95(5) TEU re Art. 30 EC).
[213] *PreussenElektra AG supra* note 160 (See Sara Poli "National Schemes Supporting the Use of Electricity Produced from Renewable Energy Sources and the Community Legal Framework" 2002 JEnvL 209-231).

justify a discriminatory measure. The Court, however, has not stuck by this ruling in relation to measures pursuing environmental protection.[214]

The Court held that the measure did not breach Article 28, without assessing whether it was distinctly applicable. Given that the scheme prevented the purchase of electricity from renewable energy sources outside Germany, this seems somewhat remiss. The result of the Court's judgment is that it permitted "environmental protection" to support the compatibility of a measure with Article 28, rather than, as would have been a more standard approach, permitting environmental protection to be used to justify a measure conflicting with Article 28. But that, more traditional, approach would have been difficult in this case, as the mandatory requirement of environmental protection has only traditionally been available with respect to indistinctly applicable measures. There are, therefore, holes in the Court's reasoning.

It would perhaps have been more satisfactory, as Poli observes,[215] if the Court had acknowledged that it was changing the availability of mandatory requirements. To have done this would have supported the application of the duty of integration of environmental protection into the Community's other policies. The application of that duty remains, however, uncertain.

Prima facie this is not problematic, the Community has been given an objective, the form and content of which will be developed over time as legislation is adopted and developed, this is a standard Community approach. There are, however, quite genuine concerns. An example can be drawn from the obligation to carry out an environmental impact assessment for new projects. Failure to carry out an assessment would be a breach.[216] Would it be a breach of duty, however, if an EIA were carried out and the environmental impact viewed as being adverse, but the project undertaken notwithstanding that finding? How adverse must the impact be for the project not to go ahead? Clearly proportionality would be relevant here. Some discretion to balance interests in such a case is necessary, yet the

[214] See for example *Belgian Waste* case *supra* note 192.
[215] *Supra* note 213 at p. 228.
[216] Case C-72/95 *Aanermsbedrijf PK Kraaijeveld BV e.a.* v. *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403; Case C-435/97 *World Wildlife Fund* v. *Autonome Provinz Bozen* [1999] ECR I-5613; Case C-287/98 *Luxembourg* v. *Berthe Linster and Others* [2000] ECR I-6917 and *R* v. *Durham County Council and others, ex parte Huddleston* [2000] 1 WLR 1484.

nature (or indeed existence) of such discretion, has not been determined.[217] The need to establish a mechanism by which to exercise this discretion is intensified by the wide-ranging objectives of Community environmental policy.[218]

A further difficulty concerns to whom the duty is owed. The practical relevance of this question was demonstrated before the negotiation of the ToA.[219] It is disappointing that Amsterdam failed to address the lack of effective means by which to secure judicial review of measures taken by Community institutions in this respect.

The increased role of Parliament in the decision-making procedure generally within the Community will, to a certain extent, obviate this problem. Significant areas, however, which have in the past formed the basis of measures having an environmental impact, remain outside the co-decision procedure.[220] The ToA has also retained from Maastricht the list of environmental measures for which unanimous voting is required in the Council of Ministers.[221]

In relation to Article 95(5) EC the requirements of scientific evidence for both new and existing measures allow the Commission to verify that such national measures are not disguised restrictions on the operation of the internal market: which has been introduced as a new ground of rejection (Article 95(6)EC). The principle of proportionality will be fundamental to any decision on this ground, as any such national measure may inherently constitute a restriction on the functioning of the internal market. In contrast to this potentially limiting effect, the Commission is bound, under Article 95(7), to examine the need to amend a Community measure in line with any new, or existing, national measure which it authorises. Thus if a measure does succeed in receiving authorisation, the more stringent national standard may lead to a higher harmonised Community standard.[222] As a

[217] See Wiers "Regional and Global Approaches to Trade and the Environment: The EC and the WTO" LIEI [1998] 93-115 at pp 109 *et seq.*
[218] They include: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources as well as the promotion of measures at an international level to deal with regional or worldwide environmental problems.
[219] Case T-533/93 *Stichting Greenpeace Council* v. *Commission* [1995] ECR II-2205, at para. 55.
[220] Notably agriculture and specific research and development programmes.
[221] Article 175(2) These include fiscal, town planning/land use measures and those measures which "significantly affect a Member State's choice between different energy sources and the structure of its energy supply."
[222] Commission working document: Second annual survey on the implementation and enforcement of Community Environmental Law, January 1998-December 1999.

result, individual national policies and interests may once again have a direct influence upon the development of Community policies, as they did at the outset of Community "environmental" policy. From the Community perspective this would now, however, reflect environmental considerations, rather than market function protection reasons.

Remedies and Case-law

If the cases concerning the application and enforcement of environmental protection are examined some interesting points arise. The majority of cases concerning the environment, including the *Danish Bottles* and *Belgian Waste* cases, were brought by the Commission under Article 169 (now 226) EC. In principle, each of the remedies of the Community should be available, however there seems *in practice* to be limited access to the Court in this context. Article 170 (now 227) EC has, as in any other context, been very little used. Cases have arisen under Article 177 (now 234) EC, but again these have been infrequent, although it may be significant that both *Danish Bees*[223] and *PreussenElektra*[224] arrived before the ECJ by this means. In *Danish Bees* the Court ruled that a prohibition on keeping certain species of bee within a given territory constituted a measure equivalent to a quantitative restriction within the scope of Article 30 (now 28) EC. This measure, however, was held to be justified under Article 36 (now 30) EC, on grounds of the protection of the health and life of animals, particularly in view of the importance of the maintenance of bio-diversity, the protection of the environment. This is an interpretation which is highly controversial (it was almost certainly not within the contemplation of the Member States when this provision was negotiated) and could not, politically, have been given without the development of environmental protection as an objective in itself in the subsequent development of the Community. As has been seen, despite the Court's ambiguity, *PreussenElektra*[225] marks a further step forward for environmental protection where it conflicts with free movement of goods.

Judicial Review: Locus Standi

Despite having been used by Member States to challenge the basis of EC and EURATOM environmental legislation,[226] the provisions for judicial review under Article 230 (ex 173)

[223] Case C-67/97 Criminal proceedings against *Ditlev Bluhme* [1999] 1 CMLR 612.
[224] *Supra* note 160.
[225] *Ibidem.*
[226] See *inter alia* Case C-62/88 *Greece* v. *Council* [1990] ECR 1527.

EC have also had relatively little impact upon Community conduct in relation to substantive environmental law,[227] although Parliament has used it to protect its prerogatives in relation to environmental legislation.[228] It has rarely been used, however, by a natural or legal person; where such judicial review has been sought it has failed, due to the failure of the applicants to establish *locus standi*, most recently in the *Greenpeace* case.[229] Many factors affect *locus standi* in relation to public interest representation in the Community. As Harlow observes, the treaty itself poses particular difficulties for interest representation.[230]

In 1992 Harlow was justified in concluding that the Court was being increasingly pushed towards adopting a liberal/activist stance, giving effect to the spirit of the law over the written text.[231] The Court was particularly activist about the rights of Parliament, and eventually the Treaty was amended to reflect the work of the Court in this respect.[232] Arguably, however, its semi-privileged status does not go far enough. To give Parliament privileged status would provide a means by which universal interests would feasibly be more effectively protected.

As regards non-privileged applicants, the position remains bleaker, diverging even from the Member State norm, where established interest groups generally have *locus standi*. The ECJ jurisprudence concerning environmental protection highlights one particular fact: that environmental issues have consistently been considered, with regard to their effects upon the market. The *Greenpeace*[233] case offered the Court the opportunity to consider whether environmental issues should be considered in the light of criteria other than those developed for, and in the context of economic rights and interests.

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[227] It is perhaps significant that the Communication on implementing Community Environmental law relates to Member States' not Community action.
[228] See Joined Cases C-164/97 and C-165/97 *Parliament* v. *Council,* [1999] ECR I-1139.
[229] *Infra.*
[230] Harlow, C. "Towards a Theory of Access for the European Court of Justice" YEL 12 (1992) 213; Kramer, *Focus on Environmental Law*, at 229 *et seq.* and 290 *et seq*; and Ward "The Right to an efective remedy in EC law and environmental protection: A case study of UK Judicial Decisions" JEnvL (1993) 221-244.
[231] *Infra.*
[232] Following Case 294/83 *Parti Ecologiste les Verts* v. *European Parliament* [1986] ECR I-1368 Article 230 was amended in the TEU to include semi-privileged standing for Parliament to protect its prerogatives.
[233] Case C-321/95P *Greenpeace and Others* v. *Commission* [1998] ECR I-1651.

The Greenpeace Case: Background

The *Greenpeace* case[234] raised many questions concerning the application and enforcement of non-commercial interests. Before the judgment was given Philippe Sands stated that the approach of the Court in this case could indicate how far it would be prepared to go in the interests of environmental protection.[235] The judgment is, in that respect, disappointing.[236]

The ECJ's jurisprudence in the context of Article 230 (ex 173) EC clearly demonstrates the difficulties inherent in determining the approach to be taken to the Community's non-economic interests, as compared with the familiar economic interests. The cases brought by natural and legal persons in relation to judicial review (inevitably) concerned, until 1995,[237] exclusively economic interests. As such, the interpretation of "direct and individual concern", essential to the determination of *locus standi,* developed in a highly specific direction, which was entirely legitimate, and indeed appropriate.[238] The development of non-economic concerns, however, raises questions as to the appropriateness of this interpretation of Article 230(4).

Greenpeace concerned an attempted challenge to a Commission decision to grant funding to the construction of two power stations. The ground of challenge was that the construction of the power stations breached Community (and national) environmental law, as no environmental impact assessment had been carried out. Consequently, the Commission decision was unlawful and should be annulled. The Court of First Instance (CFI), applying the traditional interpretation of Article 230(4) had held that the action was inadmissible on the grounds that Greenpeace International and Others (local residents) had no *locus standi.*

The applicants appealed this decision, referring to the specific characteristics of environmental interests: that they are intrinsically common and shared, and that the rights

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[234] *Supra* note 233.
[235] Philippe Sands "The European Court of Justice: An Environmental Tribunal?" *Protecting the European Environment: Enforcing EC Environmental Law*, Han Somsen (ed.) Blackstone Press Ltd 1996.
[236] For a full analysis of the case see Gérard, Nicole "Case Note: *Greenpeace and Others* v. *the Commission* C-321/95 P" (1998) RECIEL 209; Jack, Brian "A Birthday Suit for the Environment"[1998] 4 Web JCLI (http://webjcli.ncl.ac.uk/1998/issue4/jack1.htm) Reid, Emily: "Judicial Review and the Protection of Non-Commercial Interests in the European Community" (2000) 1 Web JCLI. (http://webjcli.ncl.ac.uk/2000/issue1/reid1.html): Torrens, Diana L. "Locus Standi for Environmental Associations under EC Law - Greenpeace – A Missed Opportunity for the ECJ" RECIEL 8 [1999] 336.
[237] Case T117/94 *Associazione Agricoltori Della Provincia di Rovigo and Others* v. *Commission*, [1995] ECR II-455 and *Stichting Greenpeace Council supra* note218.
[238] See *inter alia* Case 25/62 *Plaumann* v. *Commission* [1963] ECR 95.

relating to these interests are liable to be held by a potentially large number of individuals, thus they would never give rise to the kind of closed class necessary to satisfy the criteria arising from the earlier case-law. Since the privileged parties are unlikely to challenge such an act there is, consequently, an effective legal vacuum.

The Court of Justice simply ruled that it was the construction of the power stations which affected the environmental interests, and that the decision to fund the construction did not itself directly effect the environment.[239] Therefore, having ruled that there was no direct concern, the Court avoided addressing the argument concerning individual concern and universal interests, and simply applied the traditional case law concerning *locus standi*.[240]

After considerable analysis of the existing case law and arguments Advocate-General Cosmas stated that easing the requirements in certain circumstances would be neither impossible nor inappropriate. Unlike the ECJ, he did not dismiss the effect upon environmental interests as being only indirect.

Observing that environmental protection constituted an essential Community interest, Cosmas referred to the *World Wide Fund for Nature* case[241] to demonstrate that a general objective such as environmental protection may in some cases be enforceable by individuals. Cosmas referred in particular to the risk that protection of rights in the Community could "remain incomplete and fragmentary",[242] and recommended a purposive approach to the interpretation of "individual concern", to include recognition of a particular group of individuals, particularly affected by a decision, who should have the capacity to challenge that decision.

Cosmas' willingness to consider such an outcome in principle, although not finding it on the facts, has subsequently found implicit support from both the CFI[243] and Advocate-General Jacobs in *UPA*.[244] In Jégo Quéré the CFI held that the right to an effective remedy, included in both Article 6 ECHR, and Article 47 of the Charter, required that the strict interpretation of Article 230(4) should be reconsidered.[245] Thus the CFI held that a person should be held

[239] *Supra* note 232 at paras 30-31.
[240] See *inter alia, Plaumann, supra* note 238.
[241] Case C-118/94 *Associazione Italiana per il World Wildlife Fund* v. *Regione Veneto* [1996] ECR I-1223.
[242] At paragraph 60.
[243] Case T-177/01 *Jégo Quéré & Cie SA* v. *Commission* [2002] ECR II-2365.
[244] Opinion of Advocate General Jacobs *supra* note 77.
[245] *Supra* note 243 at paragraph 50.

to have individual concern if the measure affects their legal position, either by imposing obligations or restricting their rights.[246]

Under this test, the local residents may have had standing, but Greenpeace probably would not. In any case, however, as the ECJ pointed out[247] alternative remedies were available to challenge the construction of the power stations, and thus protect the environmental interests via national courts.[248]

Advocate-General Jacobs in *UPA*, however, takes alternative challenge through the national courts as his starting point, exploring the issue of whether this can always provide effective judicial protection[249] and concluding that it does not. The pragmatic question is whether, in view of the possibility to bring an alternative action before the national courts, *environmental interests* remain unprotected. In this case, the answer to this question would be no.[250]

Jacobs' proposed solution to the problem of effective protection is that the requirement of individual concern should be reinterpreted to require that an individual have individual concern in a measure where: "by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect upon his interests".[251] De Witte also advocates a relaxation of the requirements of Article 230 (4) in relation to human rights, advocating the "adversely affected" test, framed in such a way as to include associations and public interest groups.[252]

Such an interpretation could conceivably have given the local residents individual concern, as a consequence of the direct impact of the power stations upon them. It could also extend to give Greenpeace individual concern by virtue of its particular interest in environmental protection. What this does not do, however, is overcome the hurdle imposed by the ECJ in ruling that there was no direct concern in the Commission decision.

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[246] *Supra* note 245 at p. 51.
[247] *Supra* note 233 at paras 32-34.
[248] Although the Commission decision itself could not be challenged.
[249] *Supra* note 77, at paras. 38-49.
[250] Although this would not satisfy the dicta of the Court in *Les Verts supra* note 232 that "a direct action [should be] available against all measures adopted by the institutions which are intended to have legal effects".
[251] *UPA supra* note 77 at para. 60. See also De Witte "The Past and Future Role of the European Court of Justice in the Protection of Human Rights" in Alston et al *The EU and Human Rights*.
[252] De Witte, *ibidem*, at p. 893.

Glencore Grain: A Solution to this problem?

The approach of the Court in *Glencore*[253] would overcome this particular hurdle. Glencore sought to challenge a Commission decision (addressed to the Russian Federation's financial agents VEB) that they would not provide an emergency assistance loan. The loan was to have been in relation to a contract for the supply of wheat, between Richco (now trading as Glencore) and Expokhleb (responsible for the negotiations on behalf of Russia.) As the loan was not made available, the contract could not be performed.

The CFI[254] adopted a *Greenpeace* type approach, holding that the decision did not affect the existence of the contract, and therefore Glencore were not directly affected.[255] The ECJ, however, overturned the Order of the CFI. Although it applied the traditional criteria for the establishment of direct concern, to do so it looked behind the immediate effect of the decision, to its subsidiary practical effects. [256] Because the contract could not, *in fact*, be performed without the Commission funding, the Court held that Glencore must be directly concerned by the Commission's decision.

Had this approach been used in Greenpeace, in combination with a revised interpretation of Art 230(4), it would have been possible for the Court to have granted the local residents, and possibly Greenpeace standing, without having contradicted its earlier jurisprudence. Not having done so, and having ruled out the possibility of a revised interpretation in *UPA*[257] (on the grounds that this would require amendment of the Treaty), the Court has maintained the position whereby the more universal an adverse impact of a measure upon non-economic interests, the less likely it is that any natural or legal person will be able to challenge that measure.

The Court's dismissal of the environmental interest in Greenpeace as being affected only indirectly, is significant, albeit fairly tenuous. The ECJ was not to be drawn into making a "concession" for environmental interest where not convinced it was essential (or appropriate). It is possible that the Court was seeking to give a message concerning the abuse of Community law provisions, that is, their exploitation where they are not genuinely

[253] Cases C-403and 404/96 P *Glencore Grain Ltd* v. *Commission* Judgment of 5 May 1998.
[254] Cases T-491/93 *Richco* v. *Commission* [1996] ECR II-1131 and T509/93 *Richco* v. *Commission* [1996] ECR II-1181.
[255] Paragraphs 51-53 of the CFI's Order.
[256] Paragraph 45.

at issue. This is comparable to the stance taken by the Court in *Kremzow*[258] in relation to the attempted use of Community law in the context of human rights and criminal proceedings, and in *Keck,*[259] following the (ab)use of free movement of goods provisions to contest Sunday closing laws.[260]

It would have been helpful if the Court had considered the argument relating to the special nature of environmental interests. The Court could have *recognised the potential* for a wider interpretation of direct and individual concern in a case concerning non-economic interests. Such an approach would have been consistent with the Court's own dicta; for example in *Plaumann* itself[261] that "the provisions of the Treaty regarding the rights of action of interested parties must not be interpreted restrictively". In *Pescastaing,*[262] Advocate-General Capotorti described the role of the *national courts* as being: "to interpret the provisions in force whilst endeavouring to adapt them to developments in the system and the changing requirements of the Community."

Both these dicta are consistent with the general duty of sympathetic interpretation imposed by the ECJ on national courts[263] as well as with the dictum in *Les Verts.*[264]

To have taken an approach such as Cosmas,[265] Jacobs[266] or de Witte[267] have advocated, interpreting Article 173(4) (now 230(4)) EC in a broader manner than hitherto, would have recognised the development of non-economic concerns as giving rise to a distinct direct and individual concern, which is not comparable with that arising from the infringement of economic interests, but for which individuals require protection.

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[257] *Supra* note 77
[258] *Supra* note 42.
[259] Cases 267 & 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6907.
[260] See *inter alia* Case 145/88 *Torfaen BC* v. *B&Q plc* [1989] ECR 3851. The Court has, however sanctioned the use of Community law for purposes not originally envisaged as in *Ditlev Bluhme (Danish Bees) supra* note 223.
[261] *Supra* note 238.
[262] Case 98/79 *Pecastaing (Josette)* v. *Belgian State* [1980] ECR 691.
[263] See, for example, Case 165/91 *Van Munster* v. *Rijkdienst voor Pensionen* [1994] ECR I-4661.
[264] *Supra* note 232.
[265] *Supra* note 233.
[266] *Supra note* 77.
[267] *Supra* note 251.

The approach of the Court in *Greenpeace* and *Danish Bees* will encourage strategic use of Article 234 to challenge measures affecting non-economic interests. Following the ruling of the Court in *TWD*[268] the applicant has a difficult decision to make as to how to proceed.

The current position however appears to be that although the environment is being mainstreamed, and although the Court is willing to fully consider the protection of environmental interests where brought before it in conflict with economic interests, there is, as yet, relatively little possibility to enforce an environmental interest. This is problematic in itself, but particularly since the EC in 1998 acceded to the Aarhus Convention.[269] The EC has recognised that it may not yet satisfy its obligations in relation to access to justice, and has been working on this since April 2002, when it produced a draft proposal for a directive to facilitate the implementation of the Convention.[270] This has been criticised, however, for failing to offer access in a sufficiently broad range of circumstances.[271] It seems that the granting of adequate access will not be straightforward.

Conclusions

The development of both Community human rights and environmental protection has come about through a combination of Member State and Court of Justice action, followed by Community (Institutional) action and amendment to the treaty. The fact that environmental protection has developed as an objective in itself has differentiated it from human rights protection, which has developed as an underlying set of standards to be applied to the activities and policies of the Community. With respect even to environmental protection, the conclusion to the Second Survey,[272] notes that after three decades of environmental legislation, the state of the environment is not improving (although it does not define how

[268] Case C-188/92 *TWD Textilwerke Deggendorf GmbH* v. *Germany* [1994] ECR I-833.
[269] Convention on Access to Information, Public Participation in Decision Making and Access to Justice on Environmental Matters.
[270] Working Document I; Consultation began on this issue in May 2002. See in particular Second Working Document Access to Justice in Environmental Matters; http://www.europa.eu.int/comm/environment/aarhus/index.htm.
[271] Responses of the European Environmental Bureau to the Working Document, 31 May 2002. See also Consultation Paper "Access to Justice in Environmental Matters" Based on European Commission Directorate General Environment Working Paper, 11 April 2002, Alan Crockford, Sustainable Development Unit, DEFRA; Communication from the Commission to the Parliament ... concerning the common position of the Council on the adoption of a Directive... providing for public participation in respect of drawing up certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61EC, SEC/2002/0581 final and subsequent Opinion of the Commission COM 2002/0586 final.
[272] Second Annual Survey on the implementation and enforcement of Community environmental law, January 1998-December 1999, Working Document of the Commission Services.

this is measured). One of the perceived reasons for this is a lack of implementation of existing environmental legislation. The integrative approach to environmental protection is to be continued and consolidated in the sixth action programme, currently being developed, but the direction sought will be to create more ownership in and responsibility for the environment. Such an objective cannot be achieved without a corollary extension of rights of access to the ECJ to the people and groups who are to take responsibility.

The difference between environmental and human rights protection reflects a significant difference in their nature – particularly as applied within the Community. Environmental protection developed very much as a consequence of the need to remove competitive distortions, and remained, for a long time, predominantly tied to its relationship with economic interests. Fundamental rights, in contrast, developed around the identification of consensus as to common values. As Holder and McGillivaray observe, the lack of effective definition of "environment" has curtailed the development of a holistic environmental policy.[273] Although there is evidence that this is changing, this difference is reflected in external relations and also in the WTO. The lack of common consensus in the WTO prevents it from dealing with human rights issues and environmental issues are again dealt with in terms of their economic impact.

A further difference concerns the nature of cases coming before the ECJ. Cases in relation to fundamental rights tend to involve individuals seeking to invoke their rights against EC law measures, whereas environmental cases tend to concern national regulatory measures being challenged for breaching EC law. Since there is no underlying consensus as to environmental interests, there has been no mechanism by which to enforce these before the ECJ, other than in relation to economic interests. In contrast, human rights must be observed both in derogation from and application of EC law. A significant, but consistent, development concerns the fact that recently the ECJ has proved its willingness to facilitate the pursuit of environmental protection in the context of free movement of goods in *PreussenElektra*,[274] yet it has not, in *UPA*,[275] demonstrated the same willingness in relation to the enforcement of human rights, conferred in the Charter. This reflects, in

[273] *Supra* note 115.
[274] *Supra* note 160.
[275] *Supra* note 77.

PreussenElektra,[276] the development of a growing consensus in relation to environmental protection as an objective of the Community, and in *UPA*,[277] perhaps the political sensitivity of the Member States as to the status to be afforded the protection of rights. Having consistently ensured the protection of fundamental rights where required to by the Member States, and reflecting the consensus among the Member States as to the common values to be upheld, it would be surprising if the Court were now to extend that to protect rights declared in a context which the Member States have explicitly declared not to be binding.

There remains something of a lacuna in the *Court's* approach to the protection of non-economic interests, which may not always be conducive to the same treatment as economic interests. Equally there is a lacuna in the *Community's* development of non-economic policies, notably environmental, without providing adequate means of enforcement and enjoyment of the ensuing rights by individuals, or interest groups.

The new Charter of Fundamental Rights extends the problem already existing in relation to enjoyment of environmental protection to another branch of rights. The implications of this in relation to rights arising under international agreements, as well as the broad socio-economic rights conferred therein could be profound. It has already been suggested that fundamental rights be integrated into Community policy and action in the same way as environmental protection already is. If environmental policy is to be used as a model, the imperative to resolve existing difficulties becomes even stronger.

The Community must address these issues, in the interests of both its own citizens, and the credibility of its external policies. The incomplete picture of rights protection currently portrayed within the Community, both in relation to access to justice, and to the lack of "equality" in benefiting from rights, does not enhance the Community's credibility when it seeks to promote these interests externally.

What is very clear from the nature of the development of both environmental and human rights protection, albeit incomplete, is that effective protection of these interests is dependent upon a common consensus as to both the nature of the interests to be pursued, requiring shared values, and the means by which these are to be protected. In the

[276] *Supra* note 160.
[277] *Supra* note 77.

Community this has been expressed in relation to human rights in the adoption of the Charter, the new legislation under Article 13, and the draft constitution. In relation to the environment there is explicit acknowledgement of the importance of governance in sustainable development.

In relation to each of these interests the Community has developed an active policy of pursuing their development in the context of its relations with third states. This raises questions concerning both its competence to do so, and the effect (and implications) of such a development. It is these questions that will now be addressed.

Chapter 2

The European Community's Relations with Third States

Since the 1970s the Community has developed the protection of human rights and environmental protection both internally and, now, actively in its external relations. Before examining this external development it is useful to consider the nature of the Community's competence to enter into relations with third states, and the effect of any agreements thus entered into. This chapter, therefore, examines first the Community's general competence in external relations, and secondly the extent of its competence specifically in relation to human rights and the environment. Thirdly it assesses the status and effect of international agreements in the Community legal order.

The External Competence of the European Community

The external competence of the European Community is a complicated issue.[1] It clearly demonstrates the complexity of the inter-relationship between the respective powers of the Member States, the Union and the Community. In relation to any specific issue it must be asked whether the Member States have in fact transferred any power to act to the Community, have they retained any power and, if so, how can the respective powers best be exercised? Will it be a matter for joint action or may one party act alone? In addition, it should be asked whether the issue is a matter for inter-governmental cooperation, to be dealt with under the Common Foreign and Security policy, rather than through action by either the Member States and/or the Community?

The Basis of Community Powers

The Community's powers are rooted in the Treaty, and limited to those conferred within it.[2] Whether economic or non-economic, any action of the Community must be carried out with

[1] See David O' Keefe "Community and Member State Competence in External Relations Agreements of the EU" EFAR 4 : 7-36, (1999); Marise Cremona, "External Relations and External Competence: The Emergence of an Integrated Policy" in P Craig and Grainne de Burca *The Evolution of EU Law* 1999 OUP; Macleod, Hendry and Hyett *The External Relations of the European Communities* 1996 OUP; Dillon *International Trade and Economic Law and the European Union* Hart, 2002; Dashwood and Hillion eds *The General Law of EC External Relations* 2000 Sweet and Maxwell.

[2] Article 5 EC.

respect to the principles of subsidiarity and proportionality.[3] The effect of the principle of subsidiarity is that an act will only be undertaken at Community level if its objective cannot be achieved through action at national level. This is consistent with, although not an inevitable result of, the nature of the requirement of transfer of powers from the Member States as the basis of Community competence. Subsidiarity reflects a growing "federalist" approach to the working of the Community; rather than rigid allocation of powers there is "consensual action".[4] In addition, as decision-making was generally liberalised (to qualified majority voting rather than unanimity), the development of "subsidiarity" was a necessary balance to the potentially relatively free development of Community legislation. This is not merely a political gesture by the Member States by which to restrict their loss of sovereignty. It is an inevitable consequence of the inclusion of more political issues in the Community remit. On such issues the Member States would naturally want to be able to maintain some potential to act independently and reflect their different national priorities. In that broader sense it was politically inspired.

Proportionality

The requirement of proportionality means that where the Community is competent to act, its actions must be the least possible to achieve the desired objective. In addition, the achievement of the objective must be balanced against restrictive effects of the measure on other interests. Where these are excessive, consideration must be given to importance of the aim, whether it merits such effects.[5] The application of these principles indicates a rejection of the "maximalist" approach to Community competence.[6]

The European Community: The First Pillar of the Union

Since the Treaty of European Union (TEU), the Community has been the first of the three pillars which together form the European Union (Union). The second pillar is that of the Common Foreign and Security Policy, and the third pillar is that concerning Police and Judicial Cooperation on Criminal Matters (formerly Justice and Home Affairs).[7]

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[3] *Ibidem.*
[4] Jose Palacio Gonzalez "The Principle of Subsidiarity (A Guide for Lawyers with a particular Community Orientation" (1995) European Law Journal 335; On subsidiarity generally see: Emiliou, Nicholas: "Subsidiarity: An Effective Barrier Against "the Enterprises of Ambition"?" (1992) ELRev. Toth, A.G.: "The Principle of Subsidiarity in the Maastricht Treaty" (1992) (29) CMLRev. 1079-1105.
[5] See Tridimas General Principles of EC Law, Chapter 4.
[6] See, for example, Case C-376/98 *Germany* v. *Parliament and Council* [2000] ECR I-8419.
[7] The third pillar will not be discussed here as it is not of direct relevance.

Article 281 EC states that: "The Community shall have legal personality". Thus it is fully empowered to enter into legal obligations on behalf of its Members. This power extends, however, as seen above, only as far as the Member States have granted it. Consequently, any external action by the Community, must be based upon some provision of the Treaty, which may either confer express competence to act externally[8] or give rise to "implied" external competence. Transfer of competence to the Community must be from the Member States, who would otherwise be the competent actors. Tridimas and Eeckhout identify two presumptions concerning the division of competencies between the Community and the Member States: firstly, that competence to act lies with the Member States, and secondly, that Community competence is concurrent rather than exclusive.[9]

These presumptions mean that where the Community has competence to act internationally, the Member States are not prevented from acting in the same field unless the Community's competence is "exclusive". With regard to the exclusive powers of the Community (such as the Common Commercial Policy) the Member States may not independently enter into obligations in that field, even in the event that the Community has not acted internally.[10]

In relation to implied powers the Community's external competence only becomes exclusive following action by the Community, either internal or external. Until that point the powers run *concurrently*, thus until the Community acts, the Member States may continue to enter into obligations in the relevant field. The existence of concurrent powers does not require the Member States and Community to act simultaneously and the Member States' competence will only be excluded when the Community has acted in such a manner as to exhaustively occupy the field.

Competence to conclude an agreement may also be *joint;* where an agreement covers issues of both Member State and Community competence, both the Community and the Member States must conclude the agreement. This is distinct from concurrent competence, in which

[8] See for example Article 133 (ex Art. 113) EC. The Community's external competences will be discussed below.
[9] Takis Tridimas and Piet Eeckhout *"The External Competence of the Community and the Case Law of the Court of Justice: Principle versus Pragmatism"* (1995) 14 YEL 143-177 at p.154.
[10] See below for discussion of the relevant jurisprudence of the Court.

situation the Member States may act independently.[11] Joint competence does, however, give rise to issues concerning complementarity which will be returned to below.

The Common Foreign and Security Policy: The Second Pillar of the Union

The second pillar of the Union is the Common Foreign and Security policy (CFSP). The most significant distinction between it and the Community, apart from its concerns, is that it operates inter-governmentally, rather than supra-nationally. The Amsterdam inter-governmental conference provoked vigorous debate on whether the Union, like the Community, should be given legal personality. Ultimately this did not happen, although the Council may authorise the Presidency to conclude international agreements where necessary for the implementation of Title V of the Treaty (Provisions on a Common Foreign and Security Policy).[12] Article 2 TEU mandates the Union "to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy". Article 3 provides that the consistency of the Union's external relations is to be ensured by the Council *and the Commission* who "shall ensure the implementation of these policies, *each in accordance with its respective powers.*" Although Article 18 TEU is explicit that "the Commission shall be fully associated in [matters coming within the CFSP and the implementation of decisions made under the CFSP]" the distinction between the roles and responsibilities of the Community and Union is clearly maintained in Articles 24 and 25 which refer to the Commission "assisting the Council as appropriate" in the conclusion of international agreements in the pursuit of the CFSP, and the Council "monitoring the implementation of agreed policies *without prejudice to the responsibility of the President and the Commission*"[13] respectively.

The Distinction between Community and Union Competencies

The significance of the identification of whether the Union or the Community has competence, and the related establishment of the appropriate legal base, lies in the resultant procedure by which the competence will be exercised, as the decision-making procedure varies. This variation reflects the intentions of the Member States when they transferred the

[11] Joined Cases C-181 and C-248/91 *Parliament* v. *Council and Commission (Bangladesh Case)* and Case C-361/91 *Parliament* v. *Council* [1994] ECR I-625 (*Fourth Lomé Convention).*
[12] Art. 24 TEU.
[13] Emphasis added.

powers both as to the extent of transfer they were making, and the manner by which action in the pursuit of the objectives could then be undertaken.

In the action of the Union "asserting its identity" it is clear that it is envisaged that the Member States will cooperate and will "uphold the common positions adopted as a result of such cooperation".[14] Where the Member States choose not to cooperate, or do not reach a consensus, the Union has no "identity" as such to assert, and there will be no common policy to express. This contrasts sharply with the position of the Community, which may, as a legal person, act independently of the Member States, albeit within restricted fields. Thus, although the overlap of responsibilities, and relevant institutions (between the Community in respect of its external relations and the Union, "acting" in the pursuit of the CFSP) is readily apparent, and recognised, it is unquestionable that each maintains its own sphere of competence.

The difference between the Union and the Community is not, therefore, purely semantic. It results from, and reflects, the desire of the Member States to restrict the mandate of the Community, and indeed restrict the transfer of their sovereignty, while accepting the need to formalise cooperation in additional fields. As Dashwood observes: the distinction between EC external competence, and the CFSP cannot be viewed as being temporary.[15]

The Express Powers of the European Community

The Common Commercial Policy: Opinion 1/94

The *express* powers of the Community concerning external relations are fairly limited. First, under Article 133 (ex Art. 113) EC the Community is empowered to develop a Common Commercial Policy (CCP). This power, due to its lack of specificity, aroused vigorous debate as to its extent. This issue was comprehensively dealt with in *Opinions 1/94* and *2/92*.[16] The issue before the Court in *Opinion 1/94* was whether the Community was exclusively competent to conclude the WTO agreement. The WTO agreement includes annexes incorporating multilateral agreements on trade in goods, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual

[14] Article 19. Article 18 also mandates the Presidency to represent the Union, and express the position of the Union in international fora.
[15] Alan Dashwood *"External Relations Provisions of the Amsterdam Treaty"* (1998) CMLRev 1019, at 1020.
[16] *Opinion 1/94* Re the Uruguay Round Treaties [1994] ECR I-5267; *Opinion 2/92* Re the OECD Third

Property Rights (TRIPS). Ultimately the question as to exclusive Community competence could only be answered by determining whether the entire content of the agreement came within the scope of the Common Commercial Policy (CCP).

To answer this question the Court looked at each section of the agreement individually, and on that basis concluded that the exclusive competence of the Community (under the CCP) extended to the conclusion of the Agreements on Trade in Goods (including the Agreement on Technical Barriers to Trade and agricultural products and tariff regulation of products covered by the ECSC and Euratom Treaties). In relation to GATS, however, the Court concluded that the CCP extends only to services which do not involve the movement of either the supplier or the recipient of the service (and can therefore be equated to the supply of goods).[17] The CCP was held not to extend to intellectual property either. The Court ruled that these aspects required that the Community and the Member States jointly conclude the WTO Agreement.

This has been criticized by Tridimas and Eeckhout who argue that the question the Court should have answered: "was not whether the Community had exclusive competence on the basis of Article 113 or on the basis of its implied powers ... but whether the entire WTO Agreement comes within the competence of the Community, whether concurrent or exclusive."[18]

If the entire agreement came within the scope of the Community's competence then, they argue, there is no requirement that the Member States also participate in its conclusion. The difference arising from the existence of concurrent power, as opposed to exclusive, being that the Member States are not prevented from concluding agreements in the field.

It is submitted that this raises the question of whether the existence of a concurrent power requires all parties possessing that power to participate in any exercise of that power? This question may best be understood and answered by reversing the situation. Can the Member States, possessed of concurrent power, act unilaterally in situations where there has been no

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Revised Decision on National Treatment [1995] ECR I-521.

[17] For criticism of the Court's reasoning on this point see Tridimas and Eeckhout *"The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism"*(1995) 14 YEL 143-177 at p.161-162.

[18] *Ibidem* at p. 173-174.

Community action? The presumptions (that competence lies with the Member States and that power, where it has been transferred, is concurrent rather than exclusive) do not exclude this approach, and would not exclude independent Member State action. (If Member State action were excluded it would indicate complete transfer of competence.) If Member State action, alone, is a possibility in relation to concurrent powers, that may apply equally to the Community.

Consequently, it is submitted, where the act sought to be undertaken falls entirely within the competence of whichever party, it should be possible for that party to exercise its competence, notwithstanding that another party is also competent to act in the same field. Joint participation may thus be *required* only where the international obligation at issue straddles matters of exclusively Member State and exclusively Community competence.[19]

Opinion 1/94 has been further criticised on the grounds that the CCP should include all aspects of economic relations with third countries: including both trade in goods and related services.[20] This view shares a perspective eloquently expressed by Pescatore when he observed that:

> "One of the results attained [by the creation of the WTO] was to give trade in services and trade aspects of intellectual property an established place in the framework of global trade law as governed by the WTO. ... The initial error of those who inspired Opinion 1/94 was therefore to reduce the scope of the discussion to some fringe aspects of the vast field of trade covered by the WTO ... The mischief done by Opinion 1/94 is to have split artificially the trade policy into a "traditional" compartment, imposed to the Community like a straight-jacket, and an extensible concept for the use of Member States."[21]

It should be noted that the Amsterdam amendments to Article 113 (now Article 133) EC provide for the extension of the application of the CCP to both services and intellectual

[19] This question, concerning the exercise of concurrent powers, will be returned to in the context of development cooperation.
[20] "The Allocation of Competence Between the EC and its Member States in the Sphere of External Relations" Nicholas Emiliou; Nicholas Emiliou and David O'Keefe eds *The European Union and World Trade Law,* at p.35.
[21] Pierre Pescatore "Opinion1/94 on "conclusion" of the WTO Agreement: Is there an escape from a Programmed disaster?" (1999) CMLRev. 36: 387-405 at p. 391.

property.[22] That is, to the areas excluded by the Court in *Opinion 1/94.* This would permit the single approach to the "framework of global trade advocated by Pescatore. If Paragraph (5) comprises an exhaustive list, however, as trade develops it may again be required to be split into "compartments".[23]

Research and Technological Development

A second group of competences are contained in Articles 170-181 EC. Article 170 EC gives the Community competence to enter into international agreements in relation to Research and Technological Development.

Environmental Protection

Similar powers exist in relation to the *protection of the environment* under Title XIX,[24] where Article 174(1) EC includes as one of the objectives of Community environmental policy "promoting measures at international level to deal with regional or worldwide environmental problems". Article 174(1) provides that: the Community and Member States may cooperate with international bodies and third states, "*within their respective spheres of competence.*" The Community may conclude relevant international agreements, but this may not affect the Member States' competence. This is very clearly a matter of concurrent competence, for which the Member States have determinedly retained their own competence.

Development Cooperation

Article 181 makes identical provision to Article 174(4) in relation to *Development Cooperation* under Title XX (Development Cooperation). The competence of the Community extends to "the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."[25] In relation to development cooperation the Treaty is explicit that Community policy shall be "complementary to the policies pursued by the Member States" [26] and that both the

[22] Article 133(5) EC. For recent discussion of this issue see: European Policy Centre Dialogue "Convention and Trade Policy, Reforming Article 133 to strengthen the Union" Pascal Lamy, Stanley Crossick and Nick Clegg 6 February 2003.
[23] The extent and applicability of the CCP was recently returned to by the Court in Opinion 2/00, *Re Biosafety Protocol* [2001] ECR I-9713.
[24] See Chapter 1 for general discussion of the Community's powers in relation to the environment.
[25] See Chapter 1.
[26] Article 177.

Community and Member States are bound by the international objectives and commitments they have undertaken in their relations with external bodies.[27]

As observed by Cremona the primary objectives of complementary policies may vary, but they must be consistent insofar as they may not be contradictory.[28] The reference to complementarity is significant in that it suggests that while the Community is widening its objectives, and the Member States are willing to transfer the relevant competence for that to be attainable, they are not willing to do so at the expense of their own power to take autonomous action. In relation to development cooperation this is of particular importance given the history of the Member States, and the ongoing particular relations which some have with particular developing states (for example their former colonies). Such complementarity is implied in relation to environmental protection through the reference to the respective competences of the Community and the Member States. This again reflects the Member States' individual interests, which were fundamental to the development of environmental protection as a Community objective.[29]

These powers, developed in the SEA and the TEU are all exercised according to the provisions of Article 300 EC. This provision specifies that the powers of the institutions in this respect apply in relation to the situations for which the Treaty has provided.

Monetary Union

In addition, the Community has the power to enter into agreements relating to Monetary Union (Article 111 EC) under which the Member States may "*Without prejudice to Community competence* ..... negotiate in international bodies and conclude international agreements."

This demonstrates a different emphasis to that given to the division of competences in relation to the newer, non-economic objectives. On the one hand this may be inevitable, given the centrality of monetary union to the Community itself. It is unquestionable that the

[27] The influence, and effect, of agreements between both the Community and/or Member States on the one hand, and international organisations and/or third states on the other hand will be discussed below.
[28] Marise Cremona *"External Relations and External Competence: The Emergence of an Integrated Policy"* in Craig and de Burca *"Evolution of EU Law"* Oxford, 1999 at p. 172.
[29] See Chapter 1.

Member States have transferred their competence in this respect. Therefore any unilateral international action an individual Member State may take in such fields must be consistent with, and subordinate to, Community action and policy.

In contrast, the provisions on development cooperation and environmental protection place Member State competence on an equal level with Community competence. This may reflect political sensitivity when these provisions and objectives were inserted into the Treaty, as well as the status of these objectives within the Community.

Alternatively, it is possible that this simply reflects the fact that environmental protection was initially introduced into the Community as result of Member State practice and values (providing grounds for an exception to the free movement of goods principles.)[30] It would, consequently, be paradoxical if Member State competence in this field could then be limited by Community action.[31]

It is possible that the formulation of the division of competence in these fields influenced the Court to some extent in its approach to external competence in its *Opinions 1/94*[32] and *2/92*.[33] The emphasis placed on joint competence certainly suggests that the Court was retreating from its earlier approach to the division of powers (where it was very ready to grant exclusive Community competence) and perhaps responding to the political climate which had developed these new powers in a manner more respectful of the Member States' competence

The Catch-all Competence

Finally, Article 308 EC gives the Community a general power to take whatever measures are appropriate to achieve the objectives of the Community and, under Article 310 the Community may conclude reciprocal international agreements (with states or international organisations) establishing an association.

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[30] Case 302/86 *Commission v. Denmark* [1988] ECR 4607.
[31] This would apply also to the introduction of human rights as seen in Chapter 1. This itself may link into the division of competences in relation to development cooperation, given the human rights element there.
[32] *Opinion 1/94*, *supra* note 16.
[33] *Opinion 2/92*, (*re OECD Agreement*) *supra* note 16.

The Implied Powers of the European Community

The Court of Justice expanded Community competence in its external relations through the development, initially in *ERTA,*[34] of the doctrine of implied powers. In *ERTA* the Court ruled that the Community's internal powers are reflected in its external powers: in parallel to any internal competence, the Community has an implicit competence to act externally in that field. Until the Community acts in that field the external competence is concurrent with the Member States' residual power. However, once the Community legislates in a field the Member States may not act externally in a manner which affects the Community legislation.[35] Thus, when the Community acts internally, the residual power of the Member States disappears, and the Community's competence is exclusive. In *Opinion 1/75*[36] the Court suggested that external competence does not require the pre-existence of secondary legislation and this was confirmed in *Opinion 1/76*[37] when the Court ruled that the Community has external competence *without the enactment of internal measures* within the field where: "the participation of the Community in the international agreement is.... necessary for the attainment of one of the objectives of the Community."[38]

This is entirely consistent with the operation of Article 308 (ex 235) EC, as stated above. It is a marked extension, however, of the expression of the doctrine of implied powers given in *ERTA*, as it permits the exercise externally by the Community of the power conferred by the Member States *but not yet acted upon internally.* In *ERTA*, the Court referred to fields *in which internal legislation had already been adopted.* This is not a contradiction, as the *ERTA* statement does not exclude the possibility of Community action without the adoption of internal legislation. The *ERTA* judgment does, however, state that following internal legislation the Community's competence externally would be exclusive. *Opinion 1/78* clarified that where competence is shared, negotiation and conclusion of the Agreement must be undertaken jointly.[39] This is consistent with the judgment in *Kramer.*[40]

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[34] Case 22/70 *Commission* v. *Council* (*Re ERTA*) [1971] ECR 263.
[35] *Ibidem* at paragraph 17.
[36] *Opinion 1/75* on the *Understanding on a Local Cost Standard* 1975 ECR 1363.
[37] *Opinion 1/76* on the *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741.
[38] *Ibidem* at paragraph 4.
[39] *Opinion 1/78 Re the Draft International Agreement on Natural Rubber* [1979] ECR 2871, At paragraph 60.
[40] Joined Cases 3,4 & 6/76 *Kramer* [1976] ECR 1279, at paragraphs 39-45.

In *Opinion 2/91* the Court held that ILO Convention 170 fell within the scope of Community action, notwithstanding that in some respects its provisions went beyond existing Community legislation, because independent action by the Member States could alter or affect the Community standards.[41] The fundamental question concerned the nature of Community competence: was it exclusive? This question was interesting because aside from the nature and state of internal legislation there were "external" considerations. Firstly, the ILO Convention covered issues not covered in Association Agreements between the Community and certain of its overseas territories. The international relations of these territories, however, were the responsibility of the Member States and from that perspective the Member States argued they had to be involved. In addition the Community, not being a member of the ILO, was not competent under international law to conclude the agreement. Ultimately the Court ruled that conclusion of the Convention was a matter of joint competence. O'Keefe observes that the consideration of Community competence, in view of internal legislation, in this Opinion *suggests* that "the possibility of exclusive Community competence will increase if Community internal legislation is extensive in a given area".[42] This left open the question as to whether in the absence of internal legislation the Community could act alone.

Opinion 1/94[43] clarified that for the Community to acquire *exclusive* competence, prior internal legislation would be required *and* the attainment of the objective and the exercise of the internal power must be inextricably linked to each other, thus emphasising the crucial nature of the requirement of necessity, which was confirmed by *Opinion 2/92*.[44]

The Position Following Opinion 1/94: Complementary and Concurrent Powers

The Community has express powers to act in specific fields (where the Member States have transferred their competence). In addition, the Community has implied powers to act internationally where that is necessary for the attainment of one of the objectives of the

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[41] Opinion 2/91 *Re ILO Convention 170 on chemicals at work* [1993] ECR I-1061. In Opinion 2/00, *supra* note 23, the Court effectively introduced a "de minimus" element to this: where the effect would be minimal there is no need for exclusive Community competence.

[42] David O'Keefe "Community and Member State Competence in External Relations Agreements of the EU" European Foreign Affairs Review 4 (1999) 7-36 at p. 15.

[43] *Supra* note 16.

[44] *Supra* note 16. For detailed discussion of the case law developing the doctrine of implied powers see Dashwood "Implied External Competence of the EC" in Koskenniemi (ed) *International Law Aspects of the European Union*; Dashwood "The Attribution of External Relations Competence" in Dashwood and Hillion

Community. Where there is no prior internal legislation the Community's competence is concurrent with that of the Member States, who have not specifically ceded their power.[45] Where the Community has enacted internal legislation in the field these powers may, however, be exclusive, but only to the extent that Member State action would impede the realisation of Community objectives, or where the Community has, effectively, occupied the whole field.

The Significance of Concurrent Powers

Such comprehensive occupation of the field is, however, increasingly rare, including in relation to the express powers of the Community. This is demonstrated by the Community's newer, non-economic competences (for example environmental protection and development cooperation) which have been expressly formulated to reflect the respective competences of the Community and Member States.

This significantly restricts the potential for the development of exclusive Community competence, as even the development of internal legislation cannot encroach on the competence held by the Member States to act internationally. Clearly, Community competence cannot in any field simply "encroach" on the competence of the Member States, yet effectively this is what the doctrine of implied powers achieves: as a particular course of action becomes necessary for the achievement of the Community's objectives, the Community acquires competence. *Opinion 1/94* clarified that this could not be at the expense of the Member States' competence, essentially confirming the terminology of the new Community competences.

There are, however, problems in the approach of *Opinion 1/94*. The presumptions that power lies with the Member States, and that power transferred is concurrent, may suggest that the Member States, in exercising concurrent competence, are in a different position to that of the Community, in that they may act independently. In the *Bangladesh*[46] and *Fourth Lomé Convention*[47] cases the Court held that the Member states may exercise concurrent competence individually or collectively, or even under the auspices of the Council. The

(eds) *The General Law of EC External Relations*.

[45] Unless the Member States have conferred exclusive competence as in relation to the CCP.

[46] Joined Cases C-181 and C-248/91*Parliament* v. *Council and Commission* [1993] ECR I-3685.

[47] Case C-361/91 *Parliament* v. *Council* [1994] ECR I-625.

Court in *Opinion 1/94* did not consider the possibility of the Community acting alone in a field in which there was concurrent competence.

The case law concerning the division of competences is complex and can, where the particular implications of judgments are drawn out, give rise to inconsistencies. The difficulties in relation to the exercise of concurrent powers may conceivably be brushed aside with reference to the presumptions: that the Member States are competent and, that where the Community has been given power, that is concurrent.

It is possible to argue on the basis of these presumptions that the Member States may act autonomously in the exercise of concurrent powers, whereas the Community, not having been granted exclusive competence, and not being possessed of residual or presumptive power may not. This suggests that the exercise of concurrent powers varies according to the identity of the actor.

The Relationship between Concurrent and Complementary Powers

Inherent within complementarity, as recognised in the case of development cooperation, is the notion of the capacity of both the Member States and the Community, to take independent action. Thus, a distinction may be discerned between concurrent and complementary powers, since only the Member States appear to be able to act independently in relation to concurrent powers.

The Nature of the Community's Competence in relation to its new objectives: Conclusions

The respective powers of the Community and Member States in the pursuit of these new objectives are less fluid than they may have been held to be without such an explicit provision written into the legal basis of the Community's competence. It may be viewed as being a reminder to the Community that the Member States would protect their competence. *Opinion 1/94,*[48] while protecting the role of the Member States as against exclusive Community action, may not, following the *Bangladesh* and *Fourth Lomé Convention* cases,[49] be read as limiting the possibility for autonomous Member State exercise of competence, which they have not yet fully transferred to the Community. The Court's

[48] *Supra* note 16.
[49] *Supra* notes 46 & 47.

approach in *Opinion 1/94* does not infringe the desire, demonstrated in the inclusion of subsidiarity in the Treaty, to retain national competence and action unless Community action is absolutely necessary.

This suggests that the Member States consciously limited the working of the doctrine of implied powers. If the provisions in relation to environmental protection and development cooperation had not explicitly referred to the respective competences of both the Community and the Member States, it may have been easier to develop wider Community power by subsequently applying the logic of *Opinion 1/94*[50] (as applied to the Community) in reverse: that is to exclude autonomous Member State action. The fact that these competences are stated to run alongside Member State power makes it clear that the Member States had no intention to transfer all their power in these fields, or even limit themselves to only acting with the Community.

Having examined the general rules applying to the existence and development of Community external competence it is possible to consider the extent of such competence in relation to the specific interests examined in Chapter One: the protection of human rights and the environment.

External Community Competence in Relation to Environmental Protection

Article 174(4) clearly gives the Community power to act externally in relation to the environment, and to conclude relevant agreements with both third states and international organisations. As seen above, this power runs alongside the power of the Member States to participate in international environmental agreements. Thus the transfer of power by the Member States is by no means absolute. The Community's competence is not exclusive. The relationship between Articles 174(4), 175(1) and 133 was recently revisited by the Court. In *Opinion 2/00* the Court held that the primary purpose of the Agreement was environmental protection, ruling out Article 133 as a basis.[51] The Court subsequently ruled that the substance of the Agreement went beyond what was possible under Article 174(4)

[50] *Supra* note 16.

[51] *Supra* note 41. Despite the fact that there was some impact upon trade, and thus some impact upon the Community's exclusive common commercial policy. The Court held that this could not confer exclusive Community competence because harmonisation in the field was minimal. Thus refining its reasoning in *Opinion 2/91.*

and therefore the appropriate basis was Article 175(1), and it was a matter of shared competence.

External Community Competence in Relation to the Protection of Human Rights

In contrast to the position regarding external environmental competence a question may be raised as to the basis of the Community's competence to act in the pursuit of human rights.

In the context of development cooperation the position is clear, Community policy is directed to "contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."[52] Community external competence outwith this context is less clear. This question was particularly relevant pre-Amsterdam, since when the substantiation of the Community's commitment to human rights[53] may indeed give rise to a parallel power to act in the pursuit of human rights. This remains uncertain however, and would in any case leave a void as to the proper legal basis, and legitimacy, of agreements concluded outwith the context of development cooperation before the entry into force of the Amsterdam Treaty. There is no doubt as to the extension of Community competence in this field under the Nice Treaty.[54]

The Court of Justice was asked, in *Opinion 2/94,*[55] whether the Community was competent to accede to the European Convention on Human Rights (ECHR) and appeared to draw a distinction between human rights as a fundamental principle underlying Community action and policies, and competence to develop a specific human rights policy *per se*. This reflects the fact that human rights are recognised in Article F2 TEU as "general principles of Community law" but there is no specific power of the Community in relation to human rights.

If the inclusion of respect for human rights as an element of the Community's international agreements is seen only as an expression of the fundamental principles underpinning Community action, it is certainly not inappropriate for the Community to respect these fundamental principles in its external as well as its internal actions. If, however, the

[52] Article 177 (2) EC.
[53] See Chapter 1.
[54] Article 181(a).
[55] *Supra* note 43 Chapter 1.

inclusion of these clauses is seen to demonstrate the development and exercise of a specific policy then the basis of that policy may be called into question. As Cremona observes, the general principle of respect for fundamental rights does not, of itself, create a human rights competence, even where it is a requirement of lawful Community action.[56]

This is an issue which may only be decided with reference to the content and form of the human rights clauses in the Community's agreements and the statements surrounding the development of these clauses.[57]

In the opinion of the Commission in relation to accession to the ECHR, Article 235 (now 308) EC could be used as an appropriate legal basis for adherence. This rests on the establishment of protection of human rights as an *objective* of the Community. Brandtner and Rosas[58] refer to the "long-standing practice" of using Article 235 as a legal basis for international agreements, and refer to the Court's "validation" of this in *ERTA.*[59] The significance of that case, however, lies in the Court's development within its judgment of the doctrine of implied powers, holding that such an implied power does indeed exist in relation to that field, on the basis of the internal competence. The Court, as Brandtner and Rosas recognise, denied the existence of such an internal power in relation to human rights. The critical element being that human rights protection is not an objective of Community action *per se*. It thus seems not entirely convincing to make such a comparison between the two cases and the use of Article 235 (now 308) EC. Brandtner and Rosas focus on the fact that the refusal by the Court to accept Article 235 (now 308) EC as a possible legal basis for accession "underlined the institutional implications of adherence to the ECHR and thus does not seem to constitute a refusal to acknowledge an EC human rights competence under Article 235".[60]

They subsequently assert that human rights, in view of both the preamble and provisions of the TEU, and the ECJ's jurisprudence on human rights, are a "transverse objective" of the Community. However, the Court's case law is founded upon the notion that human rights

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[56] Marise Cremona *"External Relations and External Competence: The emergence of an integrated Policy"* in Craig and de Burca *Evolution of EU Law* at p. 150. She cites *Opinion 2/94* (*supra* note 43 of Chapter 1) at para. 34.
[57] See Chapter 3.
[58] Barbar Brandtner and Allan Rosas *"Human Rights and the External Relations of the European Community: An analysis of Doctrine and Practice"* (1998) 9 EJIL 468-490.
[59] *Supra* note 34.

are to be protected within the Community (and that the Community has an obligation to ensure their observance by the Member States)[61] as they *reflect fundamental principles of the Member States*. In *Opinion 2/94*, as we have seen, the Court was, however, explicit that: "no Treaty provision confers on the Community Institutions any general power to enact rules on human rights or to conclude international conventions in this field".[62] Brandtner and Rosas themselves observe that there are problems in the assertion of human rights competence, in that "consensus is still lacking on the precise delimitation of Community competence in the field of human rights".[63]

Brandtner and Rosas also point out that the lack of inclusion of "environmental protection" as an objective of the Community proved no object to environmental action. Until environmental protection was included in the Treaty, however, it could only be pursued to the extent that lack of uniformity was causing competitive distortions, not as an objective in itself. Admittedly, however, this limitation did not prevent the Community participating in international environmental agreements.[64] Yet it could also be asked, however fatuously, whether the fact that one area of Community concern was developed without a sound legal basis justifies a similar approach being taken in another field.

Weiler and Fries, agree with Brandtner and Rosas in their acceptance of a Community competence for human rights.[65] They appear to root the Community's competence in the duty, articulated by the Court of Justice, on the institutions to ensure the protection of human rights within the Community, "within the field" of Community law: "should [the institutions] decide to discharge their inherent duty to ensure the observance of fundamental rights in the field of Community law by legislating to do just that, it is hard to see on what ground their overall competences could be challenged."[66]

There can be little argument as to the truth of that. It is submitted, however, that there remains a fundamental difference between action which respects fundamental values within

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[60] *Supra* note 59, at pp2-3.
[61] *Wachauf supra* note 31, Chapter 1.
[62] *Opinion 2/94, supra* note 43, Chapter 1, at paragraph 27.
[63] Supra note 58 at p.3.
[64] As seen in Chapter 1.
[65] JHH Weiler and Sybilla C. Fries *"A Human Rights Policy for the European Community and Union: The Question of Competences"* Harvard Law School, Jean Monnet Chair, Working Papers, 1999.
[66] *"A Human rights Policy for the European Community and Union: The Question of Competences"* in "*The EU and Human Rights*" ed. Alston OUP 1999 at 157.

the Member States, while pursuing the objectives of the Community, and action which pursues the achievement of human rights as its primary objective. The former is certainly within the competence of the Community, whereas the position of the latter is far more doubtful, as there remains no discrete objective to protect human rights.

Weiler and Fries subsequently question the difference between accession to the ECHR and to the WTO, which did not require a constitutional amendment despite its dispute settlement mechanism. Approaching this question from a slightly different perspective, however, the fact that the CCP has been a keystone of the Community since its foundation is crucial. It would be potentially damaging to the uniformity of the common policy, if the Community itself were not a member, given that the Member States are.

This contrasts sharply with the position in relation to human rights protection, which has not been the subject of such a common Community policy, therefore the Community's absence from such a forum (the Council of Europe) would not lead to one of its objectives, and the uniformity of one of its policies being jeopardised. Thus, although each raises constitutional questions, the issues do not easily lend themselves to comparison.

From one perspective, the existence of the human rights and democracy clause can be viewed simply as a way of ensuring that the Community does not get locked into commitments with states who proceed to violate standards which are fundamental to the (Community) Member States. The way to avoid such a situation is to make it clear that the upholding of human rights standards and democracy are essential elements, the breach of which entitles the Community to act under the Vienna Convention.[67] The complexities of the interplay between national law, Community competence and international law are clearly visible. These complexities, however, do not of themselves create a Community competence. Community recognition that it must ensure respect of the fundamental principles of the Member States in the operation of its policies does not, of itself, prove the existence of the competence which would legitimise the pursuit of the protection of human rights as an objective of external Community action.

[67] Article 60.

Community or Union Competence in Relation to Human Rights?

A further question which should be raised is whether the pursuit of the protection of human rights, in contexts other than development cooperation, should be a matter for the Community or for the European Union acting under the Common Foreign and Security Policy (CFSP). It is within the provisions on the CFSP that the ToA charges the Union with the objective "to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms".[68] The means for the Union to pursue the objectives of the CFSP are explicitly inter-governmental rather than through the Community. This is by no means a trivial issue for, as observed by Lenaerts and de Smijter, the matters encompassed within the second pillar tend to be politically sensitive, and consequently the Member States are not inclined to leave such interests to be defended by a supra-national institution.[69]

Naturally, the Member States are equally reluctant to transfer sovereignty in such sensitive fields, which fundamentally affect national interests, hence the placing of such matters under the inter-Governmental structure of the second pillar, rather than within the existing Community structure. Article 24 EU, which empowers the Council to negotiate and conclude agreements with third states or international organisations where necessary for the implementation of the CFSP, requires authorisation for such action by the Member States. The inclusion of a matter within the TEU in no ways implies any kind of power for independent relevant or related action by the Community.

Dashwood certainly recognises the difficulties inherent in this when he "regrets that the opportunity was not taken [at Amsterdam] of rationalising the external relations of the EC Treaty, which are scattered, incoherent and incomplete".[70] This inevitably leaves lacunae in the legal bases for external Community action.

If there is no general basis for external action by the Community in the field of human rights, any Community agreements concluded (outside the context of development cooperation) which had human rights protection as an objective, as opposed to an

[68] Article 11. It should be noted, however, as seen above that preamble to the SEA referred to the need for "Europe" to speak with one voice and refers to the need "to display the principles of democracy and compliance with the law and with human rights to which they are attached".
[69] *"The European Union as an Actor under International Law"* Koen Lenaerts and Eddy de Smijter 19 (1999-2000) YEL.

underlying principle of cooperation, would certainly be open to criticism, if not challenge.[71] If the Community discharges its duty to ensure the respect of human rights and democracy in its actions by including the respect of these values as an underlying condition of cooperation this would not be beyond its competence. Such a provision would allow the Community to suspend cooperation in the event of a violation of these values by its partner state (and vice versa). If the Community failed to include such a clause it could find itself in the position of being *unable* to suspend cooperation in the event of a breach of human rights.[72] The effect of this would be that the Community would fail to ensure the respect of human rights in its actions.

Thus, on one level, in order to discharge its duty the Community *must* impose conditionality in its relations with third states. To discharge its duty, however, the Community must do no more than this. If the Community went beyond suspension of cooperation or aid, and imposed sanctions, that would be a positive act, the objective of which would be to ensure human rights standards. Such an act is beyond the existing competence of the Community, although clearly it would be consistent with the objectives of the CFSP. The imposition of sanctions is therefore a matter for the member states acting collectively through the procedures of the CFSP. This clearly demonstrates the distinction between the obligation, on the one hand, to ensure human rights in its actions and, on the other, a Community objective to pursue the protection of human rights. It also shows the limits of the Community's external competence in relation to human rights.

Case C-268/94 Portugal v. Council and Commission of the European Community

The correct legal basis for the inclusion of a human rights clause in the context of a *development cooperation agreement* was challenged in *Portugal* v. *Council,*[73] demonstrating that even where a clear power exists its exercise may be contentious. Portugal challenged the use of Article 113, 130y and 228 as the bases for a development cooperation agreement,[74] on account of the inclusion within the agreement of a human

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[70] Dashwood, *supra* note 15 at page 1043.
[71] The complexities in relation to challenge and, for example, judicial review of international agreements will be discussed in Chapter 3.
[72] See Chapter 3 for direct precedent for this in relations with the ACP states prior to the negotiation of Lomé IV.
[73] Case C-268/94 *Portugal* v. *Council and Commission of the European Union* [1996] ECR 6177.
[74] Cooperation Agreement between the European Community and the Republic of India on Partnership and

rights and democracy clause. The challenge in this case related to the form of the agreement rather than its substance, which Portugal had no issue with. This case demonstrates the necessity that the Community clearly identify the legal base, and thus the source of its competence to undertake any action.

Article 1 of the contested agreement declares the respect of human rights and democratic principles to be the very basis of cooperation and essential elements of the Agreement.[75] The second paragraph continues that "the principal objective of the agreement is to enhance and develop, through dialogue and partnership, the various aspects of cooperation between the Contracting Parties".

Article 130u (now Art. 177) EC provides that the Community's development cooperation policy "shall contribute to the general objective of developing and supporting democracy and the rule of law, and to that of respecting human rights and fundamental freedoms." Article 130y (now Article 181), as seen above, gives the Community competence to conclude agreements with third states in this sphere.

Portugal challenged the use of Article 130y as a legal basis on which to conclude an agreement in which human rights constitutes an essential element, deeming it adequate only for the conclusion of an agreement in which human rights are prescribed as a general objective. Portugal's specific concern was that the consequences of the characterisation of human rights as an essential element were not explicit, and that the implication was that the Community would potentially resort to action outwith the scope of the bases chosen. Such action may be appropriate only on the basis of Article 235 (now Article 308 EC). In contrast, the Danish Government applied the same logic in reverse, to argue that Article 235 (308) EC would only be appropriate if the main purpose of the Agreement was to safeguard human rights. Conclusion of the agreement under Article 235 would have required unanimous consent. The Council disputed Portugal's "artificial" distinction between Article 130u and 130y and 130w, the result of which it describes as paradoxical since it implies that any action which has the objective of protecting human rights, consistent with Article 130u would have to be based on Article 235. The Advocate-General stated that policy in this

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Development. OJ 1994 L 223/23.

[75] This is a standard example of the human rights clause, the development of which will be examined in Chapter 3.

field requires the observance of fundamental rights in order to promote the general objective of respect for such values.[76]

Being assured of the relationship between the protection of human rights and the context of development cooperation he moved on to consider whether the human rights clause in Article 1, may properly form part of an agreement concluded in accordance with Article 130y, and found that: "it is designed to allow the Community to exercise the right to terminate the Agreement, in accordance with Article 60 of the Vienna Convention ..."[77] Consequently he concluded that the clause is indeed necessary for the lawful pursuit of development cooperation policy.

The Court itself was similarly clear in its conclusions, ruling that the adaptation of cooperation policy to respect for human rights implies a link between the two, and the subordination of one to the other. Therefore it may be necessary to impose conditionality with regard to human rights in order to suspend or terminate an agreement in the face of a violation of human rights.[78]

The Court then observed that "the question of respect for human rights and democratic principles is not a specific field of cooperation provided for by the Agreement". Following the approach of the Danish Government this rules out any question of basing the measure on Article 235 (308) EC, and the Court held that in this respect "the contested decision could be validly based upon Article 130y".

With the exception of a reference to "cooperation policy" in Paragraph 26[79] (as distinct from development cooperation policy, as seen above) at no time does the Court suggest that Community human rights competence extends beyond development cooperation. Even the reference in Paragraph 26 does not suggest the existence of a wider competence, merely considering the relationship between two policies.

In discussing the division of powers between the Community and the Member States the Court is explicit that although the respective competences are complementary, the

[76] Paragraph 26 of the Opinion.
[77] Paragraph 28 of the Opinion.
[78] Paragraphs 26-27 of the Judgment.

Community may act alone where the matters covered within the agreement fall entirely within the Community's competence, be it express or implied. [80] If concurrent powers may be exercised in the same manner as complementary powers this contrasts with the approach of the Court in *Opinion 1/94.*[81] It is, however, consistent with the approach taken to the Member States' exercise of concurrent powers, in the *Bangladesh* and *Lomé IV* cases.[82] Where the Agreement also includes matters of Member State competence which are not within Community competence (such as intellectual property) their participation is also required, and again, the matter could not be concluded on the basis of Article 181 (130y) EC.[83]

This case effectively illustrates the division of competences between the Member States and the Community, and the operation of that division in the case of a shared competence, as well as examining the relationship between the different elements of the Community's development cooperation policy. Crucially, it also suggests that the inclusion of human rights is indeed consistent with their protection being a fundamental principle underpinning Community action, rather than an objective in itself: the pursuit of which would require specific, although not necessarily explicit, competence.

The Effect of International Agreements in Community Law

Having examined the nature of the Community's powers and the exercise of its external competence, the next question for consideration concerns the effect, in the Community legal order, of agreements competently concluded by the Community. The effect of international agreements within the Community has two basic elements: firstly, the effects of such agreements *vis-à-vis* the Community and the Member States, and secondly their effect with respect to individuals within the Community. In this context it is essential to recall that the effects of Community law with respect to both its Members and individuals, as well as being unique, applies only to those groups. Thus the status and effect of Community law within and upon the Member States is quite distinct from its effect upon third countries. This distinction is exemplified by the fact, seen above, that the Community enjoys its legal

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[79] *Supra* note 73.
[80] At paragraph 31 of the Judgment. NB The conclusion of agreements in the field of Development Cooperation is, as seen above, a matter of complementary competence.
[81] *Supra* note 16
[82] *Supra* notes 46 & 47.
[83] *Supra* note 16.

personality, conferred upon it by Article 281 EC, within the Member States.[84] Externally such enjoyment is dependent upon recognition by other states, as is clearly demonstrated by *Opinion 2/91*.[85] Such recognition can be sought and given, but not demanded.

The effect of international agreements within the Community derives particularly from those principles of Community law which make it a unique legal system. Traditionally, the international law of treaties leaves the domestic effect of international treaties to be determined by the individual states. The treaty applies only to the state parties, and its internal, domestic effect is determined by national (constitutional) law. In a *monist* state, (for example France) the provisions of the treaty require no further implementing measures to be enforceable by individuals before the national courts. In contrast, in a *dualist* state, (such as the United Kingdom) national implementing measures are required before individuals may enforce the provisions of the treaty before national courts.

The EC Treaties contain no indications as to their effect in the Member States which could have meant the traditional international law would apply, however, the treaty creates a unique legal system, and the Court of Justice, in *Van Gend en Loos,*[86] laid down the principle of direct effect of Community law.[87] The requirement of uniform application across the Community was fundamental to this decision, which suggests that the Community imposes a degree of monism upon its Member States, at least insofar as concerns its own treaty provisions.

The next question, however, concerns whether, and to what extent, this monistic approach extends to agreements entered into by the Community with third states. In the *International Fruit Company* case[88] the Court was asked whether it could review the validity of a Community Regulation in relation to the GATT. The Court held that before it could review the validity of the measure it had to be established that the measure could confer rights on

[84] Article 282 EC.
[85] *Supra* note 41.
[86] Case 49/62, *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos* v. *Nederlandse Administratie der Belastingen* [1963] ECR 1.
[87] The Court laid down conditions of direct effect: that the provision must be clear, unconditional and leave no discretion to the Member States. These have been liberally interpreted in subsequent case law: see *inter alia* Case 6/64, *Flaminio Costa* v. *ENEL* [1964] ECR 53; Case 2/74 *Reyners* v. *Belgium* [1974] ECR 631; Case 43/75 *Defrenne* v. *Société anonyme Belge de Navigation Aerienne (SABENA)* [1976] ECR 455.
[88] Cases 21-24/72 *International Fruit Company* v. *Produktschaap voor Groenten en Fruit* [1972] ECR 1219.

individuals. The Court, having considered the spirit, general scheme and the terms of the agreement, concluded that it was not capable of conferring rights on individuals.

Subsequently the Court held in *Haegemann,*[89] that both Community Institutions and the Member States are bound by agreements concluded under the provisions of Article 300, since these are concluded by the Community and consequently deemed to be Community Acts, part of Community law, and can even in certain circumstances, have direct effect.[90]

Significantly, in its analysis, the Court did not distinguish between the elements of the agreement which were of Member State and those of Community competence, although the agreement concerned was a mixed agreement. Thus, as far as these agreements are concerned the Court appears, *prima facie*, to have adopted a monistic approach. As Lenaerts and De Smijder point out, however, the Court relied here, *inter alia,* upon the fact that the Council concluded the agreement through a Decision, which opened the Community up to the agreement concerned.[91] They hold, therefore, that the real test comes in relation to the status, in Community law, of decisions taken by institutions set up by the Agreements to which the Community has been a party.

In *Polydor* the Court had to consider a provision of the Free Trade Agreement between the Community and Portugal. The Court held that despite the identical wording to Article 30 (now 28) EC, it could not be held to have the same meaning, since the aim of the Agreement was not the same as that of the Community. On the facts, the Court found it unnecessary to rule on whether the provision (like Article 30(now 28) EC) would have direct effect.[92] In *Kupferberg,*[93] however, the Court held that a provision of the EEC Portugal Free Trade Agreement did have direct effect, because its application fell within the purpose of the agreement, as well it satisfying the conditions of direct effect. The Court subsequently, in 1989, ruled that a Decision of an Association Council is an integral part of Community law from the date of its entry into force.[94] Thus the Court, once again, adopted a monist approach. This case law has been consolidated and this principle now covers

[89] Case 181/73 *R* v. *Haegemann and Belgian State* [1974] ECR 449, at paras 4-6.
[90] This was confirmed in Case 12/86 *Demirel* v. *Stadt Schwäbisch Gmünd* [1987] ECR 3719.
[91] *Supra* note 69.
[92] Case 270/80 *Polydor Ltd and RSO Records Inc.* v. *Harlequin Record Shops Ltd and Simons Records Ltd* [1982] ECR 329, at para. 23.
[93] Case 104/81 *Hauptzollamt Mainz* v. *Kupferberg* [1982] ECR 3641.
[94] Case30/88 *Greece* v. *Commission* [1989] ECR 3711.

decisions taken by organs set up under any form of Agreement to which the Community is a party.

The position is still, however, not entirely settled, since the Court, in *Germany* v. *Council*[95] denied direct effect to a provision of an international agreement which conflicted with primary Community law. This is because the Court is not competent to review the legality of primary Community law and, therefore, the latter cannot be denied legal effect, or overruled, by any body.[96] The position is, in principle, different in relation to secondary Community law[97] and national law,[98] both of which are bound by the Community's international obligations, although neither secondary Community nor national law have been frequently found to be incompatible with international law.

A number of cases concerning the direct effect or otherwise of international agreements have come before the Court of Justice. The Court has developed a two-prong test in order to decide this question. First, the "spirit, general terms and scheme" of the Treaty must be consistent with it having direct effect. Secondly, the relevant provisions must be "clear and unconditional". These requirements are a clear throw back to the requirements for the direct effectiveness of Community law *per se*, developed in *Van Gend en Loos* and the subsequent case law.[99] In *Pabst,*[100] the Court applied both tests and found the agreement to be directly effective. In *Sevince,*[101] however, the Court demonstrated that both conditions need not be satisfied: finding that although the agreement *per se* may be too general and conditional, further elucidation of its provisions by an authoritative body may cure that defect and confer direct effect. In contrast, however, a provision complying with the requirements of direct effect may or may not have direct effect according to the objective and nature of the agreement.[102] Thus it is possible for a specific provision to be directly effective despite being contained within an Agreement which is not generally susceptible to direct effect. Similarly, as provisions must be read in the context of their agreement, two provisions with virtually identical terms may have different effects. An additional factor to be noted is that

[95] Case C-122/95 *Germany* v. *Council* [1998] ECR I-973.
[96] Lenaerts and De Smijder, *supra* note 69.
[97] Case C-286/90, *Anklagemyndigheden* v. *Poulsen and Diva Navigation* [1992] ECR I-6019.
[98] Case 104/81 *Hauptzollamt Mainz* v. *Kupferberg* [1982] ECR 3641.
[99] Case 26/62 Van Gend en Loos [1963] ECR 13.
[100] Case 17/81 *Pabst* [1982] ECR 1331, [1983] 3 CMLR 11.
[101] Case C-192/89 *Sevince* [1990] 1 ECR 3461, [1992] 2 CMLR 57.
[102] *Kupferburg supra* note 93.

where the Court *has* recognised the direct effect of an agreement, the purpose of the agreement under consideration has been similar to that of the Community.

The Jurisdiction of the Court of Justice to Review the Legality of Community Law in view of the Community's International Obligations

It has been suggested that the Court may only have jurisdiction to review the actions of the Community in relation to an international obligation where that obligation falls within internal Community competence. This is logical, in that a legal basis is required for all acts of the Community, but leads to particular complications in relation to mixed agreements: to what extent could the Court be competent to review the elements of the agreement falling within Member State competence? Cheyne has refuted the suggested restriction on the Court's jurisdiction, due to the combination between the Member States' right to require compliance with international obligations, and the requirement that the institutions comply with the treaty. As a result of these, the Court of Justice has the competence to prevent violations of even external legal obligations, and this may not even be a discretionary competence, but may be a requirement.[103]

This question is also discussed by Eeckhout, who, following an analysis of the Court's case law, concludes that it has not been confirmed by the Court that it has no jurisdiction as regards the provisions of a mixed agreement which fall under national competence, nor that Community law will not determine the status of such provisions.[104] He goes on to observe that the Court has avoided such statements by interpreting its jurisdiction broadly. Although in *Sevince*[105] the Court viewed decisions of an Association Council as forming an integral part of Community law, Eeckhout notes that: "the Court has jurisdiction in so far as the agreement is an act adopted by one of the institutions of the Community". He also notes, however, that this limitation is expressed less strongly in the French version of the judgment.

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[103] Ilona Cheyne "*International Agreements and the European Community Legal System*" [1994] 19 EL Rev 581-598.
[104] Piet Eeckhout *"The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems"* 34 CML Rev 11-58, pp16-17.
[105] *Supra* note 101.

The Court has certainly not found itself to have any difficulty in interpreting and ensuring the provisions of the ECHR,[106] notwithstanding that it is not a party to that agreement. It has done that, however, on the basis that the Convention reflects the rights, principles and values common to the Member States, which perhaps gives it another ground of jurisdiction: clearly it must ensure that the Community acts in accordance with its obligations to the Member States, and does not, in their name, breach their international obligations.

In *Hermes* v. *FHT Marketing Choice*[107] the question was raised as to whether the Court would have jurisdiction to interpret Article 50 of the TRIPS agreement. The Netherlands, French and UK Governments argued that this element of the WTO (a mixed agreement) fell within the competence of the Member States rather than the Community, and that therefore the ECJ was not competent to interpret it. The Court held, however, that the Community is a party to the TRIPS Agreement, and the TRIPS agreement applies to the Community trademark: thus the ECJ, like the national Member State courts, is obliged to protect rights arising under the Community Trademark in conformity with Article 50 TRIPS. Consequently, the Court is competent to interpret TRIPS.[108]

The mere fact that an agreement is concluded as a mixed agreement thus has no bearing on the competence of the ECJ to review or interpret that agreement, where the particular provision has some impact upon Community law and if there is no explicit allocation of competences (that is, nothing within the agreement excluding Community competence). It is *possible* however, given the emphasis placed by the Court upon the application of the TRIPS agreement to the Community trademark, that had that not been the case, the Court would have held it to be beyond its jurisdiction. The Court could still, in the future, assert its jurisdiction on the grounds that the Community is a party to the agreement (and that therefore it is an act of the Community institutions) and additionally that its competence has not been excluded within either the agreement or its ratification by the Member States.

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[106] See Chapter 1.
[107] Case C-53/96 *Hermes International* v. *FHT Marketing Choice BV* [1998] ECR I-3603.
[108] See paragraphs 22-29 Judgment.

The question of competence to review the legality of GATT 1994 was addressed in *Portugal* v. *Council*[109] which concerned the 1996 textile agreements between the European Community and Pakistan and the European Community and India.[110] Portugal sought an annulment of the Council Decision concerning these Memoranda *inter alia* on the ground that the decision violated certain provisions of the WTO.[111] The Court referred to the fundamental importance of negotiation in the exercise of the WTO provisions by the participating states, and the possibility of reaching temporary compromise arrangements, in order to deny itself the competence to review the compatibility of a Council measure with the provisions of the WTO. This flexibility, which would be denied the Community in its negotiations with other WTO members, and which denial would not be reciprocated, is indeed the crux of the Court's argument against reviewability of the Community provisions in view of its WTO obligations. The Court held that such review would only be possible where: "the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements".[112] The Court concluded that this was not at issue in the present case as the decision was neither intended to implement a particular obligation in the WTO context, nor did it refer to any specific WTO provisions.[113]

In the *International Fruit Company*[114] Case the Court held that there was a direct link between reviewability before the national courts of the compliance with international law of Community acts and the direct effect of its provisions. This has been widely criticised[115] as it protects the validity of Community Acts where the international agreement has no direct effect, as well as confusing the issues of the relationship between the Community legal order and the international agreement, and the national legal orders and the international agreement.

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[109] Case C-149/96 *Portuguese Republic* v. *Council of the European Union*, [1999] ECR I-8395. See Peers "Fundamental Right or Political Whim" in de Burca & Scott (eds) *The EU and the WTO: Legal and Constitutional Issues;* Zonnekeyn, "The Status of WTO Law in the Community Legal Order: Some Comments in the Light of the Portugese Textiles Case" (2000) ELRev. 293; Griller "Judicial Enforceability of WTO Law in the European Union: Annotation to case C-149/96, Portugal v. Council, (2000) 3 JIEL 441.

[110] Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and the European Community and the Republic of India on arrangements in the area of market access for textile products OJ 1996 L 153/47.

[111] Paragraph 24 of Judgment.

[112] Paragraph 49.

[113] Paragraph 51.

[114] *Supra* note 88.

In conclusion, the Court is competent to review the compatibility of Community law with the agreements by which the Community is bound. Such agreements prevail over both national law and secondary Community legislation, but may only, however, be relied upon *before the national courts* if they comply with the conditions of direct effect.[116] If all such agreements were held to be directly effective the Community could be viewed as being fundamentally monist, despite the reservations expressed above.

International agreements affect relations between states, and in so doing regulate the behaviour of states rather than individuals. As has been seen, however, the Court has shown itself to be willing to recognise the direct effect of international agreements in certain circumstances. Even where *the Community* recognises an international agreement, or even certain provisions within such an agreement, as being directly effective, this does not affect the status of the agreement within the partner state, as this is a matter for the domestic law of each state as long as the partners fulfil their obligations under the agreement as regards each other.[117]

The implications of any potential disparity in recognised effect could be interesting however, although no more so than the existing disparity between monist and dualist states generally. This question may become significant, however, where individuals are conferred rights in such agreements.

It has been established, therefore, that agreements concluded by the Community with third states are capable of having direct effect, supporting a monist perception of the Community legal system. This is not always the case, however, as has been seen, perhaps the most significant example being the GATT which was held not to meet the required conditions of clarity and precision.[118] Under the international law principle, *Pacta sunt servanda,* the GATT is, of course, binding upon its signatories, and the Court recognised in *International Fruit Company* that it was binding upon the Community.

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[115] See *inter alia* Zonnekeyn *supra* note 109.
[116] *International Fruit Company supra* note 88.
[117] See Cremona: "External Relations and External Competence: The Emergence of an Integrated Policy" in Craig, Paul and De Burca, Grainne *The Evolution of EU Law* 1999 OUP.
[118] *Portugal* v. *Council* [1996] ECR 6177.

It is significant that although it was confirmed in the *Banana* judgment[119] that the GATT could not be relied upon by individuals to challenge Community law (in relation to the Community organisation of banana imports) the question had not been raised in relation to the WTO Agreement and renegotiated GATT (of 1994) until *Portugal* v. *Council* in 1999.[120] The amendments made to the GATT in 1994 may have rendered inapplicable the Court's earlier objections to the direct effect of the GATT. The Portuguese Government stated that the case did not concern the question of direct effect, concerning instead the conditions under which the Court may review the legality of a Council measure in view of the WTO.[121]

The emphasis placed by the Court, however, upon the requirement that the Community maintain its freedom to manoeuvre, negotiate and arrive at temporary arrangements with its WTO trading partners denies any possibility of direct effect, which would remove such flexibility.[122]

This is, the Court observes, consistent with the final recital to the preamble of Decision 94/800: "by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts."[123]

This reluctance of the Court to consider the question of direct effect has been confirmed in *Cordis*[124] and *T-Port*[125] in which the CFI rejected attempts to rely upon a panel dispute settlement ruling. While the possibility of a specific provision being invoked has not yet been completely ruled out, should it be found to be specific enough to comply in a particular instance, it does not seem likely. Any such invocation would, certainly be resisted, given that such enforcement would inherently restrict the Community's manoeuvrability *vis-à-vis* its partner states.

In short, it appears that there is still a degree of restriction upon the extent to which the

[119] Case C-280/93, *Germany* v. *Council* [1994] ECR I-4973.
[120] *Supra* note109.
[121] Paragraph 32 of Judgment.
[122] Paragraph 46 of Judgment.
[123] Paragraph 48 of Judgment.
[124] Case T-18/99 *Cordis Obst und Gemuse Grosshandel* v. *Commission* [2001] ECR II-943.
[125] Case T-52/99 *T.Port GmbH* v. *Commission* [2001] ECR II-981.

Community legal order may be described as monist. The general principle, however, is that provisions of international agreements to which the Community is a party prevail over secondary Community and national law, and the compatibility of such Community and national law with these agreements will be subject to review. Any provisions of these agreements, or any decisions taken by bodies set up under these agreements will also be capable of direct effect providing they fulfill the standard conditions.

Conclusions

In a world of increasing globalisation, and in particular the globalisation of trade, the significance of the development of non-economic interests, concerns and policies within the European Community is considerably enhanced if these can be carried over into the Community's external relations.

The extent to which the Community is competent to act externally in these fields depends upon the nature and extent of the Community's external powers. The express external powers of the Community are fairly limited but the Court has developed a doctrine of implied competence; whereby the internal competence is matched by a parallel external competence to conclude whatever acts are necessary to achieve the Community's objective in that field.[126] The initial approach of the Court was to make this a wide power and to tend towards recognising the possibility of exclusive Community competence. Subsequently, however, perhaps in response to the political climate and, particularly, Member States' uneasiness with a perceived drain on their competence, the Court retreated towards recognising Community competence in partnership with the Member States. Thus whereas in *Opinion 2/91*[127] the approach of the Court had been to establish first that the ILO Convention fell within the scope of Community competence, and then examine whether that competence was exclusive, in *Opinion 1/94*[128] the Court examined first whether the different sections of the WTO Agreement fell within the scope of the Common Commercial Policy. Having decided that they did not, it held that Member State participation was required since there was no exclusive Community competence. Had the Court adopted the approach of *Opinion 2/91* it may have concluded that the Community's competence, although not exclusive, did extend over all sections of the Agreements as concurrent

[126] Re *ERTA, supra* note 34.
[127] *Supra* note 41.

competence.

If concurrent powers operate in the same manner as complementary powers, either holder of the powers may act independently. Thus there need only be joint action where a matter covers fields of both exclusive Community and Member State competence. In that case, had the Court been of the opinion that the Community was possessed of concurrent powers to conclude the entire WTO Agreements it could have ruled that the Community was competent to do so without the participation of the Member States.

It is possible, however, that the approach of the Court was influenced by the political attitude of the Member States towards the Community at this point, and it therefore sought a more inclusive solution. The express external competences developed with regard to the Community's new objectives ruled out exclusive Community competence, and are therefore consistent with the impression that the Member States resist complete transfer of their power. They expressly provide for independent exercise of their respective competencies by the Community and the Member States, requiring only complementarity between the different acts concluded.

Thus a new era has developed in the allocation of powers. This itself is entirely consistent with the almost contemporaneous development of the principle of subsidiarity which was certainly a political move. The timing suggests that the factors influencing its development were also players in the Court's approach to *Opinion 1/94*. Underlying all action of course, runs the principle of proportionality.

These factors together underline the retreat from what may be described as a maximalist approach to the transfer to, and exercise of, powers of the Community. This is a move away from a requirement of absolute uniformity across the Community which may only be achieved through imposition from Community level. Instead there has been a development of complementary action, respecting the political nuances of different states' policies on different issues, and accepting differences insofar as these do not inhibit the achievement of the Community's objectives. Alongside this development in the nature of the Community's external competence, is the development of the intergovernmental Common Foreign and

[128] *Supra* note 16.

Security Policy. This unequivocally demonstrates the reluctance of the Member States to unreservedly transfer power in external relations to the Community.

In relation to the specific interests of the environment, the Community's external environmental competence is unambiguous: being expressly conferred in Article 174. Notably, however, it is retained as a complementary competence to that of the Member States who may also continue to act. This reflects two things, the first being the Member States' reluctance to lose their competence on an issue which is clearly of national concern. The second factor is that perhaps the conferral of an express power concerning environmental protection indicates a recognition of the fact that environmental problems are global, and, not respecting national boundaries, may not be effectively addressed by unilateral action (even where "unilateral" refers to the entire Community). The lack of clarity in what is meant by "environment" may, however, reduce the effectiveness of this provision.

The position in relation to human rights is more ambiguous. Outwith the context of development cooperation, in relation to which Article 181 makes identical provision to that applying to environmental protection, there is no general express internal power in this field. That notwithstanding, there is a widespread view that there is an underlying Community objective relating to human rights protection. It is submitted, however, that there is a difference between an obligation to uphold and respect certain fundamental principles relating to human rights in the pursuit of the Community's objectives, and an objective to pursue the protection of human rights *per se*. Without the existence of an internal power there can be no development of an implied external power. This suggests therefore that outwith the scope of development cooperation the Community cannot act externally in the pursuit of human rights protection. The extension of this competence in the ToN is entirely consistent with the development of a deeper policy concerning the protection of human rights.

Community agreements with third states have been recognised as being part of the Community legal order, and consequently binding upon the Community and the Member States. Community acts are reviewable as to their compliance with such international agreements. In addition, provisions of the agreements may have direct effect where such effect would be within the general spirit and objectives of the agreement and they comply

with its standard requirements.

Thus once the Community establishes competence and acts externally the implications are profound, both for the Community itself, and for the Member States, as well as individuals within the Member States. That being the case the Community requires to be sure that it has an appropriate legal basis to include all the elements it seeks to within its agreements. This is doubly significant because it is open not only to challenge from the Member States, if there is a belief that the legal basis specified is inadequate, but also to scrutiny from the third (partner) states as to whether the Community, internally, is complying with its undertakings.

The development of external competence in relation to non-economic issues suggests that the Community has moved beyond consideration of these purely as incidental to economic issues, but views them in their own right. The environmental competence is curious, as it developed significantly before the Community has begun to develop a more comprehensive vision of "environment". In relation to human rights, Community competence reflects the shared values of the Member States, and a desire not to have these prejudiced in the Community in any context. Thus these shared values reflect very much an internal vision, and any external competence may, cynically, appear to be only a reflection of this internal interest. If not solely fuelled by internal interest, the effectiveness of the exercise of these competences in the external context may indicate that the Community self interest is indeed significant. This is not, however, to deny any altruistic interest whatsoever. The extent to which altruism or self-interest motivate the Community's external policy in relation to human rights and the environment may be seen by examining the manifestation of these interests in the Community's relations with third states.

The next issue to examine in relation to the Community's development of its non-economic interests is, therefore, what action has been taken externally in their pursuit, and the legal bases chosen in different contexts. Assuming the legal bases are sufficient, consideration can then be given to the effect of the different agreements: do they serve the Community's purposes externally and do they have any ancillary effects internally. Does this change the impression of the rather narrow-based nature of the Community's commitment to these interests?

Chapter 3

The protection of non-economic interests in the European Community's relations with third states

Having identified the Community's external competencies, it is now possible to examine the manner in which they have been exercised, in relation to the protection of non-economic interests in agreements between the European Community (Community) and third states. The external pursuit of human rights and environmental protection has differed, leading to substantial differences in their form, significance and force within agreements. Notwithstanding recent interest in the human rights and democracy clause,[1] important questions, remain to be addressed.

Forms and Types of Agreement between the European Community and Third States

Trade Agreements

The Community's relations with third states may be divided into four categories. The first, *trade agreements*, are based upon Article 113 and deal exclusively with commercial matters, for example imports and exports.[2] Such agreements are negotiated by the Community acting without the Member States, since the common commercial policy falls within its exclusive competence. This itself led to internal difficulty as the scope of the

[1] See *inter alia*, Cremona, "Human Rights and Democracy Clauses in the EC's Trade Agreements", in Emiliou and O'Keefe (eds) The European Union and World Trade Law after the Uruguay Round; Smith K "The use of political conditionality in the EU's Relations with Third Countries: How Effective?" (1998) EFARev. 253; Clestin de Ulimubenshi, P. "La Problemmatique de la clause des droits de l'homme dans un accord de cooperation economique: l'example dela Convention de Lomé", African Journal of International Comparative Law 3 (1994) 253-70; Fouwels M "The European Union's Common Foreign and Security Policy and Human Rights" (1997) 15/3 NQHR 291-324; Fierro "Legal basis and scope of the human rights clauses in EC bilateral agreements: any room for positive interpretation?" ELJ 2001 7(1) 41-68; Pieter Jan de Kuyper "Trade Sanctions, Security and Human Rights and Commercial Policy" in Marc Maresceau ed. *The European Community's Commercial Policy after 1992: The Legal Dimension;* Kris Pollet "Human Rights clauses in agreements between the European Union and Central and Eastern European States" RAE – LEA (7) 1997 290-39; Ward, "Frameworks for Cooperation between the European Union and Third States: A Viable Matrix for Uniform Human Rights Standards" EFARev. 1998, 505-536.

[2] For example Free Trade Agreements signed with Estonia [1994] OJ L373/94 Latvia [1994] OJ L374/94 and Lithuania [1994] OJ 375/94 in 1994.

common commercial policy was by no means certain and the Member States were resistant to the loss of their own competency through its expansion.[3]

Partnership and Cooperation Agreements

The second category of agreement, based on Articles 113, 235 and 228, relate to *trade and cooperation*. These deal with trade regulation and, additionally, varying degrees of economic, industrial, technical, scientific, transport and environmental cooperation.[4] These agreements may be reciprocal or non-reciprocal and may be concluded by the Community acting alone, or with the Member States. Framework cooperation agreements (Partnership and Cooperation Agreements) tend to be concluded with states which are not of immediate strategic or historic importance, but with which the Community nonetheless desires to achieve a closer relation, or pursue slightly wider aims, than could be achieved by a pure trade agreement. Typically they aim towards the improvement of conditions of trade and investment, emphasise the protection of the environment and seek to strengthen the political environment in which they operate. Thus relations with Asia and Latin America tend to be concluded on this basis.

Association Agreements

The third category of agreements are *association agreements*. Based upon Articles 113, 228 and 238 EC these include both trade and political elements, thereby creating strong links between the parties. Such strong links may be a "stepping stone" to EU membership (Europe Agreements, for example that concluded with Hungary in 1991[5]) or have a purely developmental associative purpose (Development Cooperation Agreements, for example Cotonou[6]). Each of these categories are now generally concluded by the Community acting with the Member States.

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[3] The relevance of this internal question has subsequently been demonstrated in the context of the conclusion of international agreements, in the negotiation of a new agreement with Australia in 1997, discussed below.
[4] For example 1992 Trade and Commercial and Economic Cooperation Agreements with Estonia, Latvia and Lithuania [1992] OJ L403/92.
[5] [1993] OJ L347/93.
[6] Cotonou Convention, signed 23 June 2000, at: http://www.europa.eu.int/comm/development/cotonou/agreement_en.htm.

Development Cooperation Agreements

The Community's current relations with third states are clearly determined by both geographical and historical as well as political factors. Thus development cooperation agreements, aimed at less developed countries (LDCs) were developed in relation to the Community's former colonies; the African, Caribbean and Pacific (ACP) states. Complementarity between Community policies and those of the partner states is fundamental to Development Cooperation, as is coordination of Community, Member State and other international policies.

The Development of ACP-EEC Cooperation

ACP-EEC cooperation dates from the very founding of the Community, when the Treaty of Rome expressed the Member States' solidarity with and commitment to the prosperity of their overseas departments and territories. The Member States initially sought to fulfill this commitment through the mechanism of its development funds (EDF). The Yaoundé Convention, in force from 1964-69 committed the Community to providing Commercial advantages and financial aid to the African former colonies, this cooperation was covered by the 2nd EDF. In 1970 Yaoundé II, (between the Associated African and Malagache countries and the Community) extended the cooperation under the 3rd EDF until 1974. By 1974, however, the Community had changed. The accession of the UK introduced a whole new group, the Commonwealth countries, to those to whom development cooperation could be applied. Thus the successor to Yaoundé, the Lomé Convention, (which ran from 1975-79), included some of these states. The basis of Lomé, which coincided with the 4th EDF, is partnership: the relationship is contractual, and comprises a combination of aid, trade and political aspects. The political aspects in particular are matters which were, unquestionably at that time, of Member State rather than Community competence. Lomé was signed however by the Community acting alone rather than with the Member States. Lomé II (1979-84) introduced no major changes except the introduction of SYSMIN (aid to the mining industry). Lomé III,[7] however (1984-89) shifted the main focus of the convention from the promotion of industrial development to self-reliant, self-sufficient development and food security, and included references to human rights in the preamble and in certain articles.[8]

[7] 24 ILM 571 (1985).
[8] Articles 4, 119, 122, 125 and 127.

Lomé IV[9] was signed in 1989, to run for ten years. In this convention the emphasis shifted again, with the political focus becoming more pronounced. Thus the promotion of human rights and democratic principles and good governance were emphasised, alongside strengthening the position of women, environmental protection, decentralized cooperation, diversification of ACP economies, promotion of the private sector and increasing regional cooperation. The mid-term review of Lomé increased the strength of the human rights provisions: states failing to comply with these provisions risked suspension of the agreement. At this point the EDF was not increased in real terms and the decentralized cooperation, which could be seen in Lomé IV was broadened to include participatory partnership embracing a variety of actors from civil society.

As development cooperation has matured a steady progression can be seen away from purely financial aid, to wider cooperation, moving the focus away from the EC and back to the partner states themselves. Thus the partnership by the second half of Lomé IV was based on shared objectives and principles as well as on trade and financial benefits.

Changing Priorities in the 1990s

Outside the context of development cooperation two factors during the 1990s meant that, by the time of negotiation for the successor to Lomé, priorities were changing. Internally, the development of the Maastricht Treaty had radically changed the Community, not just in terms of the institutional change and the creation of the EU, but also in terms of the spheres of interest. The scope of the Community's interest had broadened and its commitment to more political aims was increased, as is reflected to some extent in the mid-term review of Lomé IV. This development subsequently became even more pronounced in the Amsterdam Treaty. In addition to Community developments things were changing internationally. The contribution of the UN to the nature of international relations (through its conferences on the Environment, Population, Human Rights, Social Development, Women and the World Food Summit) was particularly significant, as it set new standards both for donors and developing nations.

The principle objectives of the Cotonou convention[10] (the successor to Lomé IV) are sustainable development and poverty reduction (to reverse the processes of social,

[9] [1991] OJ L229/91.
[10] *Supra* note 6.

technological and economic marginalisation). These are to be achieved through a combination of political dialogue, development aid and closer economic and trade cooperation. The agreement is based on five interdependent pillars: a comprehensive political dimension, participatory approaches, a strengthened focus on poverty reduction, a new framework for economic and trade cooperation and reform of financial cooperation.

The Europe Agreements

The second type of association agreements, the Europe Agreements, developed since 1991,[11] with the Central and Eastern European Countries (CEECs)[12] and, subsequently the Baltic states (since 1995).[13] The Europe Agreements now include five central elements: (i) a commitment aiming to achieve a free trade area over ten years, (ii) limited trade concessions (in agriculture and fisheries), (iii) the liberalisation of services, (iv) the application of competition rules similar to those applying to the EC and, finally, (v) political conditionality. These agreements have been developed as a bridge to enlargement, the first wave of states will accede in 2004.

Other Association Agreements

Certain of the Mediterranean Countries have similar "associative" status,[14] however the main relation with the Mediterranean region (developed at the Barcelona conference) aims to create a free trade area by 2010. This has obvious political and strategic significance, as the development of a free trade area should offer some increase in stability in relations which may or may not precede enlargement. Similar strategic interests also arose in relation to the CEECs and Baltic States following their emergence from Soviet control, and the Warsaw pact required a unique approach. Economic provisions alone, as may have been developed through trade agreements or trade and economic cooperation agreements, would not have been sufficient to develop the stability (both economic and political) sought by the Community for each of these areas.

[11] Initial links with these states (from 1989) had concerned very limited sectoral cooperation, since 1989 this had shifted to trade and economic cooperation, see for example note 4.
[12] See for example Agreement with Hungary, *supra* note 5.
[13] See for example Agreement with Latvia, [1998] OJ L26/3;
[14] For example Cyprus [1973] OJ L133/73 and Tunisia [1998] OJ L97/1.

Interim Agreements

The final category is that of *interim agreements*, in which the Community acts without the Member States, bringing the commercial elements of Association or Trade and Development Agreements into force ahead of the political or other provisions (which are those matters which concern Member States' competency).[15] In this the Community separates out the matters falling within its exclusive competence and brings them into force ahead of the other provisions. This may be problematic, particularly where commercial cooperation is dependent upon the other areas. Yet, it offers tangible benefits to a state to facilitate the achievement of its other commitments, crystallising the cooperation before it can disintegrate, and is standard procedure.

The Emergence of the Human Rights and Democracy Clause

The Human Rights and Democracy Clause in Development Cooperation Agreements

The emergence of the "human rights and democracy clause" has been relatively well documented.[16] It first appeared, as a human rights clause, in the context of development cooperation, in the Fourth Lomé Convention:

> "1. .... Cooperation shall thus be conceived in accordance with the positive approach, where respect for human rights is recognized as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights.
>
> In this context development policy and cooperation are closely linked with the respect for and enjoyment of fundamental human rights....
>
> 2. Hence the Parties reiterate their deep attachment to human dignity and human rights ... the rights in question are all human rights, the various categories thereof being indivisible and interrelated, each having its own legitimacy: non-discriminatory treatment, fundamental human rights; civil and political rights; economic, social and cultural rights...

[15] See for example Interim Agreement between the European Community and the United Mexican States, December [1997] OJ C356/10.
[16] *Supra* note 1.

> ACP-EEC cooperation shall help abolish the obstacles preventing individuals and peoples from actually enjoying to the full their economic, social and cultural rights...."[17]

The Community had sought to introduce such a clause in Lomé III, but this had been blocked by the partner states which were suspicious of both what they perceived as political intervention,[18] and the crucial question of how "human rights" would be interpreted. In particular, the Community's approach to human rights focused on the individual whereas the ACP states sought to protect collective rights including the right to development.[19]

Article 5 listed the type of human rights intended by the Parties and provided for the allocation of financial resources to schemes promoting human rights. The Commission, in answer to a Parliamentary question in 1991, stated that the response made to requests for funding would: "depend on the intrinsic value of the operations proposed and ... the competence of the bodies with which these operations would be mounted."[20]

The revised Lomé IV introduced a suspension provision in Article 366a, under which if a Party believed there had been a violation of Article 5 Lomé they could invite the other Party to consultations to assess the situation and seek a remedy. Art. 366a laid down the procedure to be followed, including timetables for the consultations. If the deadline laid down in the timetable expired without resolution of the problem, the Party which invoked the consultations could take appropriate steps to address the situation. Such steps included, where necessary, the partial or full suspension of application of the Convention to the Party in breach. Any measures adopted would be communicated to the Party in breach and revoked as soon as the reasons for their adoption had been resolved. Article 366a thus introduces the element of conditionality to Lomé - that the agreement and its continued operation are dependent upon the parties adhering to these conditions.

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[17] OJ [1991] L229/3, Article 5.
[18] Ulimubenshi, *supra* note 1.
[19] See De Kuyper, Pollet, *supra* note 1.
[20] Answer given by Mr Marin on behalf of the Commission (in response to Parliamentary written question No. 2698/90 by Mr Ernest Glinne 4 December 1990) on 14 January 1991, OJ [1991] C107/53.

In 1996 the Commission proposed a Council Decision laying down the procedure for implementing Art. 366a[21] which was subsequently enacted in 1999.[22] This provides the framework to be followed by the Council when opening consultations at the initiative of the Commission or a Member State, and has been invoked on several occasions, the first being in relation to Togo.[23] As yet Art. 366a has not resulted in suspension of cooperation beyond a moratorium on additional financial aid.

In the new Cotonou Agreement[24] respect for human rights, democratic principles and the rule of law remain essential elements of the partnership, and indeed are required to underpin the domestic and international policies of the parties.[25] In addition, "good governance"[26] is also a fundamental element of the agreement, and "serious" cases of corruption will constitute a violation of the agreement.

There is a new procedure to deal with violations of the essential elements: Article 96 sets down the framework for consultations in the event that one Party considers the other Party[27] has failed to fulfil its obligations regarding the essential elements. One party can invite the other party to participate in consultations with a view to remedying the situation. In the case of "special urgency" the party may take "appropriate measures" which must be proportionate and conform to international law. Thus, action may be taken *before proceeding to consultations*. Suspension *may* be invoked *as a last resort.*[28] The

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[21] COM (96) 0069, [1996] OJ C 119/7 see also Parliamentary Resolution on the Proposal for a Council Decision on a framework procedure for implementing Article 366a of the fourth Lomé Convention [1997] OJ C200/256.

[22] Council Decision 99/214/EC of 11 March 1999 on the procedure for implementing Article 366a of the fourth ACP-EC Convention [1999] OJ L75/32.

[23] Consultations with Togo took place on 30/07/98 (Europe 01/08/98) See also COM (99)204 Communication from the Commission to the Council on the opening of consultations with Niger pursuant to article 366a of the Lomé Convention; COM (99)295 concerning the opening of consultations with the Comoros; COM(99) 361 on the opening of negotiations with Guinea-Bissau (and COM (99) 491 on the *conclusion* of negotiations with Guinea-Bissau); COM (99)695 Proposal for a Council Decision *concluding* consultations with the Comoros; COM (99)899 on the opening of consultations with the Cote d'Ivoire; COM(2000) 460 final on the opening of consultations with Fiji; COM (2000) 486 final on the opening of consultations with Haiti.

[24] *Supra* note 6.

[25] Art. 9(2). Article 9 provides: "Cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights ... Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development."

[26] Art. 9(2) defines good governance as transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development.

[27] The parties are: the Community and its Member States; and the ACP states.

[28] See House of Commons- European Scrutiny Committee- Nineteenth Report http://www.publications.parliament.uk/pa/cm199900/cmselect/cmeuleg/23-xix/2321.htm. Within the

development whereby parties may take "appropriate measures" prior to opening consultations is a significant development, and permits an urgent response to a situation in which political negotiation and consultation may be impractical.

The inclusion of "good governance" as an essential element is also significant, and reflects the Community's own focus upon developing governance in different contexts. It permits a more holistic view to be taken of a situation, without waiting for a total collapse in governance before acting. In this sense it reflects the development in the Treaty of Nice, whereby the Council may act if it believes there is a "clear risk" that a Member State will seriously violate human rights.[29] As it permits pre-emptive action Cotonou can be said to provide a potentially more effective instrument for the protection of fundamental rights. It could also give rise to an increased risk of allegations of coercion of the ACP states by the Community.

The Human Rights and Democracy Clause in Agreements with Central and Eastern European States.

Despite the initial appearance of the human rights clause in the context of development cooperation, the introduction of conditionality occurred in the context of agreements with states of Central and Eastern Europe.

In its relations with Eastern Europe, the Community initially afforded special treatment to those countries which made greatest progress on political reforms (Hungary and Poland) and withheld any prospect of any agreement with those countries which blatantly violated human rights (Bulgaria and Romania). Despite this political approach, there was no reference to human rights in the agreements then concluded.[30] The element of conditionality was thus applied *before* the substantive stage was reached. The dangers of this approach are evident. Either party may enter into an agreement on the basis of certain political conditions and circumstances, yet a change in those circumstances does not give rise to a right to suspend the agreement. This had occurred in the Community's earlier

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Community partial suspension requires a decision by qualified majority of the Council, whereas full suspension would require unanimity.

[29] Article 7, See Chapter 1

[30] See for example Agreement with Hungary, *supra* note 5.

relations with the ACP states, and had indeed led, finally, to the inclusion of the human rights clause in Lomé IV.[31]

The introduction of human rights conditionality into the agreements occurred in 1992 and 1993, when the Community concluded trade and cooperation agreements with Albania, the Baltic States and Slovenia (as well as Uruguay).[32] Subsequent Europe agreements also contain the clause as do the trade and cooperation agreements with the remaining former Soviet republics. The focus on the development of this clause in the European context is easily explained. Firstly, on a practical level, the sheer volume of agreements being formed between the EC and this part of the world increases the likelihood of developments occurring there. Secondly, on a strategic level, the political interest the Community has in realising and maintaining stability in this part of Europe is clearly instrumental. Thirdly, if Europe Agreements are a precursor to accession, protection of human rights will have to be ensured. Evidently these factors are themselves related.

There are two levels in the development of conditionality. The first level is the essential elements clause. This means that adherence to certain standards of human rights and democracy are essential elements of cooperation (and agreement) between the Community and its partner states. This clause has been backed up with a non-compliance clause (the second level) which has seen two formulations: first, that of explicit suspension (the Baltic clause)[33] and secondly, that of general non-execution (the Bulgarian clause).[34] The more extreme Baltic clause was used only in agreements with the Baltic States, Albania and Slovenia.[35]

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[31] See Ulimubenshi, *supra* note 1 and Kuyper *supra* note 1 at pp 408-410.

[32] E.g. Agreements with Estonia, Latvia and Lithuania, *supra* note 4; Albania [1992] OJ L343/2, Slovenia [1993] OJ L189/2, Uruguay [1992] OJ L94/2.

[33] "[T]he Parties reserve the right to suspend this agreement, in whole or in part with immediate effect if a serious breach of its essential elements occurs".

[34] "[I]f either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before doing so, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. In the selection of measures, priority must be given to those which least disturb the functioning this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests". The Bulgarian clause is generally accompanied by a provision that "cases of special urgency" include the breach of essential elements of the Agreement. See for example Agreement with the Ukraine (Partnership and Cooperation Agreement between the European Communities and their Member States, and the Ukraine [1998] OJ l L 49/3) where this was provided for in a Special Declaration re. Art 102.

[35] See, for example, agreement with Slovenia, *supra* note 32.

In these clauses there is no equivalent of Article 7 TEU (following Nice) or of the possibility to act pre-emptively in relation to human rights violations, which occurs as a result of inclusion of "good governance" as an essential element in Cotonou.[36] Having been used initially as a condition of the conclusion of an agreement and subsequently as an element of the continued operation of an agreement, it should be noted that adherence to human rights and democratic standards is now a requirement for accession to the European Union,[37] following which Article 7 EU will apply.

Broader Application of the Clause

By 1993 it had been decided that a human rights and democracy clause would be included in every agreement concluded by the Community with third states.[38] In 1993 Commissioner Marin stated that: "Very explicit clauses on human rights and basic freedoms are now an integral part of all agreements concluded by the Community with non-member countries"[39]

The implementation of this policy has not always been easy. In 1995 the Commission observed that "although Commission guidelines [on the inclusion of these clauses] have been respected, the objectives of a systematic approach have not yet been achieved." It concludes that "there is a need ... to improve the consistency, transparency and visibility of the Community approach and make greater allowance for the sensitivity of third countries."[40]

The commitment to human rights and democracy is evident not only in the appearance of the clauses themselves, but in the development since 1996, of a specific title within agreements on "Cooperation on Matters relating to Human Rights and Democracy" providing for cooperation:

> "on all questions relevant to the establishment or reinforcement of democratic institutions, including those required in order to strengthen the rule of law, and the protection of human rights and fundamental freedoms according to International law and OSCE principles"

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[36] *Supra* note 6.
[37] TEU Article 49.
[38] Commission Decision of 26/1/93, MIN 93 1137 pt XIV.
[39] COM (95) 216 final *Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the European Community and Third Countries.*
[40] *Ibid.*

This appears in the 1996 Partnership and Cooperation Agreements with Uzbekistan and Azerbaijan, but not in the earlier (1995) Europe Agreement with Lithuania.[41]

The form and strength of commitment expressed appears to vary not only chronologically but also according to geography. The 1994 partnership and cooperation agreement with the Ukraine, for example, includes reference to human rights and democracy in Title II (Political dialogue).[42] In the Agreements with Uzbekistan, Georgia and Azerbaijan[43] it goes even further:

> "the Parties shall endeavour to cooperate on matters pertaining to the observance of the principles of democracy and the respect, protection and promotion of Human Rights, particularly those of persons belonging to minorities and shall hold consultation if necessary on relevant matters"[44]

The Community had earlier refrained from the inclusion of provisions concerning minority rights in its Europe Agreements, where minority rights were undoubtedly a crucial issue. This is in turn significant in that in general economic, political and legal terms the Partnership and Cooperation Agreements (PCAs) have been deemed to be "looser" than the Europe Agreements.[45] Certainly, the PCAs, being based on Article 113 and 235 do not create the associative status of the Europe Agreements, which are based also on Article 238. The different objectives create a different level of link. The association agreement with Tunisia, however, concluded in 1995, refers to "coordination on international issues of common interest" but does not specify human rights and democracy: creating again a less explicit obligation, but in what might have been described as a "closer" relationship.

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[41] Partnership and Cooperation Agreement with Azerbaijan [1999] OJ L246/3, Title VII, Art. 71; Partnership and Cooperation Agreement with Uzbekistan [1999] OJ L 229/1 Europe Agreement with Lithuania [1998] OJ L51/3

[42] [1998] OJ L49/3.

[43] Uzbekistan and Azerbaijan *supra* note 41, Partnership and Cooperation Agreement with Georgia [1999] OJ L205/1.

[44] See also COM (95) 219 final where it is stated that the protection of minorities is of paramount. importance to the establishment of partnership.

[45] Christophe Hillion, "Partnership and Cooperation Agreements between the EU and NIS" (1998) E.F.A.Rev. 3 399-420.

This difference may reflect the difference in approach in each type of agreement: partnership and cooperation, as contrasted with association. That would not explain, however, the varying approaches within different types of agreements. Alternatively, it may reflect the particular importance the Community places on human rights and democracy issues on its doorstep. Once again this may be explained by the urgent need to consolidate the progress made on these fronts in these states since the break up of the Soviet Union, and the risk to the Community in the event of a failure of these reforms.

Problems relating to the implementation of the Human Rights Clause

External Opposition to Inclusion of the Human Right Clause

By 1997 the policy of inclusion of the human rights and democracy clause in all agreements concluded with third states had encountered serious problems. Negotiations on economic cooperation agreements with both Australia and Mexico faltered over the proposed inclusion of the human rights and democracy clause. The Commission expressed the inclusion of the clause in such an agreement "not as imposing a condition, but in the spirit of a joint undertaking to promote universal values."[46] This itself expresses an intensely political agenda. Yet, more positively, the observation that the clause represents the promotion of universal values, suggests that the Community takes a holistic view of economic liberalisation and development and is consistent certainly with the Community's subsequent focus on good governance and sustainable development. Yet, outwith this context, the Community's stance is questionable and questions arise regarding the basis of the Community's competence for its pursuit, if the internal duty to ensure that these interests are respected in the operation of its policies did not give rise to a parallel external competence. The practical distinction between a condition to uphold human rights, and the fulfilment of a joint undertaking to promote universal values, is ambiguous.

The negotiating difficulties with Mexico were finally resolved to the satisfaction of all parties. Both the Interim Agreement and Framework Agreement, signed in December 1997,[47] included the protection of human rights and democracy as an essential element. It should be noted, however, that in April 1999 the International Confederation of Free Trade

[46] COM (95) 567 final *"The European Union and the external Dimension of Human Rights Policy"*.
[47] OJ [1997] C356 and C350.

Unions (ICFTU) called for a delay in the ratification of the EU-Mexico Agreement. The complaint was that the agreement is "without adequate provisions on social, environmental and human rights issues".[48] ICFTU was particularly concerned by the fact that the EU-Mexico Agreement is: "a pioneering agreement because of its scope and depth and the first of several between the EU and Latin American countries". With respect to human rights the agreement provides in Art. 1 that: fundamental rights and democratic principles as contained in the Universal Declaration of Human Rights (UDHR) are essential elements of the agreement, underpinning both the domestic and external policies of the parties. There is nothing, specifically, concerning social rights, however the Universal Declaration of Human Rights (UDHR) provides that: "Everyone, ... is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."[49]

More specifically Article 23 UDHR refers to the right to work, choice of employment and just and favourable conditions of employment (para. (1)) including equal pay for equal work (para. (2)) and remuneration ensuring an existence worthy of human dignity and supplemented, if necessary, by other means of social protection (para. (3)). Article 24 concerns the right to limited working hours and paid holidays. Article 25 guarantees an adequate standard of living in terms of health and well-being and Article 26 provides for the right to education. Thus although the agreement with Mexico does not *per se* explicitly guarantee specific social rights, they are included by reference. The doubts expressed by the ICFTU demonstrate, however, the reality of the questions surrounding the interpretation of "human rights" which the ACP states baulked at in the 1980s.

This uncertainty was brought into even sharper relief by the negotiations with Australia. Notwithstanding the Commission's statement that the human rights clause would reflect a joint undertaking to promote universal values rather than the imposition of a condition, the protection of human rights in Australia is controversial, particularly with regard to the Aboriginal people. This is particularly striking given that the protection of indigenous peoples is, and was at that time, being strengthened at an international level.[50]

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[48] ICFTU Online 082/270499/DD (Press release, 27/04/99).
[49] Article 22.
[50] GA Resolution 47/53 1992 UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities; UN GA Res 48/163, of 21/03/93 declared 1995-2004 Decade of Indigenous Peoples; Resolution 1995/32 – UN Commission on Human Rights Established working group on

Ultimately, the Community and Australia failed to conclude a framework agreement and instead the parties issued a "Joint Declaration". This declaration is not binding and therefore contains no equivalent of human rights conditionality, although the political declaration includes some references to the protection of human rights and democracy. The declaration, however, sets a framework for cooperation which is in practical terms the equivalent of a framework agreement. Indeed it has been followed by a "Mutual Recognition Agreement".[51] There is no indication that trade relations, or the development of closer commercial ties have been in any way hampered by the failure to conclude a "Framework Agreement". Notably, the Community's sectoral agreements, which continue to be concluded with Australia, do not contain reference to human rights. The situation with regard to Australia poses some difficulties for the future universality of the Community's policy. Had the clause been included, however, it may have proved to be the catalyst required to demonstrate serious issues concerning the enforcement of the clause.[52]

From the statements surrounding the negotiation procedure it is clear that the Community did not consider the protection of human rights to be an issue in Australia. Yet there are serious questions concerning the treatment of the Aboriginal people. These concern in particular the treatment of minorities and the right to collective ownership of property. The Community, by its action and statements, clearly does not intend to address such issues through its use of this clause in this particular context, although the terms in which the standard essential elements clause are framed refer to the UDHR which does provide for the protection of these rights.[53]

Moreover, the rights of people belonging to minority groups have been afforded particular protection in the partnership and cooperation agreements concluded with Uzbekistan, Georgia and Armenia.[54] If the Community had succeeded in concluding an agreement with

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Draft Declaration on the rights of indigenous peoples, See UN Factsheet No. 9 Rights of Indigenous Peoples; Higgins R "Minority Rights, Discrepancies and Divergencies between the International Covenant and the Council of Europe System" Lawson and de Blois.

[51] Agreement on Mutual Recognition in relation to conformity assessment certificates and markings between the EC and Australia [1998] OJ L229/3.

[52] Or, as observed by Angela Ward, questions concerning the competence of the Community to include human rights requirements in trade and economic cooperation agreements, see "Frameworks for Cooperation between the European Union and Third States: a viable Matrix for Uniform Human Rights Standards" (1998) EFARev. (3) 505-536, at pp 518-520.

[53] Articles 2 and 17.

[54] Agreement with Uzbekistan, *supra* note 41, Agreement with Georgia *supra* note 43, Partnership and

Australia, the evidence from the negotiation procedure and its surrounding publicity suggests that allegations of breach of human rights conditionality would have emerged from both (Aboriginal) groups within Australia and the international Community.

Influential Factors in the Form and Strength of the Human Rights Clause

There can be no doubt that certain factors can be identified which have influenced the type and strength of human rights clause included by the Community in its various relations with third states. These originally included the type of agreement concluded, but that appears to be less significant now. The strategic importance of certain states, both politically and geographically, has been seen to be a significant factor: notably in the development of "conditionality" in the context of Eastern Europe.

The outcome of negotiations with Mexico and Australia, each of which initially opposed the clause demonstrates that the bargaining power of the partner state is a significant factor. There are, however, questions hanging over Australia's "strength" which suggest that a Western perception of democracy and fundamental rights within a state is significant. Australia is perceived to be a democracy, therefore human rights were not ultimately as significant as its strategic economic impact (as a gateway to the Asian markets). The content of the clauses in different contexts also indicates a combination of Community strength of policy on the one hand, and on the other, a reluctance to risk some benefit, and agreement, for a specific interest (for example the protection of minority rights). This may also suggest Community sensitivity to its own weaknesses, until recently it had no autonomous protection for minority rights.[55] Ultimately, from the combination of all these factors it can be concluded that the Community's policy is determined by political considerations, operating on varying levels.

Community Enforcement of the Human Rights Clause

It is impossible to speculate as to how the Community may have reacted to allegations of breach by Australia, had it succeeded in concluding the agreement with the human rights clause. It has demonstrated its willingness to invoke the clause on several occasions,[56] thus

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Cooperation Agreement with Armenia, [1999] OJ L239/1.

[55] See now Article 13 EC and Article 21 Charter of Fundamental Rights.

[56] *Supra* note 23.

conveying message that the human rights clause is not merely empty rhetoric, but shall be invoked. It is striking, however, that neither an agreement, nor provisions within an agreement have yet been suspended solely on the basis of the human rights clause. On the other hand this alone does not suggest that the human rights clause is worthless.

Much of the significance and efficacy of the clause may come in the awareness that it raises among states, and the pressure which it imposes upon partner states, or potential partner states at a diplomatic level. If the existence of the clause can cause states to maintain or impose (in the interests of cooperation) standards they would not otherwise achieve, that is more successful than suspension of an agreement for violation of these rights.

Where the situation may break down is in the application of this theory, and in the failure of the Community to apply this pressure consistently and transparently, although not necessarily uniformly. The use of the term "democratic principles" in Lomé IV, rather than a requirement of functioning democracy *per se* suggests that the Community does not require its partner states to already be fully fledged democracies. This is supported by the commitment of the Community to:

> "guarantee the consistency of Community measures to promote human rights and democratic principles ... ensuring that action is better attuned to the needs of partners and better coordinated with Member State' initiatives." [57]

while vigorously guarding its ability to exercise discretion in its consideration of the partner states' "social, economic and cultural circumstances". Similarly, the Community recognises that "democratic principles" refer to a gradual, ongoing "dynamic process leading to democracy which must take account of a country's socio-economic and cultural context."[58] This is logical. Experiences, however, may question the extent to which the Community may be seen to exercise its discretion to the best effect, and intentions, of the clause.

[57] COM (97) 357 final at 6.
[58] *Ibidem* at p.5.

Meaningful Conditionality? The Partnership and Cooperation Agreement with Russia

An example of the difficulties which the Community may encounter concerns the conclusion and coming into force of the partnership agreement signed with the Russian Federation, in June 1994. This agreement was followed by conclusion of a standard interim agreement (signed in December 1994), which in turn was swiftly followed by the outbreak of the "Chechen crisis." As a response to this, in January 1995, the European Parliament passed a resolution on the subject of the human rights clause, endorsing the Commission's decision to suspend ratification of the agreement.[59] The Council and Commission were requested not to ratify the agreements until both the military attacks by Russia on Chechnya *and* the human rights violations had ceased.[60]

In March, the EU made ratification of the interim agreements dependent on the permanent presence of the OSCE in Chechnya, entry of humanitarian aid into the country, a ceasefire and a serious search for political solutions to the conflict. By the end of March the OSCE reported the continuation of serious breaches of humanitarian law. This notwithstanding, in early April the EU indicated it would be satisfied by Russia "undertaking to honour its obligations soon". (This is consistent with the principle that states need not have achieved the goals sought but only demonstrate willingness to do so.) Russia demonstrated its willingness to "honour its obligations" by continued breach of its international obligations as well as OSCE principles and principles within the agreements at issue (observed by the European Parliament to be ongoing in mid-June).[61] These continued breaches notwithstanding, the European Council had decided at the end of June that, satisfied with progress over Chechnya, it would sign the interim agreement, which subsequently came into force in February 1996. The cooperation treaty itself entered into force in December 1997,[62] following Parliamentary consent which was given in November 1995[63] (in view of the continuing ceasefire).

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[59] [1995] OJ C43/04 Resolution on the situation in Chechnya.
[60] See Riedel and Will "Human Rights Clauses in External Agreements" in Alston, Bustelo and Heenan (eds) *The EU and Human Rights* at 741-742, for an account which views this as an example of the anticipatory effect of the human rights clause. This is a dubious reading of the events, which appeared more like EC capitulation to a strategically important state.
[61] [1995] OJ C166/4.
[62] [1997] OJ L327/1.
[63] [1995] OJ 339/45.

Reaching this decision despite documented, continued serious breaches, must bring into question the operation, and universal credibility, of the Community's policy. The Community may argue that it could reasonably bring the agreements into force because Russia had made real progress. Hillion describes the move as an: "exercise in Realpolitik aiming at reducing the causes of such crisis, in order to prepare for long-term change."[64] It has been acknowledged that the decision was ultimately based upon the strategic importance of Russia to the Community, and "justifiable" by the fact that Russia's treatment of Chechenya was seen as a short-term issue.[65]

These facts together, however, must have made it more difficult for the Community to react with any power to the subsequent attack of Chechnya by Russia. If the strength of the clauses is to come from their persuasive, political or "anticipatory" effect, then these must be rigorously exercised and pursued, otherwise the policy loses credibility.

Discretion and Consistency in Relation to the Human Rights Clause

Part of the confusion, and difficulty, of the policy of inclusion of the human rights clause, arises from the fact that the Community has chosen what appears to be an "absolute" stance on human rights, in making their protection a legally binding condition of cooperation. Yet the Community desires to maintain the political discretion it would be free to exercise by pursuing this policy on a purely political level.

Whether the Community would have been inclined to act in relation to Australia, a state which is of crucial economic importance to the Community (given its links with Asia), and which does not, *prima facie*, fit the general perception of a state committing human rights abuses, is another question. Many states, however, expressed their concern as to Australia's human rights record regarding its treatment of the Aboriginal people during the negotiating period.[66] If the Community had concluded an agreement and not acted, it is unlikely that that would have gone unnoticed. The credibility of the Community's policy would consequently have been damaged, regardless of the Community's intentions in this respect.

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[64] Hillion *Supra* note 45 at p. 417.
[65] Hillion *supra* note 45 p.418, see also Declaration of the EU's Presidency on the situation in Chechnya, IP 4215/95 17 January 1995.
[66] See, for example, comments of South African delegation to Canberra, Sydney Morning Herald, 21/11/97.

This may be dismissed as mere speculation, the importance of which should not be overstated. The rights of indigenous peoples are, however, the focus of growing international attention, particularly within the United Nations.[67] A case such as this could not be sidelined by the Community if the universality of its policy, on which much of its political strength depends, is to be genuinely upheld.

The current Australian situation with regard to the Aboriginal people could offer little comfort to the Community. While the Community is pursuing the development of its commercial links with Australia, without reference to human rights standards, within Australia itself the issue of Land Rights has not abated since the conclusion of its negotiations with the Community. Indeed the controversy surrounding the treatment of the Aborigines, is growing with the political storm over mandatory sentencing, a penal policy which has a disproportionate impact upon Aboriginal people. This is demonstrated by the fact that in 2000 the Aboriginal people comprise 2.1% of the Australian population, but 18.8% of the prison population, the figures in relation to juvenile detention, on which mandatory sentencing is having a particular impact are no less disturbing.[68] This is another fact which has not failed to attract international attention.[69]

The European Union is a significant trading partner of Australia, raising the question why the EC could not have exerted some of its economic power to compel Australia to have accepted the clause. There are various factors at issue here: the significance of the EU's share of Australia's trade has increased since 1997, with the instability and decline of the South East Asian markets: therefore the power the EC would have had in 1997 would not necessarily be as significant as it may be now. The significance of that fact may also be reversed: Australia was then perceived to be a crucial gateway for EC trade into those same markets, which would reduce the EU's bargaining power.

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[67] *Supra* note 50. See also Record of the 1059th Meeting of the Committee on the Elimination of Racial Discrimination, 12 August 1994, CERD/C/SR.1059, Consideration of 9th Periodic Report on Australia (CERD/C/223/Add.1)

[68] Amnesty International press releases: ASA 12/003/2000 of 14 March 2000 and ASA 12/006/2000 of 5 July 2000

[69] The UN Human Rights Committee in July 2000 reached disturbing conclusions re Australia's record of Civil and Political Rights, particularly concerning human rights issues arising today as a result of the "stolen children" policy of the 1950s, mandatory sentencing, and mandatory immigration detention. The response of the Australian Government a month later was to announce that it would be pulling out of certain UN human rights obligations. Amnesty International Press release ASA 12/010/2000 of 5 September 2000. See also UNHCHR report December 1999.

The Subsequent Challenge: Locus Standi *to Enforce the Clause*

A further reason for which the speculation with regard to Australia should not be too swiftly brushed aside is that it demonstrates an additional question with reference to the policy. In the event of a dispute, which court has jurisdiction to rule on it? If a Court can be established, who has *locus standi* to enforce the human rights and democracy clause? Only the contracting parties. That is, the Community, the Member States (assuming the agreement has been concluded as a mixed agreement) and the third state, for example Australia[70], unless of course the provisions of the agreement meet the requirements of direct effect. In this case, the EC did not view human rights as an issue in Australia, therefore would there have been any means of enforcement of the clause by anyone?

Direct Effect of the Human Rights Clause?

If the clause is directly effective, the national courts will have jurisdiction and standing would be determined according to national rules. This is directly relevant to Lomé IV in which Article 5 stated unambiguously that: "Every individual shall have the right, in their own or in a host country, to respect for his dignity and protection by the law."

This was an explicit commitment entered into by the contracting parties which raises the question, within the EC at least, of whether it was directly effective. As has been established, it is not necessary that an entire agreement be capable of direct effect, for certain of its provisions to have that characteristic.[71] This provision clearly complied with the requirements of clarity and unconditionality. More questionable, however, would be satisfaction of the requirement that the "spirit, general terms and scheme" of the Treaty are consistent with it having direct effect. As the protection of human rights is an essential element of the agreement, however, it may not have been inappropriate, under the spirit, general terms and scheme of the Treaty to give direct effect to that particular provision. In fact, it would have been difficult to deny its direct effect on the grounds of the spirit, general terms and scheme of the agreement.

It may be argued that as a Framework Cooperation Agreement Lomé IV was not intended to be enforceable by individuals. As seen above, however, it was held in *Sevince* that a Treaty

[70] See below for discussion on direct effect of international agreements and possible implications re EC nationals.
[71] See Chapter 2.

which is lacking that characteristic may have provisions within it which are capable of direct effect, even if only following elucidation by a relevant authoritative body, such as an Association Council. This provision of Lomé did not require such elucidation. It gave every individual within the contracting parties' territories an unconditional right to "respect for his dignity and the protection of the law". Moreover, the fact that the EC Treaty itself is a framework Treaty does not detract from the direct effect of some of its provisions.

Perhaps it would be argued that "respect for his dignity" is not sufficiently clear to constitute an enforceable right. This would be a difficult position to maintain however, as the concept of "human dignity" is one which is familiar throughout international human rights law. It may, however run into difficulties if it is perceived to be *too wide* a concept to be capable of direct effect. It may also be argued by the Member States that to protect the rights of individuals outside the context of development cooperation was not within the intention of Lomé IV. This argument is supported by the fact that it is only in the context of development cooperation that the Community has an objective to pursue the protection of human rights. How such a practical distinction could be maintained, however, is difficult to see. Moreover, such an approach would weaken the basis of *any* Community human rights competence in agreements outwith the context of development cooperation. In any case, the Member States, as signatories, are also bound and there can be no question of their competence to pursue the protection of human rights according to the terms of the agreement.

Furthermore, the statements surrounding the undertaking made it clear that human rights protection is a pre-requisite of democracy and development. In view of that it would be difficult for the parties to have sustained a position that the obligation should only apply in restricted circumstances, particularly as the protection of human rights and upholding democracy are essential elements of cooperation.

This undertaking, that all individuals have the right to respect for their dignity, has developed in Cotonou where the Parties "reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples".[72] The Parties then "*undertake* to promote and *protect all fundamental freedoms and human rights,*

[72] Cotonou Agreement *supra* note 6, Article 9(2).

be they civil and political or economic, social and cultural....".[73] This again must give rise to directly effective rights. In that case an individual would be free to enforce their rights within the EC (before either the ECJ or the national Courts). Obviously this would not affect the position in the partner states, where the status of the agreement, and thus its potential for direct effect would be determined according to whether the particular state operates a monist or a dualist legal order. In any monist contracting parties it would be enforceable, but, failing incorporation, it would not be in those which are dualist.

In the enforcement of this provision it is essential to separate the right from the remedy. Faced with a denial of dignity, an individual may have a direct action to enforce that right before the "domestic" court (which may of course, in the case of the Community, include the ECJ). In the event of a denial of dignity, the individual may also however find themselves faced with a denial of access to justice, and therefore be unable to enforce their rights. In such a case, do they have a remedy? The only possibility would be in compelling other contracting states to act upon their obligations *vis-à-vis* the breach of Cotonou. They would be unlikely to have *locus standi* to do so, however, before a court in another state.

The standard situation in which a non-resident of the EC can bring an action before ECJ is in relation to a piece of EC legislation that they can demonstrate directly affects them, in an individual manner.[74] Thus they show themselves to be within, and affected by, the specific Community law, even though they are not resident within the Community. This is not a situation which could apply in relation to Cotonou. Although it may be possible to envisage judicial review being sought of a provision which conflicts with it, that would have to be done in the state where the breach occurs.

If an individual suffered a denial of dignity while a visitor to the Community, they may, however, be able to bring an action before the Court of Justice, or Member State courts. To take an example from current UK law: asylum seekers, including those from ACP states, are frequently housed in substandard accommodation, or prisons. This scheme is without doubt an attack on their dignity and a breach of human rights. It crosses the bounds of proportionality as compared with the risk of "floods" of "bogus" asylum seekers disappearing from the system into the UK as illegal immigrants. An asylum seeker, or a

[73] *Ibidem* (emphasis added).
[74] See Chapter One.

group of asylum seekers, could potentially seek judicial review of this, for breaching their rights under Cotonou. In such a case there is a potential remedy: the UK Government may be forced to change their scheme.

In such a situation the individual(s) would have been enforcing their rights under Lomé (or Cotonou) before the national court. They would have an option, however, of bringing the matter before the ECJ through a request for a preliminary reference.

It is equally possible that an EC Member State Government may carry out an act which attacks the dignity of one of its nationals, while in their own state. Following the above approach, the outcome is that Cotonou a mixed agreement concluded between the European Community and its Member States and the ACP states, could, in fact, be used to enhance the rights of Community residents in an entirely internal Community situation.

This is itself significant in that although the Amsterdam Treaty provides for the possibility for the Council to determine a serious and persistent breach of human rights by one of the Member States, and consequently suspend the rights accruing to that state under the treaties, there remains no provision, within either the Community or Union, for an individual to enforce their human rights directly before the Community judicature.[75] That situation is currently unchanged by the Charter of Fundamental Rights, due to its lack of binding legal effect.

It may be asked whether such examples fall within the scope of Cotonou, yet Cotonou requires the respect of these rights as a condition of cooperation. To hold that these rights do not apply "outside the scope of Cotonou" would question the nature of the essential element.

Of course, again, this may all be said to be entirely hypothetical as the Member States of the Community are all bound by the ECHR, and the Court of Justice has demonstrated its willingness to ensure the Member States fulfill their obligations arising from it. It would, however, mean that in a dualist state, which has not yet implemented the Convention, an

[75] Notwithstanding that the ECJ has held itself to be bound to ensure the fulfillment by the Member States of their obligations under the European Convention of Human Rights (ECHR).

individual could bring an action directly before the national courts using their rights under Cotonou.

A more complicated situation arises, as seen above, with regard to a national who suffers an attack upon their dignity and who is subsequently denied access to justice: an example of this may be taken from recent events in Fiji, when the Prime Minister was taken hostage, and made the subject of press "viewings". (Clearly an attack upon his dignity as well as other fundamental rights.) In this situation there was a complete breakdown of the system, and there was no mechanism by which the Prime Minister could enforce his rights, under (then) Lomé IV as he had no access to justice. Nor could he *compel* one of the partner states to invoke the Treaty on his behalf, or even to take action under Article 366a, although he was suffering a breach of an absolute provision within the agreement, which concerned its essential elements.[76] The rights under Cotonou would be similarly unenforceable. Again it can be asked whether this falls within the scope of Lomé, but again, what is the scope of a Treaty which requires the protection of fundamental rights, when that protection is not upheld?

Reliance on the Exercise of Political Discretion in the Enforcement of the Human Rights Clause

Ultimately a breach may have no direct legal remedy, but instead be reliant on a political decision and action. Where a political decision is made by the Community that the abuse of certain human rights, or attack on dignity, for whatever reason, is not to be subject to challenge that decision itself will not be subject to challenge in the interests of those rights. The difficulties of this position are exacerbated by the fact that the Community cannot be completely impartial in its judgments in this respect. This itself is demonstrated by the compromise to the universality of its policy that the Community was willing to accept (in relation to Australia) where a strong economic interest was at stake, as well as in its response to the Chechen situation. Such a lacuna may well leave the interest unprotected in much the same manner as seen with respect to the internal protection provided for the environment by the Community.[77] There are clear reasons to limit the right of action, and indeed, there is no reason to suppose that the Community and Member States are not

[76] The Community did open consultations with Fiji under Article 366a, *supra* note 23.
[77] See Chapter 1 discussion of Case C-321/95P *Greenpeace* v. *Commission* [1998] ECR I-1651 and access to

competent to judge a situation, or to respond to lobbying, and proceed on the basis of third parties' complaints. Their judgment, however, remains subject to political compromise and therefore ultimately inconsistent.

This is clearly demonstrated by the situation regarding Australia where there were, as has been seen, issues which the Community did not view as being relevant to its conclusion, yet which parts of the international community viewed with concern in relation to the protection of human rights. This concern was shared by groups within Australia itself. The current situation in Australia makes it clear that had the EC and Australia concluded an agreement (including the standard clause) pressure would undoubtedly have been brought to bear upon the Community by these non-contracting parties, to enforce the clause. There would be no means, however, by which they could compel the Community to even consider the matter.

Yet such a scenario, again, would clearly damage the credibility of the Community and its policy. The Community faces a real problem in that the standard clause itself is framed in such a way as allows issues such as minority or aboriginal rights to be interpreted as being included. Indeed in certain cases it includes specific reference to such rights. It should be possible, however, for the Community to narrow the terms of the clause to clarify what rights it intends to protect, according to the circumstances.

The political sensitivity of this whole area may not be overstated and the Community clearly defends its ability to exercise its discretion. The disadvantage of the position is that the Community lays itself open to what is perhaps unnecessary criticism.

It may be significant that in 1998 the EU, acting under the "second pillar" that is, in the context of the Common Foreign and Security Policy (CFSP) adopted a Common Position concerning human rights, democratic principles, the rule of law and good governance in Africa.[78] The preamble to this states that "human rights are universal, indivisible, interdependent and intrinsically linked". Article 1 describes the objective of the Union as being "to work in partnership with African countries to promote respect for human rights, democratic principles and good governance" and states that "this approach shall serve as a

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justice on environmental issues.

[78] 98/350/CFSP: Common Position of 25 May 1998 defined by the Council on the basis of Article J.2 of the Treaty on European union, concerning human rights, democratic principles, the rule of law and good

framework for the actions of the Member States". Article 2 continues by recognising "the right of sovereign states to establish their own constitutional arrangements and to institute their own administrative structures according to their history, culture, tradition and social and ethnic composition". Article 2 then lays down the principles underlying the Union's approach. These include protection of human rights, including civil and political, social, economic and cultural; respect of basic democratic principles; the rule of law and good governance.

The common position explicitly provides for the exercise of discretion by the Union in deciding policy towards individual countries on the basis of their starting point and the general direction and pace of change within these countries, thus reiterating the position of the Commission in COM (1997) 357 final.[79]

This statement is significant as it suggests that the Union, and consequently Community, has a wide vision of the human rights it seeks to support, although taking account of the particular situations of individual countries.

The Protection of the Environment in the Community's Relations with Third States

The commitment to the protection of the environment in the Community's external relations developed initially, like human rights, in the context of development cooperation. Unlike human rights, however, there is now a general Community competence to conclude international environmental agreements, which is complementary to that of the Member States.[80] The degree of development of environmental protection in the Community's external relations has contrasted sharply with that of human rights, and not altogether as may be expected.

Development Cooperation Agreements

The original Lomé Convention referred to the need for social development but made no reference to the environment or human rights *per se*. Lomé II, however, refers to environmental protection in Article 76, in the context of cooperation on energy and in

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governance in Africa [1998] OJ L158/1.
[79] See text accompanying note 57 above.
[80] Article 174 EC.

relation to "Agricultural Cooperation".[81] Protection of the environment appears again, more significantly, in Article 93, with reference to financial and technical cooperation and Article 112 which states that in the context of "project and programme appraisal", "particular attention shall be paid to the effects of the programme on the environment"

This is significant in that environmental protection was already, at this relatively early stage, being integrated into other policy areas in the Community's external relations. In contrast, the Community had sought at this stage to include a commitment to human rights and democracy but that this had been blocked by the partner states. Environmental protection was clearly not so sensitive an issue as the highly political, and contentious, protection of human rights.

By Lomé IV not only was the protection of human rights accepted as an essential element, as seen above, but the commitment to environmental concerns was strengthened, albeit not to the same degree, Article 6 providing that: "priority must be given to environmental protection and the conservation of natural resources which are essential conditions for sustainable and balanced development both from the economic and human viewpoints."

More significantly, environmental protection has its own title (I) in Part II (Areas of Cooperation) in which Article 33 makes a comprehensive commitment to all aspects of environmental protection.[82]

It is striking, however, that only the ACP states are committed to this development, albeit with Community support. There is no corresponding undertaking by the Community. The protection of the environment within the Community was, at this point, governed by the provisions of the Single European Act (SEA), which as well as committing the Community to environmental protection internally, provided for complementary Community and Member State competence to conclude international environmental agreements.[83]

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[81] Title VI, Articles 83-84.

[82] "The protection and the enhancement of the environment and natural resources, the halting of the deterioration of land and forests, the restoration of ecological balances, the preservation of natural resources and their rational exploitation are basic objectives that the ACP States concerned shall strive to achieve with Community support with a view to bringing an immediate improvement in the living conditions of their populations and to safeguarding those of future generations."

[83] Article 130r, Single European Act Article 25 OJ [1987] L169 at p. 11.

This does not explain the lack of reciprocal undertaking with respect to environmental protection by the Community or its Member States. Such an undertaking may, arguably, be unnecessary, due to equivalent commitments of these same states in other contexts, including the Community. As an explanation, however, that is problematic.

In particular it gives rise to difficulties in relation to a hypothetical failure within the Community to effectively protect the environment, in contrast to the obligation upon the ACP states. The Community could challenge a breach within the ACP states, but these same states would be powerless in the face of such an equivalent failure within the Community.

This is, clearly, not a problem which would concern the Community unduly, but it is an omission for which it may be subject to criticism. It shows a fairly paternalistic approach to Community aid and cooperation. On the other hand, in the context of a development cooperation agreement, it is not entirely inappropriate. The Community is not unreasonable in imposing conditions upon its provision of aid. On this basis, however, the EC and its Member States should be certain that they already provide the level of protection (or at least commitment to environmental protection) required of the partner states. As has been seen above, however, the protection offered to the environment within the Community is by no means guaranteed, even 11 years after Lomé, despite the commitment in the Treaties.[84]

This is not a legal problem, there is no doubt that within the Community there are undertakings to meet at least these environmental standards. Thus there was no need for Lomé to impose obligations upon the Community. Assuming that these standards were already met, it would simply have been a symbolic gesture to include a mutual obligation. It could, however, create credibility problems, particularly in view of the fact that "Access to Justice on Environmental issues" within the Community does not meet its international obligations.

Thus the early days of the development of environmental protection in the Community's international agreements raised their own academic, if not practical, questions.

[84] See Chapter 1.

The Cotonou Agreement, focuses strongly on the need for sustainable development and emphasises environmental protection as well as human rights protection, as seen above. Article 20 describes the approach of the Agreement which is to pursue integrated strategies, incorporating economic, social, cultural, environmental and institutional elements, reflecting the internal Community approach towards the environment. As regards the environment, ACP-EC Cooperation strategies are to aim at: "promoting environmental sustainability, regeneration and best practices, and the preservation of natural resource base".[85]

This is to a degree tautological as the preservation of the natural resource base is itself an inherent element of sustainable development. Environmental issues are also included in the "thematic or cross-cutting themes" to be taken into account in all areas of cooperation.[86] As a result, the environment is also to be supported through, for example, regional cooperation.[87]

Since Lomé the inclusion of clauses relating to environmental protection has become standard practise, in trade and economic cooperation agreements as well as in development cooperation, although the commitment has never had the same strength as that generally given to human rights and democracy. Notably environmental requirements tend to be to "give priority", to "strive", to "take into account" rather than creating absolute requirements to be achieved. This notwithstanding, cooperation is dependent upon the partner states complying with their undertakings and demonstrating that they do so.

The Europe Agreements

A fairly typical example of the Commitment to environmental protection in the Europe agreements may be taken from the agreement with Slovakia.[88] Under Title VI, Economic Cooperation, Article 72 provides that sustainable development is to be a "guiding principle" of economic and social development, and that this should guarantee the integration of environmental protection.

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[85] Article 20(e) Cotonou, *supra* note 6.
[86] Article 20(2) This is expanded upon in respect of the environment in Article 32.
[87] Article 30.
[88] OJ [1994] L359/1.

Article 81 concerns the Environment and commits all parties to the development, and strengthening, of cooperation on both environment and human health. The second paragraph lists the areas of cooperation, and the third how this cooperation will be achieved. The areas of cooperation are fairly comprehensive as are the means, which include exchange of information and experts, training programmes, joint research activities, approximation of laws (Community standards), cooperation at regional level and development of strategies, particularly with regard to global and climatic issues.

Environmental protection is particularly important in this context: firstly, in view of the scale of environmental degradation and pollution in these states, and the pre-accession requirement that the states reach Community standards. Secondly, environmental problems in these states are local to the Community, and therefore have a tangible impact upon it, thus the interest of the Community in having them cleaned up is both profound and comparatively short term. Environmental protection standards were a stumbling block to accession in most applicant states but negotiations on this issue have now been closed, sufficient progress has been made on the incorporation of the environmental acquis.[89] This issue has proved particularly difficult in the northern states.[90]

The Committee of the Regions has described cooperation in the Baltic Sea region as: "an outstanding example of regional cooperation in Europe, encompassing nearly all areas of politics, society and the economy."[91] The extreme climatic conditions make this a particularly challenging area to manage environmentally, particularly in relation to the sustainable management of natural energy resources. The challenges this poses are exacerbated by the serious pollution, which has been caused in part by the manner of the exploitation of these natural resources.[92] These problems have been addressed by the Arctic Council since 1990. The committee of the regions observes that particular attention must be paid to both environmental considerations and the rights of the indigenous people. Once again reflecting the pragmatic link between human welfare and environmental protection.[93]

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[89] See Chapter 1. For report on the candidate countries' compliance see http://europa.eu.int/comm/enlargement/report2002/index/htm

[90] Opinion of the Committee of the Regions on the "Communication from the Commission on a northern dimension for the policies of the Union" OJ [1999] C374/01.

[91] *Ibidem.*

[92] For further discussion see Opinion of the Committee of the Regions, *supra* note 90.

[93] *Supra* note 90 at para. 11.24.

Certain of the Northern states (Finland, and Sweden) have already acceded to the European Union. Finland's extensive shared border with Russia has a significant effect on the external dynamics of the Union, and upon the challenges facing the Community internally in relation to environmental protection. Although these considerations will become increasingly directly significant following accession, the environmental impact pays no heed to existing borders. This of course also increases the strategic Community interest in cooperating with these states to improve environmental conditions, although as observed by the Committee of the Regions, despite the gap in standards, the position within the Community is not yet perfect.[94]

Partnership and Cooperation Agreements

Relations with those states which have not yet acceded fall either into the category of Association agreements as seen above, or Partnership and Cooperation Agreements (PCAs), for example the Ukraine.[95] The preamble to the cooperation agreement with the Ukraine refers to the wish to achieve "close cooperation in the area of environmental protection, taking into account the interdependence existing between the Parties in this field."

The approximation of the Ukraine's laws to those of the Community, to facilitate economic links extends, *inter alia* to environmental protection.[96] It is not surprising, therefore, to see "environment" appear in Title VII, Economic cooperation, where once again policies are to fully incorporate environmental considerations, and be guided by principles of sustainability.[97]

Both industrial and energy cooperation again make specific reference to the requirement to consider environmental implications.[98] It is in Article 63 "Environment", however, that the specific provisions relating to the environment are laid down. In this context the environment is linked explicitly to human health, and the provisions are fairly typically wide-ranging.

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[94] Opinion of the Committee of the regions on the "Communication from the Commission, to the Council, the European Parliament, the Economic and Social Committee, the Committee of the regions and the candidate countries in central and eastern Europe on accession strategies for environment: meeting the challenge of enlargement with the candidate countries in central and eastern Europe" at para. 1.2.
[95] *Supra* note 34.
[96] Article 51.
[97] Article 52.

Cooperation Agreements

In the wider context, the Community's "Cooperation Agreements" are again interesting. The 1988 Cooperation Agreement with the Gulf Cooperation Council[99] includes the environment as one of the areas of cooperation.[100] Elaboration of this commitment is, however, even more general and unspecific than in the development cooperation context, providing for exchange of information and cooperation on environmental protection and wildlife development and protection.[101]

Limited as this commitment is, being effectively little more than a declaration of intent and interest, it is perhaps significant that it is included at all. This agreement contains no reference to human rights and democracy. That in itself is not surprising as it was concluded before the introduction of the human rights clause, even in the context of development cooperation. The fact that environmental protection was included suggests that the explicit treaty basis of competence was of real significance at this point since this existed in relation to the environment following the SEA but not in relation to human rights and democracy. It also potentially reflects, once again, the political sensitivity in relation to fundamental rights, which was not felt in relation to the environment.

The disparity between the obligation on the part of the ACP states (limited as it is) and the loose commitment of the Gulf states, dating initially from about the same period, is readily explained by the different context. The scope and objectives of development cooperation are quite different to those of "economic" cooperation. Related to this, the Community's commitment to financial assistance in the development cooperation agreement permits it to impose conditions and standards which would be inappropriate in a more commercial agreement.

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[98] Articles 53 and 61 respectively.
[99] Cooperation Agreement between the European Economic Community, of the one part, and the countries parties to the Charter of the Cooperation Council for the Arab States of the Gulf (the State of the United Arab Emirates, the State of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Quatar and the State of Kuwait) of the other part - Joint Declarations - Declaration by the European Economic Community - Exchange of Letters OJ [1989] L54/3.
[100] Article 1.
[101] Article 9.

Trade Agreements

In the early trade, commercial and economic cooperation agreements with Central and Eastern Europe, the protection of the environment *per se* was not an objective of cooperation. In the Agreement with Lithuania for example the *objectives of economic cooperation* include no reference to the environment.[102] The *areas of economic cooperation* to be particularly *promoted for the achievement of the objectives* do, however, include environmental protection. Article 34, "Cooperation on environment and natural resources" provides for comprehensive consideration and protection of the environment in all areas including cooperation measure, the development of environmental legislation and protection. It also provides a basis for conclusion of a sectoral environmental agreement.

Such sectoral agreements have been concluded: for example the 1989 Cooperation Agreement between the European Economic Community and the Republic of Finland on research and development in the field of protection of the environment.[103] This agreement provided for Finnish participation in the Community multi-annual environmental research and development programme.[104] However, this possibility in the Lithuanian case has not been used. The 1997 Agreement with Mexico, in which the inclusion of the human rights clause provoked so much difficulty,[105] also provides for the possibility for separate environmental cooperation agreement however, again, this possibility has not yet been acted upon.

Australia

The other nation, of course, with whom the human rights clause provoked much argument and controversy should not technically enter into the discussion here, as the negotiations ultimately resulted in a joint declaration rather than a binding framework agreement. It is, however, interesting to briefly consider it. The *preamble*, as has been seen above, refers to the parties shared commitment to the respect and promotion of human rights, and refers also to their common interest in sustainable development. Similarly the *common goals* refer to the need to:

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[102] OJ [1992] L403/20, Article 15.
[103] Cooperation Agreement between the European Community and the Republic of Finland on Research and development in the field of the protection of the environment, OJ [1989] L304/9 (NB Pre Finnish Accession).
[104] Adopted by Council Decision of 10 June 1986, Multiannual research and development programmes in the field of the environment (1986-1990), including *inter alia*, a programme on protection of the environment.
[105] Framework Cooperation Agreement between the European Community, the Member States and Mexico, 1997.

"pursue policies aimed at achieving a sound world economy marked by ... sustained economic growth with low inflation, a high level of employment, *environmental protection*, equitable social conditions and a stable international financial system."

Thus the less commercial objectives (essential constituents of sustainable development) are couched squarely amongst the more economic. Specifically in relation to the environment the parties "confirm that we will continue to strengthen our cooperation on environmental matters, both bilaterally and through international agreements and conventions." This is itself surprising given the Australian position that human rights had no place in a Commercial agreement. It would not have been illogical to assume that that position applied equally to other non-economic interests and a joint declaration on trade. The major difference between the commitment in the joint undertaking and what was originally proposed lies in the fact that these common goals are non-binding. But if the question at issue concerned the very place of consideration of such interests in a trade context, it could be asked where the principled stance applies. This perhaps reflects, however, the fact that environmental issues have always been more comfortably received in economic contexts than human rights issues. This can be seen in particular in the context of the World Trade Organisation. This reflects once again the fact that they are less politically sensitive, perhaps as a consequence of their easily discernible relationship with free trade.

Ultimately in this case the statement regarding the environment is comparable to that made in the other cooperation agreements examined, and indeed rather similar to that given in relation to human rights in that agreement.

The recent amended proposal for integration of the environmental dimension in the development process of developing countries notes again the international commitments of the Community in this field, and the need for coherence between the internal and external aspects of the Community's environment policy. It links the strategy underlying Community environmental policy to these international commitments[106] and recalls that the Parliament and Council Decision on the review of the fifth action programme[107] called for a

[106] Such as the OECD's "Shaping the 21st Century Strategy", the Convention on Biological Diversity, The Framework Convention on Climate Change.
[107] European Parliament and Council Decision 2179/98/EC of 24 September 1998 on the review of the

stronger role for the Community in international cooperation in environment and sustainable development. A key element of that included the full integration of environmental policy in other policies, notably, again, development policy. The Decision provides for both direct and indirect support for a wide range of environmental purposes. Significantly, sustainable development in this context is defined as being:

> "the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the eco-systems by maintaining natural assets and their biological diversity for the benefit of present and future generations."[108]

The key elements of the Brundtland definition are present: yet although "welfare" suggests also consideration of social issues, the emphasis is on environmental elements. This is not surprising in a measure whose purpose is the integration of environment into other policies. Article 4.3, however, provides that particular attention should be paid to activities which contribute to, *inter alia*, poverty eradication. This demonstrates, once again, that the Community takes a broad view of the inter-dependence of environmental, social and economic objectives.

The Comprehensive Strategy Communication notes that: "While other EC Development Cooperation policies are also highly relevant to the sustainable development of developing countries, the extent to which environmental considerations can be integrated varies." It notes that, particularly in policies with *indirect* environmental links, there could be more systematic analysis of environmental considerations.[109] In view of this it proposes the initiation of more in-depth discussions on integrating environment into sectoral cooperation policies, and stresses the need for coherency in Community policies, particularly in the formulation of economic and structural adjustment policies: "in order to achieve structural growth without environmental degradation."[110]

Such consideration has been forthcoming: with recent communications on the integration of the environment into the common agricultural policy and future directions of Europe's

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European Community Programme of Policy and Action in relation to the environment and sustainable development "Towards Sustainability", [1998] OJ L275/5.

[108] *Ibidem* Article 2.

[109] This contrasts with the position of the Court in *Greenpeace supra* note 77.

[110] COM (2000) 264 final at 4.1.

environment:[111] In addition environmental (and human rights) standards are included among those for which the Community operates its generalised system of preferences.[112]

The Commission concludes however, that overall responsibility lies with the developing countries themselves, and that there are three crucial elements to integration in the development process: political will, formal inclusion in the organisational structure and institutional priority and sound management of integration process.

Conclusions

The Community has sought to establish a consistent external policy, requiring the protection of non-economic interests in its agreements with third states. In this it has achieved varying degrees of success.

In relation to human rights one of the first questions is whether the Community has competence to pursue this policy at all. What competence it has is narrow and, outside the context of development cooperation (until Nice) probably does not extend beyond ensuring that its own actions do not support violations of human rights, but one consequence of that obligation is that the requirement of conditionality is essential for the Community to remain within the bounds of its competence.

Assuming that the agreement has a proper legal basis, the next question concerns enforcement. On an inter-state level the Community has left itself open to criticism by adopting the approach of conditionality, yet maintaining its political discretion as to when to act. This problem could be avoided by adjusting the terms of the clause to reflect different circumstances, and notably, to exclude issues in which the Community does not intend to get involved. That would, however, damage the strength the policy gains from its purported universality.

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[111] Communication from the Commission to the Council and the European Parliament - Indicators for the integration of environmental concerns into the common agricultural policy COM (2000) 20 final; Opinion of the Economic and Social Committee on the "Communication from the Commission - Europe's Environment: What Directions for the Future? The Global Assessment of the European Community Programme of Policy and Action in relation to the environment and sustainable development" [2000] OJ C204/14.

[112] See Cullen for "The Limits of international trade mechanisms in enforcing human rights: the case of child

On the other hand, the Community is clearly moving in that direction by increasing the emphasis on the requirement as being not to *achieve* particular standards, but to *demonstrate a general trend in the direction of the achievement* of standards. Such cooperation may make the realisation of the desired standards possible. The Community should, however, address the problem that the exercise of its policy has some exceptions, generally where a significant Community interest has been at stake and it has been unable to reach a consensus with the partner state.

In relation to the environment there is no issue of conditionality, that is to say, there is no equivalent of the essential elements and suspension clauses which apply to breaches of human rights. The broad scope of environmental protection, and how it may be defined, is relevant here. This may equally be said of human rights, however, and indeed the Community has run into difficulties in this respect. That difficulty notwithstanding, the commitment to human rights has been enforced, and has led on occasion to the suspension of elements of the agreements.

It is surprising that the internal commitment to the environment has not been carried through into the Community's external relations more forcefully at a time when concerted action was being taken to promote another non-economic interest in the same relations. Yet it is unsurprising from the perspective that human rights conditionality is required by the Community's duty not to breach human rights.

In any case, there is an element of conditionality in the environmental obligations in relation to the Europe Agreements. If a partner state fails to comply with its undertakings it will not be permitted to accede to the Community. In that context the lack of conditionality within the agreement, becomes an irrelevance, it operates at a different level and the partner state will have to continue to endeavour to improve its standards or it will never accede.

In some ways this is similar to the early approach taken to human rights, where conditionality effectively operated before the conclusion of the agreement. In that case the incentive was cooperation itself, now, in this context, the incentive is accession. The problem encountered by the Community before the introduction of conditionality, that

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labour" Int. Journal of Children's Rights 7 (1999) 1-29 for discussion of GSP.

partner states failed to continue to apply human rights standards following conclusion of cooperation agreements, should not occur where the state has acceded to the Community.

The significance of Cotonou, in emphasising sustainable development and its linkage of environmental considerations and human rights should not be overlooked. That these two concerns should be tied together externally, and perhaps increasingly internally (as in the development of the Charter) merits closer comparison of them also in the international context.

There is no doubt that whatever the motivation, the strategic importance of a partner state, be it geographical or economic, is crucial to the form and force of the non-economic interest clauses, just as it is to the form of agreement *per se*. The particular human rights issues specified in different contexts also demonstrate the importance of a common view as to what standards are to be applied. This is demonstrated rather less positively in relation to its negotiation experience with Australia.

The Community, however, regardless of its primary motivation, has begun to integrate these non-economic interests into its agreements with third states, and has shown itself to be willing to act upon that.

The analysis in these first three chapters has demonstrated that the Community, internally, has been grappling with the issue of reconciling economic and non-economic interests since the early 1970s, and, for a variety of reasons, its concern for non-economic interests has been exported into its relations with third states. That being the case, as the global Community also seeks to reconcile economic and non-economic interests, it is interesting to assess the extent to which the Community approach and experience is transferable into the international context, notably in relation to the WTO.

Part II: International Law: Reconciling Economic and Non-economic Interests?

Chapter 4

The Protection of Non-Economic Interests within the Framework of the World Trade Organisation

The Framework for International Trade – The Rules of the WTO

When the European Community acts internally it is limited by the extent to which the Member States have conferred power upon it. When the Community undertakes external action and develops international policy, however, it is essential to consider also the international framework within which it operates. The basic framework governing international trade is that of the World Trade Organisation (WTO).[1] The General Agreement on Tariffs and Trade (GATT) governs any measures impinging on trade in goods, whatever their objective. It should be noted that there are additional agreements; including sanitary and phyto sanitary measures (SPS), technical barriers to trade (TBT), trade in services (GATS), and intellectual property (TRIPS).[2] The WTO regulates both its members' trade measures and regional trading arrangements, such as the EC itself. The ultimate regulation of any trading measures is, therefore, carried out through the WTO.[3]

It is worth noting in this context that, as Doaa Abdel Motaal observed, "[while] the WTO's principal mandate is to work towards an open, equitable, non-discriminatory trading system it only addresses environmental issues in so far as environmental policies have trade related aspects".[4] This applies equally to the pursuit of any non-economic interest. The WTO therefore only impinges upon the trade related elements of the Community's policies. It would seem likely that maintaining such a division would become more difficult as the

[1] See below for discussion of the development of the GATT and WTO.
[2] These agreements are contained in Annex 1A WTO Agreement.
[3] For the consequent discrepancies in the application of WTO rules see Cremona, "Neutrality or Discrimination ? The WTO, the EU and External Trade" in de Burca and Scott *The EU and the WTO: Legal and Constitutional Issues.*
[4] Doaa Abdel Motaal "Trade and Environment in the WTO: Dispelling Misconceptions" RECIEL 8(3) 1999.

pursuit of sustainable development deepens. The GATT Secretariat, however, stated in its 1992 "Report on Trade and the Environment" that international trade and sustainable development are not inherently linked, but that trade is a "magnifier", enabling countries with adequate sustainable policies to pursue these better. Nevertheless, the Preamble to the Agreement Establishing the WTO includes sustainable development (and environmental protection) among its objectives. It does not, however, make any reference to human rights *per se*. This contrasts with the position in the Community where sustainable development is included in Article 6 EC and there is the duty of environmental integration. Furthermore, the Commission's strategy on sustainable development confirms that economic growth and social cohesion may not be separated from environmental protection. Thus, from the outset there appears to be a different view of the relationship between trade and non-economic interests. This reflects the narrower focus of the GATT: the fundamental objective of which is trade liberalisation, in contrast with the Community's developing polity.

Background to the General Agreement on Tariffs and Trade and the World Trade organization

Before exploring the relationship between trade and sustainable development, the objectives of the WTO and, particularly, the rationale underpinning those objectives must be considered. International economic law seeks to promote *economic* development and welfare gains. The promotion of the rule of law and democracy is fundamental to this. This vision of the benefits of liberal trade, on which international economic law is founded, can be seen in Smith's writings in the 18th century.[5] These benefits were, and still are, viewed as being fundamental guarantors of peaceful cooperation and restraint from conflict.[6]

Smith, even then however, recognised that the pursuit of non-economic objectives could justify (or require) a departure from the pure liberal trade or comparative advantage model.[7] A nation could therefore diverge from the objective of wealth maximization. Jackson recognises that there is little in international trade law which could deny the right to make that choice, however he argues that a nation making such a choice should pay the whole

[5] Adam Smith, *Wealth of Nations* (1776) Book IV, Chapter 2.
[6] An example of the successful operation of this principle is that of the creation of the European Community, and in its subsequent enlargements and proposed accessions.
[7] Adam Smith, *The Wealth of Nations,* Book IV, Chapter 2.

cost of that policy, and not pass it on to other states through any form of regulation.[8] This could arguably work the other way: should a nation be compelled to incur GATT compliant regulatory costs in the pursuit of a particular policy, where a cheaper national solution would be, perhaps, to impose a ban? Apparently yes: a nation will be compelled to adopt a more costly regulatory system, rather than a ban, if it wishes to benefit from the advantages of liberal international trade.[9]

Both the European Community and the General Agreement on Tariffs and Trade (GATT) arose out of the devastation of the Second World War. The original vision behind the GATT was that an "International Trade Organization" (ITO) be formed within Bretton Woods, alongside the International Monetary Fund and the International Bank for Reconstruction and Development. The GATT came into provisional force in 1948 (by virtue of a Protocol of Provisional Application) and was to be attached to the ITO on its creation. The US Congress, however, failed to ratify the Havana Charter, which would have created the ITO (it proved politically unacceptable for it to rescind its sovereignty in relation to international trade). As a result the Havana Charter was abandoned in 1951, and the GATT itself became the focus of the contracting parties in resolving trade disputes. The Havana Charter had included detailed provisions concerning governance of the proposed ITO, and also included provision on labour rights.[10] Although these were not included in the General Agreement it did comprise sufficient general provisions for a workable governance structure to be established among the contracting parties.[11]

The GATT existed in this form for almost fifty years and functioned, during that period, through the 1948 "Interim Commission for the ITO" which became a "de facto" GATT Secretariat. There was an unsuccessful attempt in 1955 to create a mini-organization (the Organization for Trade Cooperation) through which to solve institutional problems, but the US Congress (again) refused to ratify it.

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[8] Jackson, *The World Trading System Law and Policy of International Economic Relations* (1989) MIT; at p.19.

[9] *Thai Cigarettes infra.* The possibility of establishing a binding external standard which could apply, to escape this, will be discussed below.

[10] In Article 7.

[11] For discussion of the development of the GATT see Davey "An Overview of the GATT" in Pescatore *Handbook of the GATT*; Petersmann, *The GATT/WTO Dispute Settlement System* Chapter 1; Trebilcock and Howse, *The Regulation of International Trade* Chapter 1; Jackson, *The World Trade Organization, Constitution and Jurisprudence* Chapters 1-2 or Jackson, *The World Trading System Law and Policy of International Economic Relations* Chapters 1-2.

Various revisions of the GATT culminated in the Uruguay Round of negotiations which created, finally, the long-sought "World Trade Organisation" (WTO), the agreement of which incorporates the GATT.

The Dispute Settlement System

The WTO includes a binding dispute settlement procedure for dispute resolution. The GATT had had dispute settlement panels, but adoption of their reports could be vetoed by the defending state. The WTO Dispute Settlement Understanding (DSU) removes this possibility (adoption of a report can only be prevented by unanimity, or by lodging an appeal). The DSU provides a unified dispute settlement system for all the agreements under the WTO,[12] but has been controversial because of the encroachment on national sovereignty which binding settlement entails.[13] Complaints may be brought to the dispute settlement body by states, and any interested party may participate in proceedings. When a panel is requested there is a tight time frame for its creation, proceedings and report. A report may be appealed on point of law, to the Appellate Body (AB). If a measure is found to breach the obligations of the GATT, the offending state will be required to bring its measures into conformity. Failure to do so may give rise to compensation, or to temporary suspension of concessions. The "temporary suspension of concessions" is a tool with variable strength, dependent on the complaining state's economic development.[14] The impact that dispute settlement may have on national policy choices, in fields such as environmental protection and human rights is potentially significant, particularly if there is no mechanism by which to balance such issues. The question this raises is whether the WTO is an appropriate body to be carrying out such a balancing act, and whether it should be considering such issues at all.

Comparisons Between the European Community and the GATT

There were two aspirations among the negotiators of the GATT, both consistent with traditional economic theory: firstly, that more liberal trade and a reduction in the use of trade restrictions would facilitate better relations between nations, promoting world peace,

[12] Art.1 DSU (although certain of the Agreements specify particular procedures).
[13] See Jackson *The World Trade Organization, Constitution and Jurisprudence* Chapter 4.
[14] It is currently a more powerful tool for the EU than, for example, Argentina.

and secondly; that more liberal trade would promote economic well-being.[15] The European Community and the GATT thus shared the objective of international cooperation with a view to maintaining peace and security, although the Community developed a greater degree of mutual inter-dependence and integration.

Liberal Trade: A Means to an End

In each of these "organisations" it is significant that liberal trade is seen as a tool towards the enhancement of both international relations and (primarily economic) welfare gains. In neither vision is it seen as an end in itself. This is significant in the issues facing each organisation today in the resolution of potential conflict between liberal trade and non-economic interests. Essentially, if trade liberalisation was originally developed as a "tool", the status it has achieved in that role should not necessarily now mean it is an end in itself. Where the priorities of the international community are changing, trade policy should evolve to reflect this. If one major objective of free trade is welfare gain (even if primarily economic) then free trade should not be pursued to the exclusion of (other) welfare issues. The significance to the global community of sustainable development cannot, in this context, be ignored. At the heart of this is the relationship between economic and non-economic issues.

The Community's commitment to sustainable development is deepening. The status of the WTO as the global trading organisation means, however, that the Community's approach cannot be considered in isolation, but can anything be learnt from the EC approach to assist the WTO in addressing this issue? Two questions therefore arise: firstly, how is the WTO handling the question of the relationship between economic and non-economic issues? Secondly, how does this compare to the Community's approach?

[15] See Jackson *The World Trading System Law and Policy of International Economic Relations* Ch. 1.

Fundamental Principles and Rules of the GATT/WTO

Objectives of the WTO as laid down in the Preamble

Tools of the GATT/WTO in the Pursuit of Liberal Trade

Before examining the provisions concerning non-economic interests in the WTO it is useful to briefly note the basic provisions of the GATT for the pursuit and protection of liberal trade. The primary aim of the GATT was restriction of tariffs. Article 1 provides for the negotiation of reciprocal concessions which must subsequently be applied in a non-discriminatory fashion, irrespective of the origin of the goods. Thus any concessions, concerning any products, negotiated between two Contracting Parties must be applied equally to all "like products" originating in, or destined for, any other Contracting Parties to the GATT: the Most Favoured Nation (MFN) principle. The essence of this requirement is non-discrimination among Contracting Parties.

Article III requires that imported products be treated no less favourably than domestically produced "like products"[16] (the "national treatment" rule) and Article XI prohibits quantitative restrictions and other measures applied on the importation of products.[17] There are certain exceptions to the principle of non-discrimination, notably that concessions in existence before the negotiation of the GATT are exempt.[18] So too are certain of the non-tariff barrier codes adopted during the Tokyo round (only the countries which have signed up to these specific codes are subject to their rights and obligations).[19]

These rules form, essentially, a framework of negative integration, which can be contrasted with the Community model of positive integration.[20] Thus the WTO creates a liberal trade area, whereas the Community has created a single market. What this means is that, in principle, any restriction will be acceptable under the GATT, unless it discriminates between imported and domestic products or constitutes an import ban.[21] The deeper

[16] The definition of "like products" has proven controversial.
[17] With certain exceptions such as for border tax adjustment.
[18] Article 1.
[19] For example the code on Government Procurement.
[20] Including mutual recognition and harmonisation of standards.
[21] See Weiler "The Constitution of the Market Place: Text and Context in the Evolution of the Free Movement of Goods" in Craig and De Burca eds *The Evolution of EU Law;* Holmes "The WTO and the EU: Some Constitutional Comparisons" in De Burca and Scott; *The EU and the WTO: Legal and Constitutional Issues.*

Community integration has proved crucial to the direction of its development, and its ability to treat competing interests.

Various regional blocs are exempted from the principle of MFN, subject to certain conditions.[22] It is this provision that permits the existence of not only the Community, but also, among others, the NAFTA and Mercosur. Without this exception they would breach the principle of MFN. Related to this, the GATT also grants specific waiver for certain preferential agreements, such as the EC-ACP agreement.[23] The GATT/WTO contains many more rules and exceptions relating to both tariff reduction and the elimination of non-tariff barriers, however it is these fundamental principles and rules that most closely concern the balance between the protection of economic and non-economic interests.

Provision for the protection of non-economic interests in the WTO

Article XX is the key provision concerning non-economic interests in the WTO, it provides for general (public policy related) exceptions from the GATT rules: these include measures: (a) necessary to protect public morals, (b) necessary to protect human, animal or plant life or health; (d) necessary to secure compliance with laws or regulations that are not inconsistent with this Agreement, (e) concerning the products of prison labour and (g) relating to the conservation of exhaustible natural resources. The Article XX exceptions are subject to an additional requirement, the "chapeau", that excepted measures do not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

Article XX clearly recognises the need to balance the objective of free trade with the regulation of other common public interests. The objectives of environmental protection and sustainable development are both referred to in the Preamble to the WTO, yet neither is mentioned in the GATT itself, nor are there any specific WTO agreements relating to them.[24]

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[22] Article XXIV.
[23] Article 9 Cotonou Convention, signed 23 June 2000, at: http://www.europa.eu.int/comm/development/cotonou/agreement_en.htm. Waiver confirmed, Doha Ministerial Declaration, 2001.
[24] Environmental protection is, however, specifically referred to in the other agreements nb SPS and TBT, infra.

Environmental Protection in the GATT and the WTO

When the GATT was negotiated the environment was not an issue of global concern. It is unsurprising therefore that Article XX does not explicitly refer to "environmental protection". The grounds of exception allowed are, however, capable of encompassing measures of environmental protection. As a result Article XX has been central to the environment-related disputes that have come before the dispute settlement procedure, both under the GATT and the WTO. This provides direct comparison with the original EC treaty, in which the exceptions to the prohibition on restrictions to free movement of goods provisions include "the protection of health and life of humans, animals or plants". [25]

The GATT set up a group on "Environmental Measures and International Trade" in 1971, to meet at the request of GATT members. Twenty years passed before the first request was made (by the EFTA members) in the run-up to the Rio Conference (1992). During this period environmental protection had a growing impact upon international trade, and was increasingly considered in the context of the GATT. The question of environmental protection and trade barriers was considered in the Tokyo Round, in the development of the Agreement on TBT. In 1982, questions were raised at GATT Ministerial level as to the environmental and health implications of the export of domestically prohibited goods. (This led ultimately, in 1989, to the creation of the Working Group on the Export of Domestically Prohibited Goods and other Hazardous Substances.)

Subsequently, the TBT and SPS agreements do contain explicit recognition of environmental objectives.[26] Similarly, in relation to agriculture, environmental programmes are exempt from cuts in subsidies. In relation to subsidies and countervailing duties, the agreement permits subsidies of up to 20% of firms' costs in adapting to new environmental laws. The GATS and TRIPS agreements also provide exemptions relating to the protection of human, animal or plant life.[27]

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[25] Article 30 (ex 36) EC.
[26] *Infra.*
[27] See GATS Article 14 and TRIPS Article 27.

The Committee on Trade and Environment

In 1994 the WTO set up a Committee on Trade and Environment, this is essentially a consultative and policy developing body and it has no executive or legislative powers. Its mandate is two fold: to identify the relationship between environmental measures and trade, and to make recommendations on any necessary changes to the WTO agreements. These must, notably, be compatible with the principle of non-discrimination. The CTE operates within certain parameters: that the WTO is a trade rather than an environmental organisation; that the GATT permits the pursuit of non-discriminatory environmental policies; that environmental policies require coordination within as well as among states and that market access is fundamental.

The success of the CTE in fulfilling its role is, of course, dependent on the interpretation given to these parameters; for example, satisfaction of the requirement that national policies are non-discriminatory depends upon the interpretation given to "like" products.

In the treatment of the environment in the GATT/WTO a parallel may once again be seen between the GATT and the Community in terms of lack of central action, but developments outside the core of the GATT.[28] During this same period several environment related disputes came before the GATT panel. Unlike the ECJ, however, the GATT panel did not take a leading role in environmental protection. This is inevitable given the different principles underlying these organisations: the Community with its positive integration, the GATT looking primarily for national treatment. The framework nature of the EEC treaty, and the interpretative role of the ECJ are also significant here. Once again, we return to the fundamental difference, even in the early stages, of what each organisation was seeking to create.

Trade-Environment Disputes Before the GATT Panel

Tuna and Tuna Products

The first "environmental" dispute to come before the GATT Panel was brought by Canada against the United States, following a US import prohibition on tuna and tuna products.[29] Canada had seized 19 US fishing vessels and arrested a number of fishermen because the

[28] See Chapter 1.
[29] US Prohibition of Imports of Tuna and Tuna Products From Canada, BISD 29S/91 Report adopted

vessels were fishing, without authorization, in waters they considered to be under its fisheries jurisdiction. The US, however, did not recognize Canada's jurisdiction over these waters and therefore introduced a retaliatory import prohibition.[30] Canada argued that this measure was discriminatory, and therefore breached Articles I and VIII.[31] They also argued that in negotiations under Article XXIII:1 the US delegation had not disputed that the measure breached the GATT, and had been ready to negotiate compensation.[32]

The US responded that the measure was justified by Article XX(g) GATT,[33] was not discriminatory, as "similar measures had been taken for similar reasons against imports from other countries (e.g. Costa Rica and Peru)"; and was not motivated by trade considerations.[34]

The US justification for the measure (Article XX (g)) was based firstly upon tuna being an exhaustible resource, which was accepted by Canada. Secondly, the measure allegedly met the requirements of non-discrimination as it was taken in conjunction with domestic measures concerning consumption and production of tuna, although not specifically Albacore tuna. Thirdly, it concerned the international management of tuna conservation. Finally, The US argued that the measure was not a disguised restriction on trade, as the effect on trade was "at most nominal".[35]

The reason for the measure was, however, retaliation for Canada's action. The US argued that this action, "significantly impaired" the international management approach and, being unilateral, was unsuitable for the management of a highly migratory species. No international measures had been adopted, however, regarding Albacore tuna. The US also argued that their measure was to encourage other states to cooperate in international conservation of tuna.

22/02/1982.

[30] Section 205 of the Fishery Conservation and Management Act 1976 provides that " if the Secretary of State determined that any fishing vessel of the United State, while fishing in waters beyond any foreign nation's territorial sea, to the extent that such sea was recognized by the United State, being seized by any foreign nation as a consequence of a claim of jurisdiction which was not recognized by the United States, the Secretary of Treasury should immediately take such action as may be necessary and appropriate to prevent the importation of fish and fish products from the foreign fishery involved". Panel Report,Para. 2.2.

[31] para. 3.1.

[32] para. 3.3.

[33] Which provides exception for measures relating to the conservation of natural resources.

[34] Para. 3.5.

[35] Para. 3.9.

Canada, in response, referred to the fact that it was apparent that protection of US commercial (fishing) interests, not conservation, was the primary objective of the US measure.[36] This interpretation was supported by the fact that the US lifted their embargo following the grant of access to Canadian waters (to within 12 miles) to US fishermen.

This raised a question as to the required relationship between the measure in question and the objective of conservation of natural resources, that is, the meaning of "relating to" in Article XX(g). The US, inevitably, argued that this did not require that conservation of natural resources be the primary intention of the measure, but that the measure must "relate to" conservation.

Findings of the Panel

The panel found that the US prohibition on the import of tuna and tuna products from Canada did indeed constitute a prohibition under Article XI (concerning the prohibition of quantitative restrictions) and therefore examined whether it fell under one of the exceptions listed in Article XI:2. They found that even if import restriction had been necessary to conserve certain species of tuna, a total ban was outwith article XI:2, first, as it covered species which had not been the subject of domestic regulation and secondly because it was maintained when catch restrictions had been lifted. In addition the Panel held that in any case the language of Article XI:2(c) could not justify an import prohibition.[37]

This raised the question of whether Article XX(g) could justify the measures taken. The Panel held that, in light of measures adopted against Costa Rica, Mexico and Peru the measure against Canada was not necessarily arbitrary or unjustifiable. Nor was it a "disguised" restriction on trade, as it had been announced as a trade measure. This seems illogical – had the measure been announced as an environmental measure, but been demonstrated to be a trade measure, it would have failed, as a disguised restriction on trade. Whereas, the panel considered whether the measure, a blatant restriction on trade, could be justified on environmental grounds.

[36] Para. 3.13.
[37] Para. 4.6.

The Panel held that the measure failed the requirement that it be taken in conjunction with restrictions on domestic production or consumption, as no restriction had been applied to various individual species of tuna, including albacore, nor was any evidence provided that consumption of tuna or tuna products had been restricted in the US. Therefore the measure could not be justified.[38] Finally, the panel briefly addressed what might be thought to be a matter of crucial significance, that the measure was retaliatory. It stated only that it "could not find that this particular action would in itself constitute a measure of a type listed in Article XX."[39] The panel did not explicitly address the question of how the requirement that the measure "relate to" conservation should be interpreted. Thus it failed to address what this exception means.

This dispute demonstrates one of the central difficulties facing the WTO/GATT: distinguishing genuine environmentally inspired measures from disguised trade protectionist restrictions. The measure adopted by the US was proclaimed as a trade measure, whose alleged motivation was concern for conservation, yet it was a direct retaliation for a Canadian measure inspired by concern for the same resources.

The Herring and Salmon Dispute

The subsequent *Herring and Salmon* Dispute[40] dealt once again with a fisheries dispute between the US and Canada. In this case the dispute concerned a Canadian requirement that herring and salmon caught within Canadian waters must be processed in Canada. Canada argued that this requirement was necessary in order to maintain accurate catch control, which was argued to be necessary in order to balance conservation objectives with the goal of sustaining a viable domestic processing industry.

The US complained that this measure was neither "necessary nor particularly useful" (as they regularly provided the relevant data to Canada) and that they objected to the interpretation of "conservation measures," which seemed to include balancing conservation with socio-economic concerns (namely the protection of a domestic industry).[41]

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[38] Para.s 4.8-4.12.
[39] Para 4.13.
[40] Canada – Measures affecting Exports of Unprocessed Herring and Salmon BISD 35 S (1988) 98.
[41] It would be interesting to explore whether this objective would be legitimate if an exception were permitted on the basis of "sustainable development", which is now referred to in the WTO preamble.

Findings of the Panel

In this case the panel did address the question which had been raised by the US in the *Tuna* dispute, concerning the interpretation to be placed upon the requirement under Article XX(g) that the measure *"relate to"* conservation. In the *Herring and Salmon* Report the panel was unambiguous that "relating to" meant that the measure must be *"primarily aimed at"* conservation, which it held to be less than the Article XX(b) requirement of "necessity" of the measure to achieve the desired objective. Significantly, in order to ascertain the "primary intent" of the measure, the panel considered the "least restrictive means" available to the restricting state, rather than the legislative history of the measure. This contrasts sharply with the approach of the panel to the issue of "disguised restriction on trade" in the *Tuna* dispute.[42]

In terms of reasoning this case can be compared with *Commission* v. *UK*[43] in which the UK sought to impose a ban on import of UHT milk, on grounds of public health. The Court of Justice, having considered the ban and its objective, concluded that the ban breached Article 30 (now 28), and could not be justified by Article 36 (now 30), as there were less restrictive means by which the public health objective could be achieved. Consequently the ban was held not to be "necessary." This is interesting because the Panel in the *Herring and Salmon* dispute held that the requirement that the measure "relate" to conservation, was not as strong as the requirement of necessity, yet, in finding that the measure related to conservation, the Panel applied what in the EC would be a "necessity" test.

In each of these disputes an impartial observer could argue that there was an apparently trade protectionist motive for the measure, rather than a genuine and primary concern for the environment. Thus, the findings of the panels (that the measures breached the GATT) appear relatively uncontroversial.

[42] *Supra* note 29.
[43] Case 124/81 *Commission* v. *UK* [1983] ECR 203.

Thai Cigarettes

The "least restrictive means" test, applied by the panel in the *Herring and Salmon* dispute, was followed in the *Thai Cigarettes* Panel report.[44] This dispute concerned a complaint by the US against Thai provisions that prohibited the import of cigarettes and other tobacco products, while permitting the sale of domestic cigarettes, on which excise, business and municipal taxes were imposed. The US argued that these provisions were inconsistent with GATT Article XI:1 and, as they concerned products which were not agricultural or fisheries related, could not be justified under Article XI:2(c). Nor could they be justified by Article XX(b) as they were not necessary to protect human health. In addition they maintained that the internal taxes breached Article III:2 since they permitted higher taxation on imported than domestically produced cigarettes.

Thailand requested that the panel find the restriction on imports consistent with Article XI, as tobacco was an agricultural product and Thailand had taken action to reduce both the area within which tobacco could be grown domestically and the production of cigarettes. In relation to Article XX(b) they argued that measures to control smoking had been adopted by the Government and that these would only be effective if imports were prohibited because chemicals and other additives contained in US cigarettes might make them more harmful than Thai cigarettes. In relation to the excise, business and municipal taxes they asserted that these were not higher for imported cigarettes than for like domestic products, and therefore were not in breach of GATT Article III.

Findings of the Panel

The Panel held that the Thai restriction on imports did breach Article XI, because no imports had been permitted during the last ten years, which constituted a total restriction. In considering whether this measure could be justified the panel held that it could not because Article XI:2(c)(i) which refers to agricultural products has been defined as referring to "fresh" products and that the domestic product affected had to be that produced by farmers.[45] Accordingly, the only domestic restrictions relevant to Article XI:2(i)(c) were those Thailand had imposed on the production of leaf tobacco, and that therefore the only

[44] Thailand – Restrictions of Importation of and Internal Taxes on Cigarettes, *Report of the Panel Adopted on 7 November 1990 (DS10/R – 37S)* (BISD 37S/200).

[45] Note ad Article XI:2(c), which under Article XXXIV is an integral part of the General Agreement. This definition was confirmed in Report of the Panel on *"Canada – Import Restrictions on Ice Cream and Yoghurt"* L/6568, para 66, adopted 4 December 1989 and Report of the Panel *on "Japan – Restrictions on the*

imported products which could be similarly restricted were "like" products: leaf tobacco and such products as met the requirements of the note on Article XI:2 (c). Thus cigarettes could not be included as eligible for exception.

Regarding Article XX(b) the Panel held that smoking does constitute a serious risk to human health and therefore measures to reduce smoking could be within the scope of Article XX(b). But the Panel stuck at the requirement of "necessity". It followed an earlier report which had considered a potential exception under Article XX(d): "a contracting party cannot justify a measure inconsistent with other GATT provisions as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it."[46] In the light of this the Panel examined whether alternative measures were available to the Thai Government, which could satisfy its concerns. Concerning quality, the Panel concluded that measures such as labelling and ingredient disclosure requirements would be appropriate. Regarding the objective of reducing consumption, the panel held this could potentially be achieved by advertising bans. Therefore the measure failed the necessity test. With reference to the taxes the Panel found that the current Thai regulations (which removed the discrimination) were compliant with GATT.

Thus in this case the "least restrictive means" test was again used to establish necessity. This dispute highlights a significant problem facing the Panels in the interpretation of the exceptions under Article XX. In invoking the necessity test,[47] the panel did not consider the *practicalities* for the Thai Government to adopt such other measures: it ignored the regulatory or compliance costs which might be incurred. This in itself raises a question regarding the *Panel's judgment* of the "availability" of alternative measures, and particularly, whether the restricting state may "reasonably be expected to apply" such alternatives.

Import of Certain Agricultural Products" BISD 35S/163, paragraph 5.3.12, adopted on 22 March 1989.
[46] Report of the Panel on *"United States – Section 337 of the Tariff Act 1930"* L/6439, paragraph 5.26, adopted on 7 November 1989.
[47] *Ibidem.*

Comparison with the ECJ approach

This provides for interesting comparison with the ECJ approach. Discriminatory measures are difficult to justify on the grounds of public health, as they either fail the proportionality test, or constitute arbitrary discrimination or a disguised restriction on trade. Thus, it seems likely that the ECJ would also have condemned the Thai import ban. However, there is some uncertainty in this, arising from *Commission* v. *Ireland.*[48] In this case, the ECJ permitted an import licence requirement (although less restrictive means would have been available) on the grounds of the particular health standards of Irish poultry. The Court held that it was necessary to balance the inconvenience of the administrative and financial burden, as against the danger to animal health. While in this case the Court balanced the burden of the restriction against its outcome, it took account of the particular circumstances in Ireland, permitting a scheme the equivalent of which had been found not to be justifiable in the UK.[49] This suggests that the Court does take account of particular circumstances in the State, and would therefore consider the practical availability of alternative less restrictive measures. This would certainly extend to human health. On the other hand the complexity of introducing a less restrictive measure was rejected by the Court as a justification for the more restrictive measure in *Regenerated Oil.*[50] That case concerned a scheme whereby, for ecological reasons, regenerated Italian oil was charged less tax than ordinary oil. Imported regenerated oil did not benefit from the same tax advantage, and therefore the scheme was held to breach EC law. In *PreussenElektra*, however, the Court has shifted its position again, not even considering the possible application of less restrictive measures. Both *Regenerated Oil* and *PreussenElektra* concerned environmental/ecological measures. It is certain, however, that it would not be possible to justify a discriminatory import *ban* in this manner in the Community, whereas a restriction may be viewed more sympathetically. Issues which impinge upon the practical availability of a less trade restrictive approach are more pressing in developing countries than developed, and less likely to occur in the relatively homogenised EC than globally.

[48]Case 74/82 *Commission* v. *Ireland* (Protection of Animal Health) [1984] ECR 317.
[49] Case 40/82 *Commission* v. *UK* [1982] ECR 2793.
[50] Case 21/79 *Commission* v. *Italy* [1980] ECR 1.

Superfund

The *Superfund* dispute concerned a new issue for the panel. *Superfund* concerned US (discriminatory) taxation of imports of petroleum and chemical products. The only justification offered by the US in relation to the tax on imported petroleum products was that there was no breach of GATT because the effect of the measures was minimal. The Panel responded that there was a *prima facie* breach of Article III.

In relation to the tax on imported chemical products, however, the US offered the justification that the tax was no greater than that levied on US producers to make the same chemicals. Therefore the US claimed that it complied with the Article II:2(a) conditions for exemption from the obligation of national treatment, that it was "equivalent to an internal tax ... in respect of an article from which the imported product has been manufactured in whole or in part."

The US internal tax was a response to the environmental harm caused by the use of the (constituent) products. The complainants argued that this tax, in relation to imported products, was on environmental harm occurring outside the US. The US products which were exported were tax-exempt and therefore did not have to pay for the environmental damage caused by their manufacture.

In contrast, imported products would, on their import to the US, be subject to border tax adjustment tax. In some cases the producers would have already paid for the environmental damage caused by their manufacture in their state of origin, under the polluter pays principle, and would in effect pay for the damage done in the US by the exported US products. The export tax-exemption, together with the import tax imposed, could give US exports a competitive advantage. Competing products in the state of destination will have been subject to the tax. In addition, assuming they overcome the disincentive to import to the US, imported products will potentially have paid the equivalent taxes twice and thus may be placed at a competitive disadvantage in the US.

Findings of the Panel

The panel held that the "Polluter pays" principle had not been adopted by the GATT and therefore could not be considered.[51] In addition it held that border-tax adjustment provisions "do not distinguish between taxes for different policy measures".[52] Therefore the objective of the taxes could not be considered as a factor in the determination of eligibility or otherwise of border-tax adjustment. Thus although the issue of measures relating to environmental damage outside the restricting state was raised in this case, the Panel did not find it necessary to consider it in its report.

This is an unfortunate decision because the result appears to be that product Y does not itself cause environmental damage, yet the US can impose a similar tax upon it to that imposed on manufacture of "Y" in the US, to counteract the environmental damage caused by (use of X in) its production. Consequently, the border tax looks like a tax imposed on production outside the US.

Comparison with the ECJ

The decision in Superfund contrasts with the decisions of the ECJ in *Commission* v. *Italy.*[53] Similarly, in *Hansen,*[54] it was held that a German tax relief for fruit spirits made by small businesses and collective farms must be equally applicable to imported (Community) spirits satisfying these requirements.

The distinction between the ECJ's approach and that of the GATT may, once again, be explained by the different levels of integration being sought by the two organisations, and the fact that the GATT simply stops at discrimination, whereas the Community also considers indirect distortions of competition.

To apply border eco-taxes consistently, *tax adjustment* should be permitted where use of the product in the territory will cause harm, and *tax-exemption* on this basis for exported products. It should not be permissible to tax on import merely because this is allegedly

[51] Report of the Panel on *"US – Taxes on Petroleum and Certain Imported Substances"* BISD 34th Supp. (1988) 136, 17th June 1987 (L/1675 – 34S/136). at paras 3.2.8-3.2.9.
[52] Panel Report at para. 5.2.4.
[53] *Supra* note 50.
[54] See also Case 148/77 *Hansen* v. *Hauptzollamt Flensburg* [1978] ECR 1787,

"equivalent" to tax on domestic production where this tax is on the basis of harm caused during the production process rather than the product itself. In that sense, in view of the purpose of the tax, the products are not "like" – the one causes harm to the US, whereas the other (manufactured in, for example, the EC) does not. This does not appear to be genuine "national treatment". If a state chooses to exempt products destined for export, that would be a policy choice that state is free to make, as the damage (and costs) affect its own territory.

The central difficulty in this respect lies in the refusal of the panel to examine the objective of the border tax and the tax being adjusted for. Consistency with the treatment of any other trade barriers or restrictions would require an examination of the purpose, and application, of the measures, not least to establish whether or not the measure is protectionist. The second difficulty arises from a lack of universal treatment of environmental costs. If all states used the same mechanism as the US there would be no competitive advantage. Equally, if all states used the "polluter pays" principle there would be no competitive disadvantage. The polluter pays principle would have the advantage of consistency with the product/process distinction applied under the WTO to the relationship between trade and the environment.

Tuna-Dolphin

In the *Tuna-Dolphin* dispute[55] the GATT panel had to consider the environmental objective underlying the US measure at issue. The US measure, the Marine Mammal Protection Act, concerned the method by which tuna are caught in the Eastern pacific and applied both to the US fleet and to any other boats operating in that part of the Pacific. The measure set out "dolphin protection standards" in the form of commercial fishing methods, and imposed a prohibition on the importation into the US of yellowfin tuna, and any of its derivatives, unless the US had established that the harvesting state had a similar program to that of the US, *and* that the average rate of take of "incidental" marine mammals was comparable to that of US vessels.

[55] BISD 40S/155 (DS21/R) Not adopted. The facts and issues of the case are outlined at http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm. The Panel Report has been reproduced in (1991) 30 ILM 1594. See also: Howse and Trebilcock *supra* note 11 at p.345; Kingsbury "The Tuna Dolphin Controversy, the World Trade Organization and the liberal project to Reconceptualize International Law" Yearbook of International Environmental Law (5) 1994, 1.

Mexico claimed that this measure breached GATT Articles XI (prohibition of quantitative restrictions), XIII and III (requirement of national treatment). In response the US argued that as the measure also applied to domestic tuna, it concerned only Article III, with which it was consistent, but (not being a quantitative restriction) not Article XI. Furthermore the US argued that, if found not to be consistent with Article III, the measure was justified under the public policy exceptions of Article XX(b) and (g).

Findings of the Panel

The Panel rejected the argument concerning Article III, holding that as the measure dealt with the manner in which the tuna was produced, Article III could not be applicable as it concerns measures dealing with the product themselves. Thus the panel highlighted what was to become a crucial difference in the treatment of "product" and "process" related measures. The panel then considered whether the measure, which *prima facie* constituted a quantitative restriction, and thus breached Article XI, could be justified by Article XX. Its approach was simple: Article XX could not apply to protect animal life outside the state adopting the measure. Thus, since the US measure was extra-territorial in its approach, Article XX(b) could not be applied. Having imposed this restriction on the application of Article XX, the panel went further, by stating that the requirement of "necessity" in Article XX(b) meant that in any case the US would have to demonstrate that all possible avenues of resolution of the problem had been exhausted before resorting to an import restriction. In relation to Article XX(g), the panel held that it could only be invoked to protect the restricting state's own environment. Significantly, this meant that a state could not act (unilaterally) to protect the global commons. Although not adopted, this report is indicative of the stance and approach of the panel.

Implications

The environmental implications of this report were startling. To hold that a state cannot pursue the protection of the environment outside its jurisdiction ignores the lack of national boundaries in environmental issues: air and water pollution spread, and species migrate. Thus the panel imposed a highly artificial condition with regard to protection of the environment. The product-process distinction has also proved controversial. Essentially, a

state may not regulate the import of a product on the basis of its production method, but only upon the basis of the effects of that product in its territory. Yet despite the implications of the ruling, which arise as a consequence of the reasoning therein, there can be no doubt that on the facts, the right result was arrived at.

Tuna-Dolphin II

In "*Tuna-Dolphin II*"[56] the EC and the Netherlands brought a complaint concerning the embargo within the US Marine Mammal Protection Act not against tuna from the specific exporting country (i.e. Mexico) but from "intermediary-countries" which have handled the tuna en-route from Mexico to the US. The EC and the Netherlands argued that the "intermediary-country" embargo was also in breach of Articles III and XI:1 and could not be saved by an Article XX exception. The Panel found that this was the case, but again the report was not adopted.

In this instance, in contrast to the ruling in *Tuna Dolphin I* however, the panel "could see no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to … the conservation of natural resources located within the territory of the contracting party invoking the provision." The Panel qualified that, however, with the restriction that Governments could only enforce the measure extra-territorially against their own nationals and vessels. [57]

Comparison with ECJ Jurisprudence

In one respect these cases can be compared to the ECJ *Red Grouse* case.[58] In each of these cases, success of the environmental measure was dependent upon a change of practice in another state, thus the link between the measure and the achievement of its objective is tenuous. Consequently, the measure in *Red Grouse* failed the proportionality test.[59] Although arriving at the same result, and on similar grounds, the reasoning in *Red Grouse* is inherently less problematic, as it addresses the specific facts rather than setting up (limiting) precedent for future cases.

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[56] Report circulated 16 June 1994, not adopted. Reproduced at (1994) 33 ILM 839.
[57] Report of the Panel at p. 5.20.
[58] Case C-169/89 *Gourmetterie van den Burg* [1990] ECR 2143.
[59] *Ibidem* Opinion of AG Van Gerven.

Cheyne has observed that in *Tuna-Dolphin* the Panel draws a distinction between extra-territorial and extra-jurisdictional application of Art. XX.[60] The Panel's recognition of extra-territorial jurisdiction is based upon the concept of "active personality jurisdiction", according to which a State may regulate its citizens' actions. This is supported by Article 31 of the Vienna Convention,[61] which requires that, in the interpretation of treaties, both the context of the Treaty and "any relevant rules of international law applicable between the parties" must be considered. This clearly includes relevant jurisdictional rules and, as Schoenbaum recalls, "it is well established as a matter of international law that states have an obligation to prevent damage to both the environment of other states and areas beyond the limits of national jurisdiction".[62]

But the product/process distinction was not considered by the panel in the "border tax adjustment case".[63] According to the rules on extra-jurisdictional application of regulation, any tax to correct environmental damage should be levied, consistently, at the point of production.

The *Tuna-Dolphin* decisions became, in Schoenbaum's words, a "cause célèbre" despite the consensus that they correctly interpreted the GATT, and that there are better ways (than unilateralism) to protect the environment.[64] Nevertheless, Schoenbaum recognises the place of "creative unilateralism" where it operates within the bounds of public international law.[65]

A further dispute in which the panel's report was not adopted concerned US (environmental) car taxes.[66] The US imposed a "luxury" tax on cars sold for more than $30000, and a "gas-guzzler" tax on the sale of cars which could not average more than 22.5 miles per gallon. It was held that each of these measures were consistent with Article III:2 of GATT. The accompanying "Corporate Average Fuel Economy" regulation required average fuel economy of cars sold in the US to reach a minimum of 27.5mpg. This

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[60] Ilona Cheyne "Environmental Unilateralism and the WTO/GATT system" 24 Ga J Int'l & Comp. L. 433. at 453-454.
[61] Vienna Convention on the Law of Treaties 1155 UNTS 331.
[62] Schoenbaum "International trade and protection of the environment: the continuing search for reconciliation" AJIL (1997) 91 268-313.
[63] *Supra* note 51.
[64] Schoenbaum, *supra* note 62 at p.312.
[65] *Ibidem.*
[66] Report on taxes on Automobiles, reproduced at (1994) 33 ILM 1399. See outline of facts and issues on http://www.wto.org/english/tratop_e/envir_e/edis06_e.htm.

regulation imposed a separate fleet accounting system for imported and domestic cars, and a fleet averaging system which was calculated on the basis of factors which did not relate to the products themselves, but to control or ownership of manufacturers or importers. The panel held the separate fleet accounting system to be inconsistent with Article III: 4 (because it discriminated against imported cars) and unjustifiable under Article XX(g). The panel did not consider the fleet averaging system itself in relation to Article XX(g) but found that the Regulation itself could not be justified under Article XX(d).

The number of unadopted reports from this period demonstrates one of the central weaknesses inherent in the GATT dispute settlement system: that the state complained against, if found to be in breach of its GATT obligations, could veto the adoption of a report.

In each of the above disputes the panels interpreted the provisions of the GATT according to the fundamental objective: free trade. Yet in the majority of these cases it appears that environmental protection was used opportunistically to justify trade protectionism. Thus, although it may be argued that the Panels were not impartial in considering the balance to be drawn between free trade and environmental protection, this is perhaps unsurprising in that there appears to be a lack of consistency surrounding the measures being implemented, or the commitment of the parties to environmental protection. Given that the GATT panels were set up to enforce the GATT, it would be surprising if they prioritised anything other than free trade.

When the Panel was faced with the situation in which it had to address the competing values of liberal trade and environmental protection, however, (the Tuna-Dolphin Disputes) the system of legitimation arguably broke down. The panel's response was to apply their standard approach, interpreting the GATT to achieve the liberal trade promoting result. In order to do so the Panel characterized the matter as being one of domestic sovereignty. Because the GATT permits exceptions on grounds of domestic environmental policy, it must also respect the decisions of sovereign states, as regards the pursuit of their domestic policy. Therefore the US could not be permitted to impose their environmental policy upon Mexico. This approach appears to be reasonable and rational but is weakened by the fact that the US was not seeking to impose its policy upon Mexico within Mexico, but to enforce it upon those wishing to trade with the US as regards their actions in international waters, to

protect the "global environmental commons". This makes the sovereignty argument rather harder to apply convincingly. Conversely, why should the US be permitted to unilaterally compel any other state to adopt its regulatory measures with regard to their action in international waters?

The Panel's approach had the effect of blocking a potentially crucial field of application of Article XX, and it is by no means certain that this was intended by the contracting parties when they formulated the exceptions. Thus the question arose: how could this sweeping approach by the panel be legitimated? In the event, the fact that the report was not adopted prevented this issue from being addressed. Thus, as observed by Howse, a potential weakness of the dispute settlement system (that its rulings could be vetoed by the restricting state) in this instance saved it from closer scrutiny, and a legitimacy crisis.[67]

Subsequently, however, as Howse observes, the introduction of the WTO system has removed this "safety valve." As a result the Panels have been required to at least appear objective in considering the balance to be adopted. Thus the rhetoric, and implications, if not the results, have changed.

Trade/Environment Disputes under the WTO Dispute Settlement System

Reformulated Gasoline

The *Reformulated Gasoline*[68] dispute appears initially to be more notable for being the first dispute to go before the Appellate Body (AB), than for its substance *per se*. The dispute centred upon US rules on the chemical standards for imported gasoline, which were stricter than those applied to domestically produced gasoline. Venezuela and Brazil complained that this violated the principle of national treatment, did not fall under the Article XX exceptions, and breached Article 2 of the Agreement on Technical Barriers to Trade. The US responded that it did not contravene Article III, but came within the Article XX exception under paragraphs (b), (d) and (g). The Panel held that the measure did breach Article III and was outside the Article XX exceptions.

[67] Howse "The Early Years of WTO Jurisprudence" In Weiler *et al*, *The EU, the WTO and the Nafta* at p.39.

The US appealed this decision unsuccessfully, arguing that the measure was consistent with Article XX(g). Venezuela argued that a measure "can only be "relating to" or "primarily aimed at" conservation if it was both primarily intended to achieve a conservation goal and had a positive conservation effect."[69] Both Venezuela and Brazil further argued that even if the AB overruled the panel on this point, the measure (being applied in an arbitrary or discriminatory manner) did not satisfy the Article XX "chapeau". The AB accepted this.

Findings of the AB

The AB criticised the Panel for having considered whether the "less favourable treatment" afforded to imports by the gasoline rule was primarily aimed at the conservation of natural resources. The Appellate body held that the Article XX chapeau is clear: the *measure itself* should be primarily aimed at this objective. It further criticised the panel for having applied the same necessity test to Article XX(g) as it applied to Article XX(b), despite the different expressions of the requirements of these different exceptions. Thus, whereas (b) refers to "necessary", (g) requires that the measure relates to the conservation of natural resources. The AB qualified what could have been a significant broadening of the scope of the exception contained in Article XX(g), stipulating that it must be read in the context of the whole GATT and therefore should not be applied in such a manner as would nullify Article III(4). Similarly, it held that Article III should not be applied so as to render Article XX inapplicable.

The significance of the AB exploring the different expressions and requirements of the exceptions contained in Article XX should not be underestimated. On one level this potentially widened the application of the Article XX exceptions, but simultaneously restricted the possibility of their abuse. This reasoning was subsequently relied upon by the AB in the context of the *Shrimp-Turtle* dispute although not by the Panel.[70]

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[68] United States – Standards for Reformulated and Conventional Gasoline WT/DS2/R.
[69] United States – Standards for Reformulated and Conventional Gasoline, AB-1996-1 Report of the Appellate Body WT/DS2/AB/R, at B. Available at: http://www.wto.org.
[70] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (98-1710), 15 May 1998; Appellate Body Report AB-1998-4 WT/DS58/R (98-0000), 12 October 1998, (1998) 38 ILM 121 both available online at http://www.wto.org.

Shrimp-Turtles

The *"shrimp-turtle"* dispute concerned a US measure to protect certain species of sea-turtle from incidental capture in shrimp-fishing. In 1987, the US enacted a regulation requiring US shrimp trawlers to use "turtle excluder devices" when fishing in areas where sea-turtles were likely to be. In 1989, a provision was introduced prohibiting the import of shrimp or shrimp-products harvested with technology which may adversely affect sea-turtles,[71] unless the harvesting nation certified annually to the US that it had a regulatory program (and incidental take rate) similar to that of the US. Consequently, any country wishing to export shrimp or shrimp products to the US, with a natural population of sea-turtles within its waters, had to impose US style requirements on their shrimp fishermen: effectively requiring turtle excluder devices. Significantly, in introducing this provision the US did not treat all exporting states in the same manner. The provision originally applied to states of the Caribbean and Western Atlantic but from 1996, all imports (from all states) had to be accompanied by a declaration that the shrimp had been harvested in a manner that did not adversely affect sea-turtles, or originated in a "certified" country. Almost immediately this changed again: only shrimp originating in "certified" states could be imported into the US. Thus the US moved from a restriction based on the process of catching the specific shrimp, to a restriction based on its country of origin.

The Findings of the GATT Panel

The panel held that this measure constituted a "prohibition or restriction" on import and therefore a breach of Article XI and that the provision had breached the "national treatment" requirement of Article III. *Prima facie*, the measure complied with that requirement: imported shrimp must satisfy the requirements applied to US produced shrimp. But the question of what constitutes a "like" product arose.

The GATT panels have consistently held the requirement of "like" to refer to the product and its specifications itself, and not to its process of production or extraction. The US requirement concerned the *process* of extraction or production, rather than the product itself, and indeed differentiated on the basis of *assumptions* about processes used in its state of origin. Thus it breached the national treatment rule under Article III, as it affords different treatment to potentially similar shrimp dependent on how (and where) it is

produced, rather than on the basis of the qualities of that shrimp. As Scott observes, the effect of this is that: "[W]hile *de jure* the principle of national treatment is preserved, *de facto* it has been undermined in the case of product standards."[72]

The Ruling of the Appellate Body

The AB, however, ruled that the measure fell within the scope of Article XX(g), notwithstanding that it constituted the application of US standards on activities taking place outside the US, and although it sought to distinguish on grounds of method of production. The AB reached this conclusion on the grounds that the species were migratory, and therefore could be viewed as being a shared natural "resource". Consequently, there was a "sufficient nexus between the migratory and endangered marine populations involved and the United States for the purposes of Article XX(g)."[73] Thus the US, because of its share, could be deemed to have an interest in the conservation of this resource. The AB held, however, that the provision failed to comply with the requirements of the chapeau. Notably the US had negotiated with some states and not others, thus there was construed to be arbitrary discrimination in the application of the restriction. The AB expressed a clear preference for multi-lateral measures in such contexts but, significantly, stated that unilateral measures would not always be prohibited.

The Significance of this Report

This ruling is of enormous importance, as although the provision itself ultimately failed to comply with the requirements of Article XX, this failure was a result of the manner of application of the provision rather than its purpose or substance. The AB recognised a potential right of a state to require the application of its standards by other states, for the purposes of gaining access to its markets. This is an enormous leap from the ruling in the *Tuna-Dolphin*[74] dispute. As Bianchi observes "the Appellate Body reversed the trade-centred approach that the prior GATT-WTO jurisprudence had seemed to adopt by acknowledging the importance of environmental measures and recommending multi-lateral

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[71] Section 609, US Public Law 101-102. WTO.
[72] Joanne Scott "Trade and Environment in the EU and WTO" in Weiler ed *The EU, the and the NAFTA* OUP 2000 at p. 135.
[73] Appellate Body Report at para. 133. This contrasts with the lack of nexus in the Tuna-Dolphin dispute, *supra* note 55.
[74] *Supra* notes 55 & 56.

ones."[75] Bianchi views the Appellate Body's approach as introducing an "element of reasonableness " to the test for compatibility of an environmental measure, which he compares to the ECJ approach in *Danish Bottles.*[76]

Sands emphasises that this development, albeit a departure from existing jurisprudence, did not occur "out of the blue."[77] He attributes it to a combination of "globalisation", "technological innovation", "democratisation" and "privatisation", which he views as part of a general shift in the development of international law. He sees this shift in the change in international actors, the increasing numbers of systems of international law, and the development of international courts, particularly in view of the discretion available to "judicial" bodies where any ambiguity has been left in the rules or law being applied, as in the *Shrimp-Turtle* dispute.[78]

The AB in the *Shrimp-Turtle* dispute[79] while opening the door to the possibility of recognising the legitimacy of environmental measures reflecting internationally agreed standards, and as arising from multilateral environmental agreements, has not given any indication of a similar relaxation with respect to measures reflecting unilateral standards.

It is significant that in *Shrimp-Turtle* the AB indicated that it will look to the process behind a measure, rather than its substance, to determine its legitimacy. This is an approach which was consolidated in the *Beef-Hormones* report[80] and which is supported by the AB's reading of the Chapeau to Art. XX as being a two prong test: of proportionality and of freedom from arbitrary discrimination. In contrast, the ECJ tends to role these tests into one. The AB makes it clear that a measure may be within the Article XX exceptions, and even proportionate, yet breach the chapeau if due process is not observed in its adoption, constituting arbitrary discrimination. As Cremona observes,[81] in this respect the AB sees the right to invoke an Article XX exception as being in direct competition with the rights of

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[75] Andrea Bianchi "The Impact of International Trade Law on Environmental Law and Process" in Francioni (ed*) Environment, Human Rights and International Trade* Hart 2001 at p.120.
[76] Case C302/86 *Commission* v. *Denmark* [1998] ECR 4607.
[77] Philippe Sands, *"Turtles and Torturers: The Transformation of International Law"* 33 NYUJ Int'l L & Pol. 527 at pp. 536 *et suiv.*
[78] *Supra* note 70.
[79] *Ibidem*
[80] *US* v. *EC:* EC Measures concerning Meat and Meat Products, Report of the Panel, 18 August 1997, WT/DS26/R; Report of the Appellate Body, 16 January 1998 WT/DS26,48/AB/R.
[81] Cremona, "Neutrality or Discrimination? The WTO, the EU and External Trade" in de Burca and Scott *The EU and the WTO: Legal and Constitutional Issues,* at 56.

other WTO members to benefit from its provisions.[82]

In this sense the WTO does not have a vision of shared interest in the protection of the Article XX public policy interests, confirming again a lack of common global interest, or polity in the WTO. Yet the requirement of due process and fair consideration of alternative standards and measures is consistent with the approach of the ECJ to indirect discrimination.[83] However, the emphasis placed upon the US's unilateral action, clearly is not reflected in EC law, where exceptions are inherently unilateral.[84]

Each of the cases considered above concerned the GATT itself, whether under the WTO or not. The SPS and TBT agreements have also, however, had some impact on this debate, notably in relation to the approach taken to public health exceptions.

Public Health: Hormones and Asbestos

The Agreement on Sanitary and Phyto-sanitary Measures

The SPS agreement, having been established to "define the manner in which member governments should create measures which reflect national policy regarding plant and animal health, as well as human health which depends upon these standards"[85] invites trade/environment/health disputes. The agreement focuses upon discrimination: permitting national standards as long as they do not constitute unjustifiable discrimination.[86] Significantly, unlike the GATT, the SPS agreement encourages harmonisation of standards through the adoption of international measures.[87] It also permits the adoption of higher standards on the basis of scientific evidence of risk, or following a risk assessment.[88] Where there is insufficient scientific evidence, a state can adopt an interim measure, on the basis of available information. This must, however, be periodically reviewed. In adopting measures states are bound to consider the objective of reducing trade restrictive effects.

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[82] Shrimp-Turtles AB report at para.159.
[83] It is also consistent with the approach of Advocate-General Van Gerven in *Red Grouse, infra* note 104. See Scott, "Trade and Environment in the EU and WTO" in Weiler et al *The EU, The WTO and the NAFTA.*
[84] See Cremona *supra* note 81 at pp156-158.
[85] Dillon *International Trade and Economic Law and the European Union* at p. 128.
[86] Preamble to the SPS Agreement.
[87] Art.3.
[88] Art.5.

The leading case under the SPS concerned an EC ban on imports of beef from hormone-treated cattle.[89] The US challenged the ban on the grounds that it breached Articles I and III of the GATT, as well as the SPS agreement. The panel found that relevant international standards existed for most of the relevant hormones, and that the EC measure was not based upon these standards. The EC had argued that these standards were not relevant as they were maximum residual standards, rather than standards for ongoing use. Consequently, the next question was whether the EC standards could be justified by scientific evidence, or a scientific risk assessment. The panel found that there had been a risk assessment but that the measures were not based on this. Subsequently, it found that there was no scientific evidence capable of justifying the EC measures. Accordingly, it held the measure was an unacceptable restriction on trade.

The AB considered the issues of national standards, and the relationship between risk assessment and the measure more deeply: concluding that there must be a "rational" relationship between the two. The AB ruled that there was no rational relationship between the two in this case. One question which arises is what relationship there is between a "rational justification" and proportionality? Apparently if the threshold of risk is satisfied, the AB will not consider balancing the objective of the measure with its costs.[90]

The EC sought to exercise the precautionary principle in this case, but this did not comply with the SPS rules on risk and scientific evidence. This indicates a lack of compatibility between international environmental law, and values, and the WTO. In failing to evolve to reflect developing international law, the WTO risks losing its force and legitimacy.

The Agreement on Technical Barriers to Trade

This agreement is based on the same premise as the SPS Agreement, that national technical regulations may be justifiable, but should not constitute unnecessary restrictions on trade. This Agreement covers all products except those falling under the SPS, and government

[89] Beef Hormones, supra note 80, See Howse *supra* note 67; Dillon *International Trade and Economic Law and the European Union.*

[90] See *Japan Measures Affecting Agricultural Products (Japan Varietals)* 19 March 1999, WT/DS76/AB/R for confirmation of need for "real support" of risk assessment. At para.s 82-84. That notwithstanding, the AB will explore whether there is a less restrictive alternative.

purchases. Like the SPS, the starting point is that international standards should be used, but that where that is inappropriate, for example due to climatic reasons, other standards may be adopted.

The leading case on TBT is the *Asbestos* dispute.[91] This concerned a French ban on the manufacture, processing, import or sale of all varieties of asbestos and asbestos fibres. Canada challenged this ban on the grounds that it violated national treatment, it gave less favourable treatment to Canadian asbestos than "like products". The fundamental question was what constitutes a "like product". Canada alleged that asbestos and its substitutes were "like products" on the basis of their shared product characteristics, end uses and tariff classification. The EC responded that the products' characteristics and properties were different, so they were not "like". The panel rejected the argument that health risk should be taken into consideration in determining likeness, arguing that this was an issue to be considered under Article XX(b). The AB held that like products must be in some kind of competitive relationship, and that health considerations may be a relevant factor in determining (or excluding) likeness. It also emphasised that consumer preferences can have a bearing upon likeness, and that including health concerns in the determination of likeness did not render Article XX irrelevant.

This finding is significant: if consumer preferences can render an otherwise similar product "unlike" it may be possible to determine that there has been no breach of national treatment, and therefore no need to have recourse to the Art. XX exceptions. This would be particularly significant in relation to human rights considerations, which are not included in the Article XX general exceptions.[92]

Application of the different tests in the determination as to whether a measure may justify a trade restriction.

In the exploration of how the objectives of free trade and non-commercial interests may be balanced, and any inherent conflict treated, it is evident that the test applied in different

[91] Panel Report European Communities - *Measures Affecting Asbestos and Asbestos Containing Products* WT/DS/135/R, 18 September 2000; Appellate body Report WT/DS/135/AB/R, 12 March 2001. See Howse and Tuerk "The WTO Impact on Internal Regulations – A Case Study of the Canada-EC Asbestos Dispute" in de Burca and Scott *The EU and the WTO: Legal and Constitutional Issues.*
[92] See Chapter 5.

contexts to the interface between these interests is of crucial importance. It is, therefore, surprising how little clarity there has been on this matter.

As seen above, the GATT applied a "necessity" test in the *Thai Cigarettes* ruling[93] requiring both a causal link between the measure and the objective pursued under Article XX, and that no reasonably available less restrictive, alternative measure existed. The extent to which the Panel is competent to judge upon the "reasonable availability" of alternatives is, however, questionable. Subsequently, in the *Tuna-Dolphin* dispute[94] the necessity test required that "no alternative" to the measure existed. The requirement of "reasonable availability" of application resurfaced, however, in *Reformulated Gasoline.*[95]

It appears from the "least-restrictive means" test that the fundamental aim is to remove trade restrictions, or at least minimise their effect. Trebilcock and Howse[96] recognise this implication but argue that a "least restrictive means" test avoids the concerns, which may apply to a proportionality test, about the legitimacy of a trade panel carrying out cost-benefit analyses, or "second-guessing" the objectives of a state in implementing a trade restricting provision. Moreover, it has the advantage of potentially reconciling the objective of prevention of disguised protectionism with that of deferring to domestic choices about environmental aims. This is based on the premise that trade liberalisation should not necessarily take precedence over environmental objectives.[97]

It is submitted that this, again, ultimately requires a trade panel to weigh up the available resources and the objectives, and despite the assumed evidence from the "broader environmental policy community" could be subject to the same concerns and criticisms as are applied to a trade panel deciding on "proportionality", dependent on the evidence made available to the panel. There is no reason why similar evidence could not be made available to a panel ruling on the basis of "proportionality" of the measure.

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[93] *Supra* note 44.
[94] Supra note 55.
[95] *Supra* note 68.
[96] Trebilcock and Howse, *The Regulation of International Trade* at pp 338-339.
[97] Compare to the ECJ approach where proportionality includes consideration of whether there is a less restrictive means, see below and Tridimas *General Principles of EC Law*, at 133-136.

To introduce the principle of "proportionality" brings its own problems, however, not least of which is what it itself entails. As a general principle of Community law[98] it is applied by the Court in its case law concerning environmental restrictions on free movement of goods.[99] In the *Danish Bottles*[100] case the ECJ, significantly, defined the test of proportionality as being that of whether the measure implemented constituted the "least restrictive" possible measure. Thus the test was drawn within substantially the same ambit as the requirements of the GATT's "necessity" test. In its application of the test in *Danish Bottles* the Court, however, appeared to go beyond "least restrictiveness" and weigh up the trade restriction as against the environmental benefit. This could be said to introduce an element of "proportionality *strictu sensu*".[101]

This disparity between the expressed definition of proportionality and its application has led to inconsistency of application of the test by the ECJ.[102] Recent case law suggests, however that the ECJ will attempt to weigh up the objective and its restrictive effect.[103] Van Gerven AG in *Red Grouse*[104] defines "necessity" as requiring both a causal link between the objective and the measure and that there is no less restrictive measure available, and "proportionality" as concerning the relationship between the obstacle introduced and the objective pursued. This test mirrors the approach of the GATT as regards "necessity". Unlike the approach of the GATT panels, however, there is a recognition of a further element: that of the relationship, and balance to be drawn, between the objective pursued (i.e. environmental protection) and the restriction upon free trade.

The GATT panels have traditionally considered both a "least trade restrictiveness" test, as well as the suitability of the measure to achieving its outcome, in applying the necessity test.[105] In contrast, both the SPS and TBT Agreements make provision for consideration of both necessity and some degree of proportionality: the technical barriers to trade agreement

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[98] For an outline of the general principle of proportionality see Part I.
[99] See for example *Regenerated Oil supra* note 50.
[100] *Supra* note 76.
[101] Notaro, Nicola *"The New Generation Case Law on Trade and Environment"* (2000) ELRev. 25 467-491.
[102] See *inter alia, Danish Bottles, supra* note 76; *Danish Bees* Case C-67/97 *Criminal Proceedings Against Ditlev Bluhme* [1999] 1 CMLR 612.
[103] *Danish Bees, supra* note 102. Although see *PreussenElektra, infra* (note 112) where the ECJ did not even consider this issue.
[104] Case C-169/89 *Gourmetterie van den Burg* [1990] ECR 2143.
[105] Montini Massimiliano *"The Nature and Function of the Necessity and Proportionality Principles in the Trade and Environment Context"* 1997 RECIEL (6) 121. It should be noted, however that as has been seen there have been significant subsequent developments in the reasoning of the WTO panels, not least as in the

requires that consideration must be given to the risks of non-fulfilment of the objective. The SPS agreement is even more striking as it makes no express reference to the "least trade restrictiveness" element of the test, although requiring that account be taken of the objective of minimizing trade effects.[106]

In their comparison of the Australian approach in *Castlemaine Tooheys*[107] with the ECJ approach in *Danish Bottles,*[108] Gerardin and Stewardson[109] note a distinction in the approach of the ECJ from that of the Australian High Court in that while both applied the same "necessity test" (whether the measure was likely to attain its goal and whether it goes too far) the ECJ went on to examine whether there was a less restrictive measure available. Gerardin and Stewardson construe that while both Courts sought "either to move the debate away from the concept of necessity, or to introduce an additional more operative requirement of proportionality",[110] the Australian approach was based more on removing protectionism than the ECJ's, which sought in addition to balance the different interests at stake. Gerardin and Stewardson's conclusion on this point is that this reflects the fact that "there is a greater degree of uniformity of national non-discrimination rules affecting trade possible in Australia" as compared with the EC situation which relies on harmonisation of minimum standards and mutual recognition. This reasoning would suggest that the position in the GATT, where there is less uniformity than in the EC would require even greater balancing of interests and objectives in addition to the focus on removing protectionism. This has not been the case in practice.

The critical element of either the proportionality test, or the "least restrictive means" test when applied in accordance with Howse and Trebilcock's interpretation, is that both move the decision away from being one based purely, or predominantly, upon trade-restricting (or liberalising) considerations. This approach, however described, is consistent with the approaches of the Advocates-General of the ECJ, as well as the practical application of the test by the ECJ. In contrast, since the conclusion of the WTO, the GATT dispute settlement panels have applied the rhetoric of greater consideration of the competing interests and

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reformulated gasoline dispute, *supra* note 68.
[106] See article 5 of the Agreement.
[107] *Castlemaine Tooheys* v. *State of South Australia* (1990) 64 ALJR 145.
[108] *Supra* note 76.
[109] Gerardin, Damien and Stewardson, Raoul "Trade and Environment: Some Lessons from Castlemaine Tooheys (Australia) and Danish Bottles (European Community)" ICLQ 44 (1995) 41-71.
[110] *Ibidem.*

objectives at stake, while continuing to consistently reach results which give precedence to trade liberalisation.

In view of the contrasting approaches it is interesting to compare what might have been the outcome before the WTO, of two recent ECJ cases: *Ditlev Bluhme,*[111] and *PreussenElektra.*[112]

Ditlev Bluhme concerned the Danish prohibition on keeping a certain species of bee within a particular territory, for the purpose of protecting the indigenous species of bee, which would otherwise die out. If this measure were challenged in the WTO how would it be treated? The first issue is that this creates an obstacle to trade which breaches Article 11. Is this a discriminatory measure, however? The answer must be no, because it affects Danish as well as other bee keepers who wish to sell to that particular territory, so it does not breach Article III. In this respect it may be distinguished from the *Tuna and Tuna Products* ruling, in which a total import ban was rejected because there was no internal regulation. Can it be justified under Article XX? The ECJ dealt with this as a matter of "animal health" but it did not have the option of "conservation of natural resources" as a possible exception. There has been little objection to Article XX(g) being used in principle for the protection of endangered species,[113] therefore the measure would come within its scope. The question is therefore whether the measure is "primarily aimed at" conservation, which appears to be the case. This in turn raises the question of "necessity". Although this is a GATT matter, rather than SPS or TBT, it seems likely that Denmark would have to provide evidence of risk, and prove the rational relationship between the risk and the measure as this would seem relevant to determining whether there is a less restrictive measure available. On the facts, given the nature of the species and the risk, a less restrictive measure appears unlikely to be available. The final question is whether the fact that this is a unilateral measure is relevant,[114] again on the facts this seems unlikely: the nature of the species and the particular conservation issue renders it a specifically Danish issue, the protection is directed towards Danish territory, consequently, it appears that this case would be one in which an environmental measure would be successful before the WTO. This is unsurprising, the measure is a genuinely environmentally inspired one, and it raises no issues of extra-territoriality, thus there is no

[111] *Supra* note 102.
[112] Case C-379/98 *PreussenElektra AG* v. *Schleswag* AG [2001] ECR I-2099.
[113] *Supra* notes 55, 56 and 70.

reason why it should not satisfy the Article XX exception.

Turning now to *PreussenElektra*.[115] This ECJ judgment was controversial: it ignored proportionality, holding that the environmental objective justified the German measure, which therefore did not breach Article 28. In the WTO, the outcome would have been different. This was a scheme which breached Article XI and Article III, raising the question of whether it came within the Article XX exceptions. It was a measure primarily aimed at conservation of natural resources, so could come within paragraph (g). However, there is no doubt that a less restrictive means was available: Germany could simply have required certification of origin, to identify energy which should be subsidised. The scheme would fail the less restrictive means test. In the interests of economic integration of markets there is no doubt that this is the correct outcome.[116] The ECJ approach suggests that any measure pursuing environmental protection will not breach Article 28, which invites segregation of the market.

What the comparisons demonstrate is the difference in objectives of the WTO and EC: while the WTO seeks liberalisation of markets, and to remove obstacles to trade, the EC has moved beyond that. The limitation of environmental protection outlined in the first chapter, that it is seen only in terms of its relationship with free movement, is being eroded. *PreussenElektra* indicates that its "integration" has moved environment to a new level, it is now an element of a discernable polity, the EC's system of governance is developing: it is clearly distinguishable from the WTO perspective, and indeed from its own original position.

The GATT Status of Trade Related Measures in Multi-lateral Environmental Agreements

A question touched upon in the *Shrimp-Turtle* ruling concerns the GATT status of Multilateral Environmental Agreements (MEAs). There are twenty Environmental agreements which include trade-related measures,[117] and following considerable

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[114] See *Shrimp-Turtle*, *supra* note 70.
[115] *Supra* note 112.
[116] It is also the outcome which would be consistent with earlier ECJ jurisprudence.
[117] GATT, Trade and the Environment in 1992 identified 17. The Convention Relative to the Preservation of Fauna and Flora in their Natural State (1933), the Convention on Nature Preservation and Wildlife Preservation in the Western Hemisphere (1940), the International Convention for the Protection of Birds (1950), the African Convention on the Conservation of Natural and Natural Resources (1968), the Benelux

speculation, the ruling in the *Shrimp-Turtle* dispute suggests that such measures will be looked upon favourably. This is supported by Article 31 of the Vienna Convention, as seen above in relation to questions of extra-territorial effect. This, although reassuring to environmentalists, leaves a rather wide lacuna: Article 31 recognises the importance of rules of international law which apply between the parties, so how a measure from a multi-lateral environmental agreement (MEA) will be treated by the panel where one party to a dispute is not a party to the MEA continues to be the subject of debate, including, before the CTE.

The CTE has made it clear that it deems the current dispute settlement system of the WTO to be adequate to deal with this issue. Arguably, if the measure under the MEA were deemed to satisfy the requirements of Article XX, and be enforceable against the non-party to the MEA, it would suggest that the MEA were binding upon non-parties. This in turn raises many questions: which MEA's will be deemed to have this effect, and under what circumstances?

These questions are a consequence of the current "system" of international law, where various bodies of law exist in parallel. The MEA exists as part of a separate system of law to the WTO. The dispute settlement body is not bound to give effect to it. If the dispute settlement body, in a particular case, allows a measure, it is not as a consequence of the status of the MEA *per se*, but rather, a reflection of the fact that these two normally parallel systems of law coincide at this point, and, significantly, that they are consistent with each other in this respect. The question of whether there should be a specific exception for MEA's is slightly different, although relevant to the issue where they do not satisfy the current Art. XX. There has been considerable comment upon the status of MEAs.[118]

Convention on the Hunting and Protecting of Birds (1970), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), the Agreement on the Conservation of Polar Bears (1973), the Convention for the Conservation and Management of the Vicuna (1980), the Convention on Conservation of North Pacific Fur Seals (1957), the Montreal Protocol on Substances that Deplete the Ozone layer (1987), the European Convention for the Protection of Animals during International Transport (1968), the International Plant Protection Agreement (1951), the Plant Protection Agreement for the South East Asia and Pacific Region (1956), the Phyto-sanitary Convention for Africa (1967), the Agreement Concerning Cooperation in the Quarantine of Plants and their Protection against Pests and Diseases (1959), the Basel Convention on the Control of Trans-Boundary Movements of Hazardous Wastes and Their Disposal (1989), the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985). Not mentioned in the GATT Report, but containing trade measures is the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (Wellington Convention), 29 ILM 449 (1990).

[118] See *inter alia* Schoenbaum "Reconciling Trade and Protection of the Environment". Supra note 62 Schultz, Jennifer "Environmental Reform of the GATT/WTO International Trading System" 18 World Competition 77 at 104 (1994); Francioni, F "Environment, Human Rights and the Limits of Free Trade" in Francioni (ed) *Environment, Human Rights and International Trade*, 2001, Hart.

The judgment whether a measure satisfies Article XX is made by the GATT dispute settlement panel (or appellate panel) who inevitably approach the question from the perspective of their expertise, which is generally trade. This demonstrates the necessity of scrutiny and of assessment of the legitimacy of the interpretative processes used by the WTO panels.[119]

In the event of a conflict with a peremptory norm of international law (thus if compliance with the international trading system were to facilitate, hypothetically, breach of the "*jus cogens*" obligation prohibiting genocide) the WTO would be unable to address that. Here again there is the difficulty that the dispute settlement panel do not have jurisdiction over the enforcement of *jus cogens* obligations.[120]

The cases which lead to difficulty are those in which there is no explicit conflict, or even no clearly defined conflict, but an ambiguity as to how the relevant provisions on the different interests should be interpreted. This is, inevitably, the most common position and leads to a judgment being made as to the relative weighting to be afforded to the differing interests. This is, of course, the balancing act at the interface between trade and non-economic interests, performed by the panel, which requires careful scrutiny of their actions.

Schoenbaum proposes an amendment to Article XX to provide an exception for measures adopted to implement provisions of MEAs.[121] Dependent upon how such an amendment is expressed this might remove the need for the dispute settlement balancing act, but achieving consensus on the necessary exception would be difficult.

Conclusions

It is ultimately the states themselves who have the responsibility to ensure the GATT is compatible with other obligations, as they are bound to ensure that they do not act in conflict with prior obligations. The WTO responsibility is to enforce the rules of the GATT

[119] See below.
[120] For discussion of the existence of international law norms relating to human rights, and their relationship with the international trading system, see Cleveland S "Human Rights Sanctions and the World Trade Organisation" in Francioni (ed) *Environment, Human Rights and International Trade* 2001.
[121] *Supra* note 62 at 283-284.

alone, although being an international legal person the WTO is also bound by customary international law, and should endeavour where possible to provide interpretations of its provisions which are consistent with its obligations under wider international law. Where the WTO cannot do so, the responsibility returns to the states, as members of the WTO, to bring it into line with those binding obligations of international law. This may not be possible, however, as it may be difficult to achieve a consensus on the amendment of the GATT to reflect environmental interests.

That there is a core of environmental agreements which contain trade measures is in sharp contrast to the lack of trade agreements which contain environmental provisions.[122] One possible reason for this, offered by Schoenbaum,[123] is that it is rarely necessary to regulate the environment to protect trade, but it is frequently necessary to regulate trade in order to protect the environment.[124] If this argument is accepted, it must be accepted that it is concerned only with present, and not future, commercial interests. This is a very narrow set of interests to give precedence to.

Regulation of the environment to protect trade would equate, in practice, to regulation of how commercial entities may exploit the environment (to protect the long term interests of both trade and the environment). Regulation of the environment may be viewed as being positive protection, whereas regulation of commercial entities could be viewed entirely negatively, as a restriction. Either way, however, it appears to be impossible to separate them, suggesting there is no inherent conflict between protecting each of these interests, but rather, a long-term mutual dependency. This is not to deny the existence of short-term conflict of interest, the effects of which should not be under-estimated. Ultimately the problem of regulation is political: as regulation may cause short term pain, governments dependant upon electoral support may be reluctant to undertake the necessary regulation to ensure the long term benefit.

This raises, once again, the underlying question of why we prioritise the pursuit of free trade. What are its objectives? If the objectives include even economic *development*, this

[122] Although EC agreements tend to now make reference to environment, they do not, as seen above, provide for specific measures to protect the environment.
[123] *Supra* note 62 at p.282.
[124] Arguably this is a short term view: long term trading interests require sustainability, which in turn requires conservation of necessary natural resources.

implies a longer-term interest, which in turn requires some consideration of sustainability, and should not be primarily concerned with the protection of current economic interests. If, however, governments are reluctant to bite the bullet on this issue it seems all the more unfortunate (if inevitable) that decisions on how the environment may be protected should be left to a body of trade experts, the WTO panels and dispute settlement body.

The current position is that if a measure satisfies the conditions, and chapeau, of Article XX, it will not be held to breach the GATT. To satisfy Article XX requires not only that the measure be necessary (including that it is the least restrictive means by which to achieve its objective) but also that it be imposed with respect to due process. The Dispute Settlement Body has expressed a clear preference for multi-lateral measures, however these too must satisfy Article XX and its chapeau.[125]

Clearly many of the questions which have arisen in the context of the environment and free trade arise also in relation to the protection of human rights and their relationship to free trade. There are, however, further difficulties in this context, not least that there is no reference to human rights in the WTO, nor even exception which *prima facie* may be used to facilitate the protection of human rights issues. The deeper, underlying difficulty surrounds, once again, the definition of "human rights". It is these questions which will now be explored.

[125] See in particular *Shrimp-Turtles, supra* note 70.

Chapter 5

Human Rights Protection and International Trade

The way in which "human rights and trade" has been addressed in different international contexts is quite different to the approach to environmental protection and trade. It is sometimes necessary to regulate trade to protect human rights, just as there are times when it is necessary to regulate trade to protect the environment. Yet, unlike certain environmental agreements, there are no examples of trade regulatory measures in human rights agreements. In contrast, respect for human rights is included as an essential element of a number of (notably EC) trade agreements.[1]

Outside the EC's relations, however, human rights are rarely considered in trade agreements. Therefore it may be unsurprising that there is no human rights provision, in any form, in the WTO agreements. The WTO has traditionally been reluctant to consider development issues[2] (which impinge on human rights) or labour standards (which are certainly relevant to people's enjoyment of economic and social rights, although, arguably, not affecting an individual's fundamental human rights).

This position contrasts with the EC's approach to human rights in its trade relations. The Community approach universally encompasses and protects fundamental human rights (that is, those relating to physical integrity) although it does not, generally, extend to economic or social rights. Yet it is this branch of human rights which arguably is more directly connected to trade, unless a broad view is adopted of "welfare enhancement" as the fundamental objective of liberal trade.[3] Such a perspective arguably leads to the conclusion that trade should be regulated to protect each of these branches of "human rights" (social and economic as well as "fundamental human" rights), and also the environment. This of course would be entirely consistent with the Brundtland definition of sustainable development, adopted by the European Community. "Sustainable development" is also referred to in the preamble to the WTO, although no definition has been given to it in the

[1] See Part I for consideration of the EC's action in this respect.
[2] There is now increasing evidence that the WTO is willing to address this issue, see e.g. Doha Ministerial Declaration.
[3] Social rights, including labour rights have been more effectively protected by the Community internally.

WTO context. The question which must now be addressed in the light of this, is what is the relationship between human rights and international trade law?

Trade Measures, Human Rights and International Law

The use of trade measures to protect various human rights is not a new phenomenon: not least because international law, despite its recognition of state sovereignty, and prohibition of intervention in the internal affairs of a sovereign state, does not prohibit non-forcible, economic measures to promote human rights. As Cleveland observes: "even if human rights measures do violate the non-intervention norm ... they may constitute an acceptable use of non-forcible countermeasures to retaliate against violations of international human rights."[4]

It was established by the International Court of Justice (ICJ) in the *Nicaragua* case that while the principle of non-intervention applied to (and therefore prohibited) US *military* support for the Nicaraguan contras, this principle did not extend to prohibit the US's *economic* coercion in pursuit of the same goal.[5] This confirmed the judgment of the Court in *Barcelona Traction*[6] that all states have an interest in the protection of human rights. Human rights are thus recognised as an exception to the traditional rules of international law.

On the other hand the limits on state intervention on the grounds of human rights is not so clear, nor is how they may seek to "enforce" an *erga omnes* obligation. Article 42 of the Draft Rules on State Responsibility indicates that all states would have sufficient interest to enforce the responsibility of the state violating *erga omnes* norms, however this only authorises a state to use a recognised dispute settlement mechanism to do so. It is far from clear that the rules would allow a state which is not directly affected to use counter measures against a state violating human rights law.[7] It has been explicitly recognised, however, by the UN Human Rights Committee that provisions of the ICCPR, as a human rights covenant for the benefit of individuals, may not be the subject of reservations.[8]

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[4] Cleveland S, "Human Rights Sanctions and the WTO" in Francioni (ed) *Environment, Human Rights and International Trade*, at p. 298.
[5] *Military and Para-military Activities (Nicaragua v. US)* [1986] ICJ 14.
[6] *The Case Concerning Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)* [1970] ICJ 3.
[7] See Marceau "WTO Dispute Settlement and Human Rights" EJIL 13 (2002) 753, at 811.
[8] UN Human Rights Committee, General Comment 24 (52) General Comment on issues relating to

This serves to reinforce the significance of establishing *which human rights* are protected as *jus cogens* obligations, and customary international law. We know that any state may claim an interest in the breach of an *erga omnes* obligation, and that that interest may be in events which would be otherwise "extra-jurisdictional". It is unclear, however, what action they may take as a consequence of that interest. Recently, extreme violations of human rights have been held to constitute a risk to international peace and security, and thus to trigger the possibility of action under Chapter VII of the UN Charter "to maintain or restore international peace and security". It has been suggested that serious violations may now automatically constitute such a threat, triggering action, even without Security Council authorisation. Although this is still to some degree speculative Marceau has suggested that: "if such unilateral force can be used against massive violations of human rights, the WTO may be interpreted in parallel so as to allow trade measures to react against some such violations".[9]

Thus, while there is no reference to human rights within the WTO, the relationship between international trade and human rights is by no means easy to define, and there can be little doubt that just as human rights have developed special status and rules under international law, their relationship to international trade rules cannot be considered in isolation from broader consideration of international law.

Human Rights and the WTO

The relationship between human rights and international trade revisits some of the familiar issues from the trade and environment debate, as well as raising some new questions. Not least among which is what definition of human rights should appropriately be applied? While the difficulty in finding a balance between the protection of economic interests and the environment has raised many pressing questions, these have arisen primarily in the context of how an existing exception may (or should) be interpreted, and how two interests, recognised as inter-acting should be treated and balanced. In relation to the balance between the protection of human rights and international trade a further problem arises: that is in the identification and establishment both of any provision within the GATT which

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reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations made under the Covenant UN Doc CCPR/C/21/Rev.1/Add.6

recognises the inter-relationship between these two, and of which human rights may constitute an exception to the GATT.

The starting point, in relation to the balance between economic interests and human rights protection is that there is, as we have seen, no explicit provision in relation to human rights protection in the WTO. As has also been touched upon above, however, protection of those human rights which have developed into *jus cogens,* or *erga omnes* obligations will apparently provide legitimate justification for restriction on trade. Thus, the protection of universal fundamental human rights may be recognised as a legitimate restriction on trade within the WTO. The question is, where is the line to be drawn in relation to these rights: which rights constitute *jus cogens* obligations? Which rights constitute customary international law? Dependent upon the answer to that question, should these (or any other) rights or standards be capable of trumping free trade?

The WTO as a body has been reluctant to address the issue of human rights and trade. This appears to be largely due to the suspicion of the developing states towards what is perceived to be the protectionism of the developed world. This suspicion arose also in relation to the early attempts of the (then) EEC to include the human rights clause in its development cooperation agreement with the ACP states.[10] This raises another familiar issue: the Community has been, and continues to be, hampered by its failure to consistently define *which* human rights it seeks to protect and promote in its relations with third states. This is of course directly related to the question of which rights may be balanced in which way with free trade.

A further easily discernible difficulty concerns the fact that (under the WTO) acceptable restriction in relation to environmental protection distinguishes product from process, and does not permit differing treatment on the basis of "process". Any restrictions on the basis of human rights, however, are far more likely to relate to manner of production. The product/process distinction, already difficult to maintain in relation to environmental protection, becomes unambiguously unworkable when extended into the wider non-economic context. Restriction on the basis of manner of production is, however, explicitly

[9] Marceau, *supra* note7 at 812.
[10] See Chapter 3.

recognised in the context of prison labour,[11] which may or may not prove to be of some wider human rights application.

In the WTO the fundamental issue of the recognition of human rights has developed on two levels: traditionally it manifested itself, perhaps unsurprisingly, as a debate on the inclusion of labour standards. Recently, however, the debate has shifted to a broader consideration of the relationship between "human rights" and the WTO.[12]

Labour Rights: The WTO and the ILO

Looking at the first level: the debate surrounding attempts to include a "social clause", or labour standards. This issue is not new: a requirement to "uphold fair labour standards" was included within the Havana Charter.[13] From the 1950s there have been assertions that Article XXIII GATT gave a ground of action against states which did not eradicate "unfair labour standards", and that a specific provision on labour standards should be included within the GATT, to reflect that contained in the ITO Charter. In 1978, the ICFTU[14] proposed a GATT social clause "linking participation in the multilateral trading system to the observance of minimum labour standards".[15] It has also been argued that as Article XXIX of the GATT incorporated the provisions of the Havana Charter, which included provisions on labour standards, these must also be upheld under the GATT. This however merely raises once again the question of which standards may be protected under this provision.

Now, however, following a significant shift, the debate seems to surround not *whether* labour standards should be considered, but *where* the appropriate forum is for their consideration. The approach of the developing states, and ultimately the current position of the WTO, has been that the WTO is not the appropriate forum for the definition and establishment of labour standards. In an equally significant, clearly linked, development there appears to have been a shift in the approach to the issue of "labour standards" with the

[11] Article XX(e).
[12] Expounded primarily by Petersmann, see *inter alia* "Time for a United Nations 'Global Compact' for integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" EJIL (2002) 13 621-650; Petersmann "From Negative to Positive Integration in the WTO: Time for Mainstreaming Human Rights into WTO Law" CMLRev 37 (2000) 1363; Marceau *supra* note 7.
[13] Article 7.
[14] International Confederation of Free Trade Unions.

focus now on the issue of "labour" (or "workers') rights".

The Singapore Ministerial Declaration

It was finally concluded (by the Ministerial conference in Singapore) that despite the "commitment to the observance of internationally recognised core labour standards" the WTO was not the appropriate forum for the protection of these interests.[16] It was agreed that the International Labour Organisation (ILO) was the appropriate forum, and that the contracting parties to the WTO "support its work in promoting them."[17]

There continues to be considerable debate, however, as to whether this really is the conclusion of the debate within the WTO, and on the impact of this statement upon the future of the debate between trade and human rights. The Chairman of the conference, Mr Yeo Cheow Tong stated in his concluding remarks to the conference that there was nothing in the text to suggest the WTO could acquire the competence to develop the relationship between labour standards and trade.

Leary, however, noting these remarks, contrasts them with the comments of the US Acting Trade Representative, Charlene Barshevsky who dismissed that as simply being Yeo Cheow Tong's interpretation of the text, and that the declaration does not preclude further consideration of this issue.[18]

Thus this was far from the conclusion of the debate concerning the balance between the interests of the free market and free trade, and those of labour standards and human rights generally. Of fundamental concern at this point is the question of the extent to which free trade (the central objective of the WTO) may be (or should be) regulated to promote (or enforce) the protection of labour standards.

The first question which must be addressed in attempting to assess the relationship between the WTO (free trade) and labour standards/rights is: what are "labour standards"? Can they

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[15] See Weiss, F. "Internationally Recognized Labour Standards and Trade" 1996/1 LIEI 162 at 169-170.
[16] World Trade Organization, Singapore Ministerial Declaration, para. 4. WT/MIN(96)/DEC/W. 13 December 1996.
[17] *Ibidem*, progress on this issue in the ILO will be considered below.
[18] Leary, V. *"The WTO and the Social Clause: Post Singapore"* 1EJIL (1997) 118-122.

constitute universal fundamental rights? As has been seen, the WTO members in 1996: "renew[ed] our commitment to the observance of internationally recognized core labour standards" and "affirmed" their support for the ILO's work in promoting them. Yet this is qualified: the declaration subsequently:

"[rejects] the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration."[19]

This could be read as suggesting that WTO/ILO collaboration will continue only for this purpose (combating protectionism). For the rest, the WTO will support but not collaborate? What practical implication could there be of such a distinction? More importantly, perhaps, what is intended by "support"? Has the WTO declared that its members adhere to the standards? Are they now bound by these standards? If not, what is the value of the Ministerial declaration? The then Director-General (Ruggiero) declared shortly afterwards that the language of the declaration only permits the exchange of information between the WTO and ILO on matters such as the compatibility of ILO conventions with international trade rules.[20] This would suggest that there is relatively little legal value in the declaration. As will become apparent, the significance of subsequent ILO developments makes it quite fundamental that the WTO should cooperate with the ILO on all levels, or risk abrogating its wider welfare obligations in favour of its trading interests. Arguably, this would not be a position for which the WTO should be criticised, as it could, in fact be held to be consistent with the WTO remaining within its own area of expertise.

The statement of the WTO's commitment to the "observance of internationally recognized core labour standards" is, however, less ambiguous. The ministerial declaration apparently commits the members of the WTO to uphold internationally recognized labour standards, and indicates that the WTO as a body also considers itself to be so committed. Does this constitute considering itself and its Members to be bound? At the very least, if the WTO is committed to the observance of the standards, it would be inconsistent to read the GATT to

[19] Ministerial Declaration, *supra* note 16.
[20] "Ruggiero says Declaration Only Allows Information Swaps with ILO" at http://www.askSam.cam, cited in Charnowitz, "Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the

restrict compliance with, or observance of, these standards. This brings us back once again to the question of which core standards the WTO is "committed to the observance of." Given that this statement was made in 1996 it is not a reference to the subsequent ILO "core standards" or even the OECD standards. It is possible that the lack of specification is the result of a compromise (in the run-up to Singapore there was considerable pressure from certain parties to include a social clause within the GATT). Alternatively it may reflect recognition of the existence of a set of core standards. If so, could these be deemed to be customary international law?

Events have rather overtaken this particular issue. Under the auspices of the ILO there has been a proliferation of "labour standards" and there can be little doubt as to the need to recognise the different weight, and priority, to be afforded these. Within this body of standards and principles a distinction may be discerned between "standards" and "rights". This distinction has been the subject of not insignificant academic comment[21] and is also reflected in the ILO's own work.[22]

"Labour Standards" to "Labour Rights" – A matter of semantics?

Within the discussion on labour standards there has been a shift in the rhetoric, away from that of "standards", to that of "rights". Yet, however labour issues are described (as rights or standards), the critical question is one of interpretation.[23] The question arises once again, therefore, of the legitimacy of a panel of trade experts making decisions as to the relative weight to be accorded to non-economic considerations in their relationship with economic interests.[24] The primary question on this level remains, however: is it possible to bring any of these rights under the Article XX exceptions? Alternatively, are there any rights which represent customary international law, obligations *erga omnes*, or (specifically) *jus cogens* obligations and if so, can these bind the WTO and its members without any need for specific exception within the WTO Agreements?

Trade and Labour Standards Debate" 11 TempInt'l & CompLJ (1997) 131.

[21] See *inter alia* Blackett A. "Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation" Columbia Human Rights Law Review (1999) 31 CLMHRLR 1; and Langille B. "Eight ways to think about International Labour Standards" 1997 JWT 27.

[22] *Infra.*

[23] This is an issue familiar from consideration of the environmental exception.

[24] This issue will be further considered below.

To answer this question it is, of course, necessary to establish what it is that is being considered. Leary observes that "discussions concerning a social clause are often confused and the terminology employed is often unclear."[25] This is also obvious from the discussion of terminology, and the shift between "standards" and "rights". Leary goes on to use the terms "social clauses", "internationally recognized workers' rights" and "minimum labour standards" interchangeably, stating that: "these terms concern basically the same issues"[26]. However, in a later section it is the definition of "internationally recognized labour standards" which Leary explores, thus introducing another term for this "same issue".

To distinguish between these terms with greater precision may permit some refinement of what is being sought to be protected, and even contribute to the realisation of that protection in relation to certain categories, thus perhaps utilising the ILO development of "fundamental" rights.[27]

At this point three questions arise: the first is perhaps, *prima facie*, the most straightforward: how (if at all) can we clarify and apply a more consistent terminology? Secondly, if this is possible, can any of the Article XX general exceptions be invoked? Thirdly, what would be the status of the rights and standards identified – how would they inter-relate with the WTO legal system: could they be binding upon it? May the WTO enforce such rights?

Clarification of the terminology

Labour rights as human rights?

In order to refine our understanding of which "standards" or "rights" are being sought to be protected at different levels, and how these may be distinguished, it is useful to look first at the different ways in which labour standards have been viewed. It is notable that generally there is, and traditionally has been, very little consideration of *labour rights* by human rights activists or writers. In addition, Amnesty International have been the only "human rights" organisation to consistently attend the ILO conference. This, of course, lends weight

[25] Leary V. "Workers Rights and International Trade: The Social Clause (GATT, ILO NAFTA, US Laws) in Bhagwati and Hudec (eds) *Fair Trade and Harmonization Volume 2, Legal Analysis* MIT Press 1996, at p. 178.
[26] *Supra* note 25 at p.179.
[27] Declaration on Fundamental Principles and Rights at Work June 1998, www.ilo.org.

to the assumption that labour standards are, basically, not a human or fundamental rights issue. On the other hand, however, certain basic labour rights are expressed in the Universal Declaration of Human Rights as well as in the International Convention on Civil and Political Rights (ICCPR)[28] and the International Convention on Economic, Social and Civil Rights (ICESCR).[29]

Why is there so little crossover between the labour organisation and the human rights context, and what are the implications of that? One possible explanation is that human rights organisations tend to ignore social and economic rights altogether (partly as a result of the controversy over whether these are fundamental rights).[30] This approach is consistent with the EC approach to human rights in its trade agreements. Although there is a similar (and equally problematic) lack of definition in that context, it appears to be the rights relating to physical integrity, "fundamental" human rights, which the EC seeks to protect universally in its external relations, rather than social and economic rights which receive much more patchy consideration.[31] Aside from this conceptual difference it is possible, as Leary notes, that the lack of crossover arises from more practical factors: human rights organisations tend to focus on the states with the most "serious" human rights violations, and labour standards tend to be pursued by trade unions operating in more "localised" contexts. This is a rather sweeping assertion, but has some generalised truth. It ignores, however, the unique contribution of the ILO, and the international trade union movement. There can be little doubt that the most compelling, pragmatic, reason for the lack of crossover is the understandable concentration, in organisations of limited resources, on eliminating violations of a physical nature: torture, genocide, the most extreme human rights violations, the elimination of which is a necessary precursor to the protection of social and economic rights.

Such practical constraints are not so readily applicable to states working as an international community. An enduring limitation arises, however, from the lack of certainty concerning the extent to which international law will permit the international community to pursue "social and economic rights" in other states. To what extent can the protection of such

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[28] Art.s 8, 22.
[29] Art.s 6-8.
[30] Leary, V. "The Paradox of Workers' Rights as Human Rights" in Compa and Diamond (eds) *Human Rights, Labor Rights and International Trade.*
[31] See conclusions to Chapter 3, *supra.*

rights provide an exception to the principle of non-intervention in a sovereign state?

Thus there is a great deal of circularity in the questions to be addressed in the developing protection of different "classes" of rights. This also leads us back, once again, to the realisation that in order to pursue the protection of these interests with any degree of binding force, international consensus as to their status is required.

This is clearly a status which may only be achieved incrementally, hence bringing us full circle to the need to distinguish between which rights (or standards) we may wish to classify (and protect) at which level. Then, having distinguished between the different levels, it may at that point be possible to establish which, if any, of the labour "rights" have achieved the necessary status.

Although *prima facie* the most straightforward of the three questions, the theoretical simplicity of clarification in the terminology belies the political complexity of distinguishing between differing labour issues, and arriving at a core body of rights which have universal acceptance, and which, significantly, are capable of universal application and may thus be distinguished from other labour issues. The political complexity arises from, among other considerations, the notion that such rights, once identified as such, would, potentially, be binding.

Blackett reflects that human "rights" suggests adherence to a specific set of principles, whereas "standards" appear too dictatorial. Thus:

> "the language of human rights enables proposals to be crafted in terms of the convergence between the principles identified in general international human rights norms and the more detailed and arguably more authoritative expressions of those rights in the selected ILO Conventions."[32]

Blackwell similarly describes "worker rights" as "deontological and normatively more compelling than labour standards".[33] Labour rights, if they are universally accepted, *may* be

[32] Blackett A "Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation" Columbia Human Rights Law Review (1999) 31 CLMHRLR 1 at pp27-28.
[33] Blackwell, R. in Business and Human Rights: An Interdisciplinary Discussion Held at Harvard Law School

capable of defeating free trade. The indications at present, however, are that labour standards, such as minimum wages, will not be able to defeat liberal trade.[34] Fields recommends a minimalist test whereby he rejects the ILO rights, because they are not respected, but suggests the prohibition on slave labour, prohibition on unsafe working conditions (without full information!); prohibition on children working long hours (where family circumstances permit), and the right to freedom of association.[35] This is indeed a minimalist approach, and offers little in the way of absolute protection, which is why Fields suggests it may be acceptable, yet it would be of relatively little value, and if accepted, could even reduce the possibility of acceptance of more protective rights in the future.

In any case, leaving aside their classification, neither "rights" nor "standards" sit easily within the exceptions expressed within the GATT.

If labour rights do not come under one of the general exceptions, then, unless they become universally accepted and representative of customary international law or obligations *erga omnes* the rules of the GATT will prevail.[36] Such assimilation appears to be more likely where the interests at stake can be termed as "human" or "fundamental rights". This fact or realisation may be a contributory factor in the shift away from the terminology of "standards" towards that of "rights".[37] This shift should not necessarily be condemned as altogether cynical.

It may even be possible to discern some practical implications of the distinction between "rights" and "standards" if the European Community's experience in relation to human rights and environmental protection is recalled. While there is strict conditionality in relation to human rights protection in the EC's agreements with third states, there is no such conditionality in relation to environmental protection. As has been seen, provision in relation to the environment tends to extend towards a commitment to seek to achieve specific *standards*. This may imply that whereas rights are absolute, standards are more malleable.

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in December 1997. Published (1999) by the Harvard Law School Human Rights Program. Available online at www.harvard.edu. at p. 15.

[34] See also Langille "Eight Ways to think about International Labour Standards" 1997 JWT 27.

[35] Fields "International Labour Standards and Economic Interdependence" (reviewing Sengenberger and Campbell, 1994) 49 Indus. & Lab. Rel. Rev. 571,572 (1996). Cited in Blackett, *supra* note 32 at 32.

[36] Even in the event that they represent customary international law their effect within the WTO is by no means automatic.

On the other hand this is too simple. The distinction in form of commitment may reflect only the nature of the subject matter – which itself gives rise to the classification as "right" or "standard", with the consequent effect upon universality or enforceability. Thus while a "right" does give rise to an obligation to uphold it, a "standard" as generally accepted in this context does not. Merely re-designating a particular "standard" as a "right" does not create any inherent obligation to uphold that "right", unless there has been a shift in global perceptions to reflect the shift in designation. Blackwell is very clear in his assessment of "rights":

> "worker rights are human rights norms that govern the way in which labour is treated internationally, regardless of a country's level of development. They include individual rights like freedom of opinion and freedom of expression, as well as collective rights like freedom of association, and freedom to organize. Poverty is no excuse for slavery...."

Thus it appears that for Blackwell it is the *substance* of the "right" that determines its status, rather than any suggestion that *classification* as a right brings an obligation. Thus, there is a genuine, and practical, distinction between labour rights and labour standards, recognition of which is fundamental to establishing whether any such interests should constitute exceptions to the GATT.

Blackwell's very straightforward approach[38] provides a neat distinction. It works because it is generally accepted by the "labour movement".[39] The difficulty is in carrying this use of terminology outside that context and into the wider human rights and corporate context. One attraction of the approach is that it feeds readily into the distinction subsequently established within the ILO context: the ILO Fundamental rights. It is of course upon the ILO that the WTO has helpfully endowed all responsibility in this field.

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[37] Langille *supra* note 34.
[38] *Supra* note 33.
[39] It is also accepted by the OECD, ILO (As agreed at the World Social Summit Copenhagen, March 1995) and is consistent with broader human rights instruments including the UN Charter, UDHR and the Covenants, see Langille, *supra* note 34.

There is, thus, a workable distinction which may be drawn between such labour rights and other labour standards. This distinction is not merely semantic but has tangible implications in the way in which a balance may be sought between the protection of these rights and the interests of free trade, as compared with the balance that may be held between the enforcement of labour standards and free trade. As Blackwell further observes, once the "workers' rights" are in place, the workers have some strength (as a body) with which to pursue, for themselves, labour standards which may be appropriate to their economic context. Such standards are not appropriate for uniform international determination. It seems eminently sensible that compliance with specific labour standards should not be a matter to provide a general exception to the GATT, it would be inappropriate to attempt, for example, to impose universally, a specific minimum wage.

Fundamental Rights Principles and Rights at Work

Since the WTO Singapore Ministerial Declaration in 1996 there has been some progress in the ILO, not least the expression of a list of "core" labour rights. These rights reflect those agreed at the World Social Summit in Copenhagen in 1995 and have been stated in the ILO Declaration on Fundamental Principles and Rights at Work.[40] This identifies four core fundamental rights: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.[41] These generally focus upon the "political" labour rights, rather than an individual's economic rights (which might include, for example, a minimum wage).[42] Significantly, they reflect a core of very basic rights: potentially universal human rights, which arguably could be defended in any country, with any state of development, and the denial of which could raise serious questions for any state, at any stage of development. Even this core of rights, however, has had its universality questioned and has

[40] 86th Session, Geneva, June 1998.
http://www.ilo.org/public/english/standards/decl/declaration/text/tindex.htm
[41] Article 2 Declaration of Fundamental Principles and Rights at Work.
[42] The ILO Governing Body has identified 8 ILO Conventions as "fundamental to the rights of human beings at work, irrespective of levels of development of individual member states". These fall into four categories: Freedom of Association - Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), Right to Organize and Collective Bargaining Convention, 1949 (No. 98); The abolition of forced labour – Forced Labour Convention, 1930 (No. 29), Abolition of Forced Labour Convention, 1957 (No. 105); Equality – Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Equal Remuneration Convention, 1951 (No. 100); The Elimination of Child Labour – Minimum Age Convention, 1973 (No. 138), Worst Forms of Child Labour Convention, 1999 (No. 182). See http://www.ilo.org

been described as "western". For example Cappuyns described the OECD "core labour standards"[43] as: "a reasonable and essential set of rights from a Western point of view [however] the existence of some consensus does not mean complete consensus nor the ability and willingness to comply."[44]

The declaration of these rights as core by the ILO may, however, indicate their more universal, rather than purely Western acceptance, given that they now represent the views of over 170 ILO member states. One major hurdle which remains, however, is that the ILO has no means of enforcement of these rights by its members, nor sanction that may be applied in the face of their breach.

Nevertheless, this declaration provides a secure point of departure for consideration of universal exceptions to the GATT. The Ministerial Declaration[45] indicated that the WTO supported the rights defined by the ILO and a set of "core" rights has now been identified. There has indeed, therefore, been clarification of the rights which are sought to be protected on a universal level. The second question facing us was whether the Article XX exceptions may be invoked in the pursuit of protection of these rights?

Labour Rights and the GATT General Exceptions (Article XX)

There is no straightforward application of any of the Article XX exceptions in relation to labour rights, although certain of these are worth exploring. There is some suggestion that Article XX(a) concerning measures "necessary to protect public morals" may be of use for the protection of human rights. Thus if the "labour rights" are "human rights" this may be applicable.

Even if this is the case, it should be treated with caution however, for it may be difficult to argue that the sale of a carpet, produced by child labour in another state, is damaging to the public morality of the importing state, as it is the production method (and not the product

[43] The right of collective bargaining and freedom of association, freedom from slavery and indentured servitude and minimum age limitations (the prohibition of exploitative forms of child labour). On the OECD study see Charnovitz "Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labour Standards Debate" 11 Temp. Int'l and Comp. LJ 131, 133 (1997).
[44] Cappuyns, E "Linking Labour Standards and Trade Sanctions: An Analysis of Their Current Relationship" (1998) 36 Columbia Journal of Transnational Law 659 at 664.
[45] *Supra* note 16.

itself) which raises undoubted questions of morality. Thus it is the background knowledge concerning the production which is potentially damaging, rather than the product itself.[46] This may readily be contrasted with a restriction on the import and sale of pornography or even blow-up dolls,[47] where it is the product itself which is allegedly damaging to public morals within the importing state. This raises the same product/process distinction that has been drawn in relation to environmental objections, and it arises in this context for similar reasons. If it is public morality in the exporting state which the importing state wishes to protect, questions are raised as to extra-jurisdictional competence. In the context of environmental protection, states make choices as to the standard of protection they wish to enjoy, and the balance to be drawn between environmental and other interests. These differ from state to state. Similarly, states make judgments as to what is morally acceptable in their particular society, and these will differ not just from state to state, but also within states over even relatively short periods of time.[48] Thus morality is also a relative issue.

Arguably, in fact, the product/process distinction is more acceptable in relation to labour standards or human rights issues than environmental issues, as the effects of the choices a state makes in this field are generally restricted to within the state, whereas the effects of environmental choices spread beyond the borders of the acting state.[49]

The relative nature of public morality makes it difficult to justify the imposition of import restrictions on the basis of the manner in which a product has been made, particularly where the product itself poses no threat to morality. Thus, *prima facie*, it is difficult to include a restriction enacted to protect certain labour standards within the general exception of "public morality". There is also, as Charnovitz observes, a high potential for protectionist abuse in the characterization of a measure as a "moral" issue.

Charnovitz, however, having studied the history behind the "public morality" clause, argues

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[46] The measure may be introduced, however, in order to protect the "morals" of the exporting state, or of the producers within the exporting state. Whether a convincing "morality" argument may be made on such grounds is arguable, however, and will be dependant largely upon whether there is an international core of "morality" which can be related to.

[47] For which the exception of public morality was invoked before the ECJ in Case 121/85 *Conegate Ltd.* v. *Commissioners of Customs and Excise* [1986] ECR 1007.

[48] A UK example can be seen in the liberalisation in laws concerning the "age of consent" in the latter half of the 20th Century.

[49] The exception to this arises in relation to gross violations of human rights, which can impact upon the stability of a region, and thus have effects outwith the state committing the abuse.

that it could, indeed, potentially be used in this way. He concedes that there would be considerable pressure upon the WTO, were any dispute to arise concerning a public morality exception, to rule out any "outwardly directed"[50] protection of public morality, but holds that given the historical application of such clauses, "outward protection" would be justifiable.[51] The difficulty in relation to import bans to protect the population of the exporting country arises if comparison is made to the cases involving environmental exceptions,[52] where the import ban could be viewed as being intended to change the policy of the exporting state, thus interfering with sovereignty. The evolutionary approach by which the WTO panel shifted from its restrictive approach to the consideration of MEAs in *Tuna Dolphin,*[53] to its wider interpretative approach in *Shrimp-Turtle*[54] must, however, be relevant here. In *Shrimp-Turtle*, the panel indicated that extra-jurisdictional action *may* be permissible where it is applied in compliance with the Article XX chapeau. That is, where the measure is applied in a manner that is not indiscriminate or arbitrary, it may be permissible, even where its effects would be extra-jurisdictional. If this development in the context of environmental protection applies also to human rights protection it is possible that fundamental rights may fall under the Article XX (a) (public morality) general exception to the GATT, even where the measure is intended to change practice in another state. Where the "morality" exception is on strongest ground in relation to "outward", or "extra-territorial", protection of morals, is where the morals to be protected reflect universally accepted norms or, better still, *jus cogens* obligations.[55]

Charnovitz suggests that a WTO panel would address any dispute arising under Article XX(a) in a manner similar to that used for Article XX(b) (human health); thus looking firstly at whether the matter falls within the range of matters covered by Article XX(a) and secondly examining the "necessity" of the measure. In view of its history he concludes that the "public morality" clause would appear to cover among others "slavery, weapons, narcotics, liquor, pornography, compulsory labour and animal welfare".[56] The question of

[50] Protection directed at those outside the acting state, for example the labour force in the exporting state.
[51] Charnovitz, S "The Moral Exception in Trade Policy" 38 Va. J. Int'l L. 689.
[52] United States – Restrictions on Imports of Tuna BISD 40S/155 (DS21/R) (1991) 30 ILM 1594.
[53] *Ibidem.*
[54] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (98-1710), 15 May 1998; Appellate Body Report AB-1998-4 WT/DS58/R (98-0000), 12 October 1998, (1998) 38 ILM 121 both available online at http://www.wto.org.
[55] It appears, however, that there may be a stronger case for such interests, according to which public morality itself may tie into the second level of argument (concerning human rights and the WTO) which will be returned to below.
[56] *Ibidem* at p. 729-730.

whose morality may be protected would be considered under the issue of "necessity". In Charnovitz's view "import measures to safeguard the morals of the domestic population would probably receive the lightest scrutiny". Export bans to protect a foreign population would probably also be accepted where the domestic population was similarly protected, but are less likely to be successful where there is no equivalent domestic protection.

In this respect the question which must be considered is whether the ILO rights can be defined as universally accepted, customary international law or *jus cogens* obligations. The number of states which are party to the ILO declaration would indicate that these rights are, at least, internationally accepted. On the other hand, the low level of adherence to these rights may cast doubts over this status. If customary international law is established according to state practice then it is doubtful whether the ILO declaration constitutes CIL. If, however, it is established by the practice of certain states, and its expression in treaty by those and other states, then it is possible the declaration has reached this level. Significantly no states have expressed reservations to the declaration, therefore suggesting it is universally accepted as a declaration of the law.

Howse, like Charnowitz, also looks explicitly to "public morality" to justify trade measures to address "labour practices which violate human rights",[57] since the evolution of human rights forms "a core element of public morality" and consequently: "the concept of public morals extends to include disapprobation of labour practices that violate universal human rights".

On this basis, could a violation of labour standards which constitutes a violation of human rights, be more securely acted against on the basis of violation of customary international law? This is potentially a stronger argument, since rather than invoking a general exception to the GATT, the basis of action would be the rules of international law, which bind the WTO and its member states. Human rights, thus, constitute the underlying law which free trade may not infringe, rather than forming the exception to the law of free trade.

If the issue was framed as one of human rights *per se*, extra-territoriality may not pose a problem. The question of whether economic and social rights (as contrasted with

[57] Howse, R. "The World Trade Organization and the Protection of Workers' Rights" [1999] 3 J. Small and Emerging Bus. L. 131.

"fundamental" human rights) may justify intervention could arise, yet if the ILO declaration has established the core labour rights as "fundamental rights" this may remove this question. On the other hand, as the ILO declaration *per se* has almost certainly not established these rights as customary international law, this would highlight the difference between the rights covered: while it would almost certainly be possible to intervene to sanction forced labour, (which is independently recognised as a human rights issue) it may, possibly, be more difficult to justify intervention to enforce equal treatment. The complexities of this proposition will be discussed below.

It has been suggested that the Article XX(e) exception (relating to products of prison labour) indicates that the WTO does not preclude "outwardly directed" measures to protect foreign nationals in other states. This could suggest that outwardly directed measures may be acceptable in relation to the other exceptions, as they are not inherently precluded in the WTO.

While it may be possible to argue that Article XX(e) would provide an exception in relation to products of forced labour (as one of the core rights) this would constitute an extension of that provision beyond what is evident in its literal terms. It could not even be justified as a strictly purposive extension, given that the prison labour exception was included on strictly economic, competitive grounds, and although forced labour may on certain levels be compared with prison labour it does not necessarily raise the same issues. It may also be argued that as provision is expressly made for exception in relation to the products of "prison labour" any other labour rights to be excepted would have been explicitly mentioned. This argument may be strengthened by the fact that they were referred to in the Havana Charter, but not included in the GATT/WTO. Alternatively, it is possible that the Article XXIX incorporation of the provisions of the Havana Charter explicitly protects labour issues, without the need for an explicit public policy exception.

It has also been proposed that the explicit inclusion of an exception for the products of prison labour (a provision relating expressly to process methods) implies that public morality cannot be interpreted to include process methods, since if it could, the prison labour exception would be superfluous. This has in fact been extended to support the argument that the other exceptions should explicitly not be interpreted to include process

measures, or indeed wide social measures.[58]

It appears that, notwithstanding these doubts as to its extent, the "public morality" exception would be the most likely justification for restriction on the basis of labour rights. There are, however, problems with its application, significantly, on whether it may be used to protect the labour rights of the workers engaged in the production of a morally neutral end product.[59]

Thus it appears that the "general exceptions" are not particularly useful to us in relation to finding an appropriate balance between the protection of human rights (or labour standards) and the interests of international trade.

The third question, which we now turn to, concerns how human rights, and specifically the "core labour rights" interact with the WTO legal system without reference to the general exceptions? Are they now accepted as binding upon the WTO/membership (either by virtue of the Ministerial Declaration or as a consequence of the ILO declaration itself)? This requires us to examine the nature of relationships between different international legal systems.

Labour Rights and WTO Rules: Conflicting legal systems?

The difficulties posed in this area of law by the operation of separate legal systems arise also in relation to WTO rules and environmental law, the difference, which makes the issue more acute in relation to human rights, is that whereas there is a general exception to the WTO which has been interpreted to cover environmental measures, there has been no such

[58] See McCrudden, C "International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of "Selective purchasing" Laws Under the WTO Government Procurement Agreement" JIEL (1999) 3-48 and Fedderson CT "Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and 'Conventional' Rules of Interpretation" 7 Minn. J. Global Trade 75 (1998).

[59] It is worth recalling that in Asbestos it was indicated that consumer differentiation of products, e.g. on their health effects may distinguish otherwise like products. If consumer preferences regarding labour standards could also be viewed in this way it is possible that regulation against products made from child labour may not breach national treatment (if consistently applied). In such a case there may be no breach of GATT, and recourse to Article XX would not be necessary. However, in *Asbestos,* the public health concerns were supported by international standards, and it is possible that without this support, consumer preferences may not be held to be relevant. Panel Report European Communities - *Measures Affecting Asbestos and Asbestos Containing Products* WT/DS/135/R, 18 September 2000; Appellate body Report WT/DS/135/AB/R, 12 March 2001.

development, as yet, in relation to a human rights general exception.

Despite the lack of formal reference to human rights or labour rights it is possible that the WTO and its members are, by virtue of the Ministerial Declaration of adherence to ILO standards, read together with the ILO declaration of fundamental labour rights, bound by the core labour rights conventions. On this reading it would not be necessary that the rights fell under the general exceptions, because these would constitute binding obligations upon, rather than providing a justification for derogation from, the WTO. This proposition has not been tested.

It must be noted, however, that even if the WTO members are bound by the ILO rights, there is nothing in the WTO which gives that organization any responsibility for ensuring adherence to these rights. Thus, in the event of a breach of fundamental labour rights, the WTO itself cannot compel any states to take action against that breach, nor can it sanction that breach itself.

It would be possible for the WTO dispute settlement body to uphold any measure introduced by a WTO member state in the pursuit of protection of fundamental labour rights as not being in breach of its WTO obligations (even if it would otherwise be a prohibited restriction) but only if the rights could be brought within the jurisdiction of the GATT.[60] This difficulty underlines the lack of coordination between different bodies of international law.

A closely related issue, arguably taking the matter a degree further, concerns whether the ILO declaration of fundamental labour rights, by virtue of the large number of adherents, means that the rights protected, and the covenants declared to protect these specific rights, now constitute customary international law (CIL). However, it is stated in the annex to the Declaration that it is "of a purely promotional nature." Alston therefore observes that despite the "intentional ambiguity" concerning the status of these rights, and notwithstanding that certain parties and ILO officials would be happy if these rights were to become CIL, this has not yet occurred.[61]

[60] Marceau (*supra* note 7) raises the possibility that the WTO, as lex specialis, could take precedence over conflicting customary international law" at p. 795.
[61] Alston, P "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann"

This is supported by the number of states in fact protecting these rights: an OECD study in 1996[62] found that while 22 of 24 OECD countries adhered to the ILO conventions with regard to freedom of association, only nine of sixty seven non-OECD states complied. Similarly, on collective bargaining, 20 of the 24 OECD states complied, whereas only 15 of the 67 non-OECD countries provided adequate protection of this right. The study did not provide much data on non-discrimination, and on child labour found that while the OECD countries were generally in compliance with the ILO requirements, the non-OECD countries generally violated these.

Significantly, the OECD study, while focusing on the same rights that the ILO was subsequently to declare "fundamental", was carried out before these rights were reinforced by the ILO declaration. Since the declaration, the ILO provides country reports as part of its "follow up" to ensure the meaningful nature of the declaration. It should perhaps also be borne in mind that since 1995 the ILO has pursued a campaign for the ratification of the conventions which may have had only limited effect at the time of the OECD study. On the other hand, lack of enforcement of these conventions combined with the "declaratory" nature of the declaration weakens any argument that the conventions currently represent customary international law. The most that can be said is perhaps that they represent "soft law".

Nevertheless, there can be little doubt that the WTO as an international legal person, and similarly its members, as international legal persons, are bound by the rules of international law. Thus the WTO and its members are bound by any rules of customary international law from which they have not expressed specific reservations, as well as being bound by *erga omnes* and *jus cogens* obligations. In addition the Singapore Ministerial Declaration indicates that WTO members are considered, by their membership of the ILO, to be bound by the core ILO conventions. The Singapore ministerial declaration was reiterated in the Doha ministerial declaration in 2001. Thus there can be no question of these states claiming specific reservation from the law embodied in these conventions. Consequently, as a result

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EJIL 13 (2002) 815-844 at 830.

[62] Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade (1996) For discussion of this study see Charnovitz "Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labour Standards Debate" 11 Temp. Int'l & Comp. L. J. 131.

of the operation of the Ministerial Declaration, if not simply through the operation of CIL, there seems little doubt that these rights are binding upon the WTO and its members. Therefore, the core labour rights may be seen to be fundamental principles underlying the WTO rules, rather than derogations from WTO law. This approach may be distinguished from that applying the public morality exception, although in many respects the arguments utilised are similar to those surrounding the content of public morality.

Thus Francioni would :

> "link the idea of "public morals" to the international standards of morality and human dignity and make those standards an integral part of the logical process by which Article XX exceptions are applied"[63]

The introduction of "morality" as an element of this particular debate is closely connected to the trend in rhetoric away from labour standards towards social rights and human rights, which being "universally" accepted are more difficult to deny (or refuse) than, for example, minimum labour standards which are more obviously dismissible as protectionism.

All of the issues discussed with reference to "human rights and the WTO" reinforce the evolving nature of international values and law. If one branch of international law fails to evolve then it will become marginalized and less able to function in the broader international legal system. The greatest difficulty to resolve is that, as Cottier has observed "a comprehensive theory on trade and human rights is still missing"[64]

International Human Rights Law and the WTO: No Coherent Relationship

In practical terms, the difficulty arising from the lack of coherent relationship between international trade law and international human rights law, is that the WTO dispute settlement system makes no provision for the application or enforcement of rules of international law: the jurisdiction of the panel extends only to "applicable WTO law". WTO applicable law includes, essentially, the rules laid down in the WTO covered

[63] Francioni "Environment, Human Rights and the Limits of Free Trade" at 20.
[64] Cottier T "Trade and Human Rights: A Relationship to Discover" JIEL (2002) 111-132.

agreements.[65] Consequently, although the WTO (as an international legal person) is bound by rules of international law, there is no provision by which in the event of a breach of human rights law the WTO can act to enforce that law.

This is *prima facie* entirely appropriate: the WTO has narrowly defined objectives and a developed set of rules through which to achieve its objectives. It also has a binding dispute settlement system to ensure that its members adhere to its rules. It would be abusing its competence to seek to use that system of rules to enforce values and rights which go beyond the scope of its objectives.

Yet to turn this around is rather more interesting: if, for example, a state acts to restrict imports on the basis that the exporting state is utilising forced labour then (unless that can be brought under one of the general exceptions to the GATT) the exporting state could, hypothetically bring a complaint against the importing state for breach of its obligations under the GATT. Recognising the human rights problem at issue, the WTO dispute settlement panel would be obliged to interpret the WTO rules consistently with human rights law in so far as was possible. In the event of a conflict between the human rights rule and the WTO rules, the dispute settlement panel would not be able to rule other than that the import restriction was a breach of the GATT rules. Notwithstanding that the WTO and its member states are bound by the rules of international law, the WTO has no jurisdiction (or responsibility) to ensure non-WTO rules.[66] As Marceau observes: "A distinction exists between the binding obligations of states (WTO members) – for which states are at all times responsible – and the 'applicable WTO law'".[67] It is the responsibility of the Member States to act to ensure that the GATT could not be used in this manner. Essentially, therefore, it is for the Member States of the WTO to act to amend the GATT to permit an exception to uphold some other rules of international law. The difficulty in this would be in achieving the necessary consensus to make this amendment, and in defining the terms of the amendment. The Member States, however, remain bound by their international legal obligations, including those of international human rights law, and remain liable, under the

[65] For discussion of the extent of "WTO applicable law" see Marceau *supra* note 7.
[66] The exception to this would concern the situation in which the Human Rights obligation breached was a *jus cogens* obligation, in which case the Member States of the WTO would not have been able to contract out of its application, and the WTO obligation which inadvertently conflicted with the *jus cogens* obligation would be set aside. This raises its own difficulties, however, not least who would determine the conflict between the *jus cogens* obligation and the WTO obligation, and who could set the WTO obligation aside.
[67] Marceau, *supra* note 7 at 756.

rules of state responsibility, for any breach of their international legal obligations. As a consequence it is possible that an act may breach a human rights treaty, but be compliant with WTO law, or, as in the example, breach WTO law while seeking to enforce a human rights obligations. Thus there may be a *prima facie* conflict of obligations. It should, however, be possible to act in compliance with both sets of rules at once. Thus, there should not be any necessity for a WTO inspired measure to breach a human rights obligations

The root of this problem is the parallel systems of international law in operation, both human rights and international trade being "subsets" of the broad body of international legal rules. States are bound by both systems simultaneously, yet there is no mechanism by which, when the two systems impact upon one another, the relevant interests may be weighed up and balanced: each system operates separately.

The systems do not, however, operate entirely separately: the Dispute Settlement Understanding includes an obligation, in its rules on interpretation, that panels and the Appellate body interpret the applicable law in accordance with general principles of interpretation of international law[68]. Under the Vienna Convention this requires that the panels take into account "other relevant rules of international law"[69] which include general principles of law, customs and relevant treaties, including human rights treaties, when interpreting and assessing compliance with human rights treaties. In so doing, however: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements"[70] Consequently, where it is not possible to interpret the relevant WTO rule consistently with another rule of international law, the dispute settlement body has no jurisdiction to seek to enforce the other rule of international law.

There has been some uncertainty over whether "a rule of international law operating between the parties" should include a rule applying to some but not all the WTO members.[71] Even on the restrictive approach, which would reject such a rule of

[68] Dispute Settlement Understanding Article 3(2).
[69] Article 31(3).
[70] *Ibidem.*
[71] See Tuna Dolphin 2 in which the GATT panel did not consider CITES since it was not signed by all members of the WTO. Para 5.19. In contrast the WTO panel took a much broader approach in Shrimp- Turtle,

international law, the ILO fundamental rights should be considered, as the WTO members have jointly expressed their commitment to the observance of these rules. However, this does not remove the need to find a way to bring them into the consideration of the WTO, should a state wish to restrict its application of WTO rules in order to pursue its fundamental rights obligations.

Thus we return to the question of whether "public morality" may be interpreted to include human rights considerations, and we return to the conclusion that it may be problematic if the intention is to pursue protection of rights in another state.

The difficulties raised by the lack of coherent relationship between international trade law and international human rights law, have led to a growing body of argument that the "human rights" perspective should be incorporated into the WTO. As we have seen above this may be possible simply by adopting an "evolutionary" approach to the WTO rules, and interpreting them in accordance with developing human rights law.

The Integration of Human Rights into the WTO

While the evolutionary approach to international law, requiring consistent interpretation of each branch of international law with other developing branches, should require that WTO obligations are interpreted, in so far as is possible, consistently with international human rights law, Petersmann advocates something that looks like a step further.[72] Petersmann asserts that the statement within the UN Development report that "rights make human beings not only better democratic citizens but also 'better economic actors'" should be accepted as a common legal framework by all international organisations.[73] Petersmann's stance arises from a very market oriented approach, that human beings are more effective economically, and that economies in turn function more efficiently, where individuals enjoy the benefits of protection of human rights. Equally, he observes that economic liberalism and market integration can act to enhance the protection of human rights: that the enjoyment of property and economic rights are intrinsically linked to both wider economic liberalism, and the enjoyment of other individual rights.

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considering not only CITES but several other multilateral treaties.

[72] Petersmann EU "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" EJIL (2002) 13, 621-650.

[73] *Ibidem* at 626.

Petersmann seems to believe that the incoherence of the two systems may be addressed to some extent by recognition of individuals (as opposed to only states) within global integration law: "UN human rights law and WTO rules offer mutually beneficial synergies for rendering human rights and the social functions and democratic legitimacy of the emerging global integration law more effective. Petersmann's view is, however, determined by a concept of constitutionalisation which he doesn't adequately succeed in supporting. Howse criticises this central aspect of Petersmann's argument stating that:

> "In sum, the relation of market freedom, or free trade, to human rights is in almost all situations a complex one, which cannot be well grasped by thinking in general terms about 'synergies', nor in terms of linear or teleological progression from economic integration to human rights based constitutionalism."[74]

According to Petersmann market freedoms should be recognised as human rights and these should then be incorporated into a hierarchy in which any limits on "human rights" can only be justified by what is necessary to protect other human rights.

Recalling that Petersmann believes that liberalisation of trade is the best mechanism by which to enhance welfare, and among others social rights, it is inevitable that Petersmann should conclude that the 'fundamental market rights' should only be limited by what is "necessary" to pursue the protection of social and other rights.

Thus Petersmann observes that:

> "The universal recognition of human rights requires us to construe the numerous public interest clauses in WTO law in conformity with the human rights requirement that individual freedom and non-discrimination may be restricted only to the extent necessary for protecting other human rights"[75]

Yet as Howse observes this may not serve the general exceptions of the GATT well, notably

[74] Howse, R "Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann" EJIL 13 (2002) 651-659, at 652.
[75] Petersmann, *supra* note 72 at 645.

because as well as introducing a dubious human rights requirement to, for example Article XX (g) (conservation of natural resources), it also introduces a "necessity" test which is not present in that particular requirement for exception.[76]

In the *Reformulated Gasoline*[77] report, however, the appellate body held that the different textual formulations of the exceptions indicate that it would be wrong to suggest that "the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized"[78] was required. Thus the danger of Petersmann's test would appear in any case to conflict with the Appellate Body's reading of the Members' intentions in drafting the exceptions.

The dangers of Petersmann's approach are well expressed by Alston when he states that: "In a form of epistemological misappropriation [Petersmann] takes the discourse of international human rights law and uses it to describe an agenda which has a fundamentally different ideological underpinning."[79]

As Alston continues, the consequences of this misappropriation, if permitted, could be grave in terms of the balance and protection of human rights as currently conceived – that is, as rooted in human dignity, whereas Petersmann's vision is (according to Alston) rooted in the achievement of liberal economic policy."[80]

Petersmann's account does, however, have a superficial attraction: building human rights considerations into the operation of the WTO among other international organisations. It is submitted that the danger is that in building in the hierarchical notion of market rights as the greatest guarantor of other human rights, there will be a skewed application of human rights, and a failure perhaps to balance different human rights effectively. Thus an approach such as this which seeks to recognise human rights, but approaches it once again from the perspective that 'market liberalism comes first', will not necessarily succeed in

[76] See Chapter 6, below for discussion of the appropriate test.
[77] United States – Standards for Reformulated and Conventional Gasoline, AB-1996-1 Report of the Appellate Body WT/DS2/AB/R, at B. Available at: http://www.wto.org.
[78] *Ibidem* at 17.
[79] Alston P "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" EJIL 13 (2002) 815-844 at 842.
[80] See Petersmann's rejoinder to Alston, in which he refutes this description vigorously, "Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston" EJIL (2002) 13, 845-851.

addressing the problems identified as a consequence of the incoherence of different systems of international law, nor the failure of the international community to develop a mechanism by which, in any context, these difficulties may be resolved. In the context of the WTO it would not be entirely inappropriate to put market liberalism first, but it must equally be recognised that this, of course, perpetuates the current problems of the lack of mechanism to balance these "conflicting" interests.

Put simply, while the issue identified so far has concerned the need for international law in all its systems, to evolve in line with the developments in other areas of integration and international law, this evolution must address not just the language through which overlaps are addressed, but should also reflect substantive developments. A need to incorporate human rights cannot stop at redesignating the freedoms guaranteed by the WTO as fundamental rights, and applying them according to the assumption that liberal trade is the greatest guarantor of welfare, and therefore the rights under liberal trade have the highest place in the hierarchy. Rather, it should reassess whether the market rights give effective protection of other rights at a particular time.

Just as in the shift from labour standards to labour rights, a mere shift in the terminology will not achieve, or indicate, any change in the substance of how these "standards" or "rights" should be protected: similarly, incorporating the language of rights into the WTO system will not *per se* achieve adequate protection of other rights. In fact, it may be more damaging where, for example (as in Petersmann's example), it would introduce a new requirement before an exception may be invoked.

There is no doubt, however, that for all the dangers inherent within it from the traditional human rights perspective, Petersmann's contributions could provide the catalyst for a rigorous debate on the true nature of the relationship which should be developed between liberal trade and human rights.

Conclusions

Any conclusions on the protection of non-economic interests under the GATT are complex: not least in recognising the significant difference in status of environmental as opposed to human rights interests. It appears, from Art.XX that the environment is protected under the

GATT, whereas this appears to be lacking in relation to human rights. On the other hand the extent to which environmental protection has been realised in the disputes brought before the GATT and WTO panels is negligible: but there are two provisos to this: firstly, there has been a shift in the argument used in weighing up the competing interests in trade/environment disputes. The fact that this has not, as yet, led to a change in outcome of disputes belies the significance of the developments in principle.

Secondly, the fact that an environmental measure has not yet been held to be a legitimate restriction on trade tells us little about the cases which have not been brought, as a consequence of the existence of the exception. Many of the "environmental" measures which have been the subject of complaint, have indeed reeked of protectionism, rather than genuine environmental concern. It is perfectly possible that there are many instances in which genuinely environmentally inspired measures are not being challenged, as a result of recognition of the exception.

This should equally be borne in mind in considering the degree of protection which may be offered to human rights, without violating the GATT. First and foremost, the WTO and its members are bound by their other commitments of international law, and by *erga omnes* and *jus cogens* obligations. Consequently , if a state violates a universal human right, it will be liable for this violation under the rules of state liability. This will not, however, give rise to any GATT obligation (or competence) to protect human rights. This should not in itself cause conflict between the objectives of free trade and those of human rights protection. One explanation why a human rights exception, under for example "public morality", has not been tested or invoked before the WTO, is that the state which is subject to a genuine public morality/human rights measure would be unlikely to complain against the measure, knowing that its human rights responsibility would in any case arise in other jurisdictions.

This does not altogether explain the lack of testing of "labour rights" as an exception: why "public morality" has not been offered as a justification for a labour rights measure, or why the imposition of labour rights has not arisen, been complained of, and given rise to dispute, leading to the testing of this possibility. Presumably one factor is that, despite the shift in rhetoric (from standards to rights) and the Ministerial Declaration, there is a lack of confidence in the binding nature of labour rights and therefore in their potential for protection as "human rights".

Whatever the nature of the potential exception under public morality, there are limitations even upon its applicability (for example whether it may be used to protect the public morality in another state). Although there are signs that extra-jurisdictional measures may be permitted under certain circumstances in relation to environmental protection, it is easier to conceive of the effect upon the state imposing the trade restriction, as environmental effects do not recognise state borders in the same way as human rights issues do.

In the event of an outright conflict between the protection of human rights and the operation of the WTO, there is no means by which the WTO dispute settlement body may disapply WTO rules in order to give precedence to the human rights objective.

In relation to both human rights and the environment there remains a significant issue: that is the process by which the dispute settlement panel interprets the "conflicting" interests, and then balances the non-economic with the economic interest. Thus, at the heart of the resolution of the relationship between economic and non-economic interests is the balancing act to be performed: who should perform this act? How should they go about interpreting the "conflicting" interests? Arguably, in order to do so, the "panel" performing this balancing act should be expert in all the relevant fields, and certainly it should bring an element of objectivity to the issue. Under the present international institutional structure it is questionable whether this is the case, or is even possible. The only forum within which the balance may currently be assessed has a specific interest, in free trade.

Even if we accept that the WTO panel interpret the conflicting objectives from the underlying perspective of "welfare enhancement", Petersmann's approach demonstrates that even if a "fundamental rights" perspective is adopted, this will not guarantee objectivity, depending on the interpretation given to fundamental rights, and how different "fundamental rights" interact. Thus while Petersmann's approach is consistent with the wider objective of welfare enhancement, it is an approach that doggedly pursues free market rights as the ultimate guarantor of welfare.

This raises an issue requiring further scrutiny: both the environment and human rights may conflict with WTO law. Both, to be protected within the context of international trade, are

currently largely reliant upon the interpretation of "exception provisions" by the WTO.[81] Can the WTO fulfil its responsibility in relation to enforcement of labour/human rights standards by merely ensuring that it does not inhibit action to enforce (by acting passively rather than actively)? Even if this is possible, is the WTO the appropriate body for this task. This is more pressing if the potentially normative effects of WTO rulings are considered, which mean that any lack of objectivity in balancing the different international obligations and interests is significant.

It is worth considering whether the WTO can learn anything from the approach of the ECJ to this question of balancing conflicting objectives, since it is, obviously, an issue which is familiar to the European Community. Any lessons to be drawn from the European Community should, however, be handled with caution, as there are different objectives and institutional structure in place that could affect the extent to which the WTO could apply the Community 's approach. This in turn raises questions concerning the constitutional status and role of the WTO/GATT.

There are therefore two questions which it is interesting to address at this point: the first concerning whether there is a more appropriate theoretical framework (or approach) for international trade could be adopted, which would permit the objective balancing of commercial and non-commercial interests, without necessarily modifying the existing institutional framework. Whether, in short, a new theoretical approach to international trade could mitigate against the incoherence in the different systems of international law. The second question concerns what may be learnt from the comparison between the EC and WTO experience in seeking to reconcile these competing interests.

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[81] It has been suggested that a consumer preference for environmentally sound products can render to otherwise like products "unlike", which would mean there was no breach of national treatment, and therefore no need to apply the Article XX exceptions. This could be applied to differentiate between products on the basis of the use of, for example, child labour in their production or not. See Asbestos, where a difference in health effects was considered in this way. See Howse and Regan "The Product/Process Distinction – An Illusory Basis for Disciplining Unilateralism in Trade Policy" EJIL 11 (2000) 249; Jackson "Comments on Shrimp/Turtle and the Product/Process Distinction" EJIL 11 (2000) 303.

Chapter 6

Conclusions: Effecting the Reconciliation of Competing Interests

It has been demonstrated that under the current international legal system we have no adequate means by which to resolve "conflict" of competing interests at international level. Nevertheless Schoenbaum believes that:

> "There is no fundamental conflict between protection of the environment and an open, multi-lateral trading system, and reform can be accomplished largely within the framework of current WTO/GATT rules and agreements as well as the jurisprudence of GATT and WTO dispute resolution panels." [1]

At the same time he feels that there may not be "one" solution.[2] What may be necessary is to establish a process to reconcile these interests in specific cases.

This reflects the dynamic nature of this "conflict" and the fact that what is an appropriate balance in the EC may not be suitable in other states. This underlines the legitimacy questions concerning the role of the dispute settlement panels in relation to balancing economic and non-economic interests.

As has been demonstrated by the European Community, it is not impossible to reconcile competing interests, difficulties arise, however, as a consequence of particular frameworks and static approaches. Even from Schoenbaum's perspective the current system is problematical, therefore the question arises as to whether a new theoretical approach will assist existing institutions to resolve these difficulties. To reconcile these issues it is necessary to take a step back from the current approach and recall the original intention of liberal trade. A more purposive approach to the interpretation of provisions of the GATT, must be applied, an approach which reflects the traditional objective of liberal trade, welfare enhancement, but applies a more modern interpretation of "welfare". An approach which goes beyond the economic perspective, and reflects sustainable development.

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[1] Schoenbaum, Thomas J. "Reconciling Trade and The Environment" AJIL 1997 at p.312.
[2] *Ibidem* at p. 270-271.

This raises important constitutional issues and the question of whether re-examining the theoretical framework can successfully address the current incoherence of international law relating to the reconciliation of economic and non-economic issues.[3] Or can the existing international legal framework and approaches be modified to deal with the difficulties?[4]

A Liberal Theoretical Framework?

According to Kingsbury it is essential to establish a theoretical framework to explain the international legal system in order to understand the behaviour and outcomes of the trade-environment interface.[5] It is submitted that this should apply equally to the interface between trade and human rights. Kingsbury offers three theories as the most influential: political realism, international cooperation theory and liberal theory, and concludes that, currently, political realism is the dominant theoretical paradigm: states are essentially homogenous units, each concerned primarily for its own survival, and restrained in its actions only by the equal actions and concerns of other states. International cooperation is founded on basically the same premise but attempts to explain the large number of instances of international cooperation (and non-cooperation) which political realism views as aberrations. The liberal theories, in contrast, are founded upon the interests of individuals and groups within states, which influence state actions, interactions and preferences.

Kingsbury believes that the evaluation of trade-environment controversies is most effectively approached from liberal theory, because that comprises norms of interaction of individuals and groups in trans-national society, rather than viewing the international legal system as being best modelled upon laws made by states to regulate their inter-relations. The enforcement of liberal norms of trans-national action relies upon international organizations and international courts as well as on states, both through national courts and before the supra-national bodies.

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[3] See Driessen "What is Free Trade? The Real Issue Lurking Behind the Trade and Environment Debate" 41 VAJIntL 279.

[4] This Chapter does not seek to deal comprehensively with these questions, but to raise further thoughts on these issues for consideration elsewhere.

[5] Benedict Kingsbury "The Tuna Dolphin Controversy, the World Trade Organization and the liberal project to Reconceptualize International Law" Yearbook of International Environmental Law (5) 1994.

The strength of this theoretical approach is that it recognises both the impact of market influence, and of trans-national pressures generally, on the development of legal rules and institutions, and also the regulatory power of non-state bodies such as trans-national industrial groups, which are unaccounted for by the state based theories.

Kingsbury argues that it would be easier to resolve the difficulties, highlighted by the jurisprudence of the GATT and WTO panels, concerning the trade-environment interface if this approach were applied to the WTO.

This "liberal" theoretical approach is also entirely consistent with the broader trend, highlighted by Petersmann, towards deregulation, market economies, protection of human rights and democracies. This reflects "an increasing recognition that individual freedom, non-discrimination and rule of law are the best conditions for promoting individual and collective self-determination and social welfare".[6] Petersmann also finds traditional state-based (democratic) theories of little assistance in the achievement of a liberal global order. He finds evidence in the EU however that international economic law is now one of the most important instruments of foreign policy, both for the promotion of the rule of law and democracy as well as for economic welfare.[7] However erroneous Petersmann's account of the EU is,[8] the pragmatic centrality of his thesis concerns deregulation, focusing primarily upon market rights. This, he observes, is consistent with the traditional theory of liberal trade as maximising welfare.

If this approach is combined with Kingsbury's, it is essential that non-state actors do not single-mindedly pursue liberal trade at the cost of all other interests. The foundation of liberal trade lies in the pursuit of broader welfare gains, thus it should be pursued as a means to an end, not as an end in itself. The dangers in the pursuit of liberalism through existing institutions are particularly apparent if this simply perpetuates traditional interests and actors with new force. The weaknesses inherent in allowing the pursuit of liberal trade unchecked are demonstrated clearly in the GATT panel findings in particular,[9] as can be

[6] Ernst Ulrich Petersmann *The GATT/WTO Dispute Settlement System International Law, International Organizations and Dispute Settlement* pp 1-2.
[7] Petersmann, "Time for a 'Global Compact' for Integrating Human Rights in to the Law of Worldwide Organisations: Lessons from European Integration" EJIL (2002) 13 621-650.
[8] For criticism of Petersmann's view of the EU see Alston "Resisting the Acquisition and Merger of Human Rights by Trade Law: A Reply to Petersmann" EJIL 13 (2002) 815-844.
[9] See Howse "Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years

seen from the discussion in Chapter 4. The dangers of trans (or supra) national organizations operating unchecked with a single agenda are apparent.

Thus the adoption of a "liberal" theoretical approach would ultimately be flawed if it permits the replacement of the operation of single-state interests with single-interest actors and tribunals.

It is, therefore, of paramount importance that in approaching the balancing of competing interests, the role and competence of particular parties is not confused. Thus, it cannot be expected that the *WTO dispute settlement body* should decide how best to balance *prima facie* conflicting interests if the member states of the WTO have neither directed the panel as to how this should be done, nor given it the tools by which to do so. In short, it cannot be expected that the dispute settlement body will resolve the issues which the member states have not addressed.

That the member states have not addressed these issues is hardly surprising, as increasing multinational regulation and interdependence reduce the members' ability to regulate to protect their own internal preferences.

What can be perceived is a clash between the desire and intention to maintain national sovereignty, and the creation of the WTO as a supra-national organisation. The Member States seek to maintain their freedom to regulate their internal domestic affairs. Thus the WTO is a classic, contract based, organisation of international law, rather than being a supra-national organisation. Consequently there are lacunae in the provisions of the WTO, for example those which have been seen in relation to the interpretation of the exceptions, and even more so, regarding its relations with other non-economic interests. The WTO Agreement, however, is not a "framework treaty" and to expect the dispute settlement panels to "fill the gaps" is tantamount, as Jackson observes, to: "demand that the panels and appellate body undertake tasks that would appear to be law-making rather than law applying, arguably more appropriate for a legislature which does not exist, or negotiations which substitute for legislation."[10]

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of WTO Jurisprudence" in Weiler et al *The EU, the WTO and the NAFTA*.

[10] Jackson, J "International Economic Law in Times that are Interesting" JIEL (2000) 3-14 at 8. CF Notaro, who maintains that the WTO AB should play a similar role to that played the ECJ in response to political

This may be summed up as creating a conflict between the sovereignty based system and the necessary evolution of the international trading system.[11] As Jackson explores, however, what is needed is a step away from traditional concepts of international law, international organisations and sovereignty, with new consideration of "allocation" of power: along the lines of the approach taken through application of the principle of "subsidiarity".

Jackson concludes by raising the question of the possibility of creating new approaches to the balancing of labour and environmental interests (among others) with international trade. In particular he questions why, if there are genuine concerns for labour standards at issue rather than mere protectionism, more has not been suggested in the way of incentives for improving standards, rather than sanction for poor standards. In the case of environment and trade he suggests the consultation of an environmental expert every time the panel must balance free trade against the environment. [12]

Driesen seeks to provide a definition of "free trade", asserting that without this the WTO's legitimacy is inherently questionable, particularly with regard to the WTO's relationship with other legal regimes. He states that "differing concepts of free trade sometimes help explain the results of cases interpreting free trade agreements."[13] Thus, a definition of free trade would both greatly enhance the debate about the WTO and help resolve the conflict between the liberal trade and environmental agendas.

Driesen offers three alternative definitions, each of which has different implications for the relationship between "free trade" and other interests. Yet each is consistent with the original concept articulated by Smith and Ricardo. He explores: non-discrimination, non-coercion and laissez faire. The dominant account of Smith and Ricardo's theories, supported by their works, is that they propounded a "laissez faire" approach to free trade.

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crisis and blocked decision-making but does not suggest a basis, or source of legitimacy for this. "The EC and WTO Trade and Environment Case law" (2001) CYELS 327 at 347.

[11] See Chapter 5.

[12] *Supra* note 10 at 13-14 On the further need to challenge the traditional assumptions about the WTO see Jackson "The WTO 'Constitution' and Proposed Reforms: Seven Mantras Revisited" JIEL (2001) 67-78, or Jackson, "The Perils of Globalisation and the World Trading System" 24 Fordham International Law Journal 371.

[13] Driesen, David M. "What is free trade?: The real issue lurking behind the trade and environment debate" 41 VJInt'l L. 279 at p 284.

However, he argues persuasively that the work of both Smith and Ricardo includes elements suggesting support of a non-discriminatory, rather than strictly laissez faire, view of liberal trade.[14] This can be seen in Smith's advocation of compensatory taxation and general taxation for legitimate public purposes. Similarly, Ricardo views taxation as necessary rather than an unacceptable trade restriction.

Following an examination of GATT jurisprudence, and the provisions of the GATT themselves, Driesen argues for non-discrimination as the GATT compliant approach to free trade to be pursued, which would remove the legitimacy problems facing the WTO panels in balancing free trade and restrictions upon it.

As Driesen observes the GATT offers no definition of discrimination, notwithstanding that the preamble and Article III appear to support a definition of free trade as trade free from discrimination. In contrast Article XI appears to be more closely related to "laissez faire". Article XX permits national regulatory exceptions but has been construed narrowly. While recognising the possibility of non-discriminatory coercion Driesen also recognises that trade which is free of international coercion is not necessarily the same as trade free of discrimination. Driesen thus proposes that anti-coercion may be equated to "laissez faire". It should be noted however that there is a greater degree of overlap between non-discrimination and non-coercion than perhaps Driesen recognises in this analysis and generally his view of "discriminatory" is rather restricted, which is unfortunate.

Indistinctly applicable measures cannot be described as "discriminatory" because they apply to all states' products. However, the effect may be discriminatory where it constitutes a "dual burden" (that is a burden whose effect does not weigh equally upon the imported products) and it is this effect, which is familiar to the EC, but not part of WTO considerations, which Driesen fails to adequately consider. There must be a recognition not only of the discrimination but also the coercion of indirect discrimination, as it seeks to compel compliance with the importing state's standards. To argue that consideration should only extend to directly discriminatory measures would be a step backwards in countering protectionism. This would not enhance the case of either non-economic, or economic, interests in the long term.

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[14] *Supra* note 13 at 290.

On the other hand, if the effects of indirect discrimination are also recognised and explored in the WTO context there is no reason why discrimination should not be central to the assessment of restrictive national regulatory measures. Driesen, however, considers that such an extension of "discriminatory" produces legitimacy problems: this cannot remove the fact, however, that such measures do exist, and have discriminatory effects.[15]

Why can the WTO dispute settlement body not consider "mandatory requirements" as a means of handling indistinctly applicable, dual burden, measures, as the ECJ has done?[16] Such an approach would require deeper integration in the WTO, and consensus on "mandatory requirements", or at least on how they may be established. Without such a consensus, legitimacy questions arise. The ECJ system, in which mutual recognition and harmonisation of minimum standards are familiar is not directly transferable to the WTO. This is consistent with Jackson's assessment, which is perhaps a more realistic way of considering the issue. Both, however, share the view that a departure from the traditional approach is required.

The Experience of the European Community

As was demonstrated in the first part, the European Community has found its own balance in the relationship between economic and non-economic interests, however imperfect (or incomplete) that may be perceived to be. In relation to fundamental rights there are lacunae in relation to the approach taken to the rights of third country nationals within the Community, but there are also problems in relation to the disparities between the rights declared in the Charter of Fundamental Rights, and the lack of protection of certain of these in practice. The problem of the lack of effective protection for these rights is a serious one, as has been evidenced by the Community experience relating to environmental protection. On the other hand, the very development of the Charter, and of secondary legislation under Article 13, does suggest that the Community is developing a more mature and complete conception of fundamental rights.

[15] Driesen, *supra* note 13 at 349-350.
[16] See Chapter 1.

In relation to environmental protection in the Community there is, again, evidence of a developing policy. Whereas protection initially developed as a by-product of market integration, there is increasing evidence of the growing strength of environmental policy. This can be seen in the efforts to give effect to the duty of integration, as well as in the approach of the Court in *PreussenElektra*. Therefore, despite ongoing problems in relation to access to justice (notwithstanding efforts to resolve these) there is evidence, once again, of the development of a genuine Community policy. Thus, despite their evident differences, the policies in relation to the protection of fundamental rights and of the environment share some underlying characteristics.

The increasing focus upon sustainable development will ultimately strengthen the interests pursued through human rights and environmental policy. In linking these two interests together with economic development, there is indisputable evidence of a growing European governance, which is far removed from the original European Economic Community.

Yet how does this European governance apply in the Community's relations with third states? The development of Community external competence, and its manifestations, demonstrates the complexity in establishing which actor should act at which point, and in which context. Here the key issue concerns the transfer of competence, and its consequent impact upon sovereignty. Again, therefore, it is evident that if the Community is to pursue particular interests in its external relations there must be a will, and a consensus to do so.

Originally, human rights in the external context developed largely as a result of the need for the Community to avoid inadvertently breaching its obligation to uphold human rights in all its activities, and the implementation of external human rights policy has been shown to be far from perfect. Again, however, there is evidence, particularly from the Nice Treaty, of a shift to a broader perspective, and a more active human rights policy extending beyond the context of development cooperation. The Community's external environmental policy clearly reflects its internal competence, and addresses the pragmatic reality that certain environmental problems require an international approach. In relation to each of these interests the strategic importance of particular states in relation to particular interests remains of fundamental importance. This demonstrates not just the importance of a European consensus, but also of a will on the part of the partner state, to pursue the protection of these interests.

The question which must now be addressed concerns the extent to which this Community approach, having reconciled to some extent economic and non-economic interests may be translated into the context of international trade.

The GATT: an appropriate framework to guide the development of the relationship between economic and non-economic interests?

Fundamentally, the international trading system is a tool with which to facilitate the achievement of certain objectives: these are traditionally deemed to be "economic welfare" objectives. However, the view of development has evolved, and now encompasses social and environmental issues. How does the pursuit of "welfare" under liberal trade fit into sustainable development? If liberal trade is a tool, rather than an end in itself, that tool must be directed to achieve certain specific aims – it will not express and achieve these aims autonomously. Thus, the objectives of liberal trade must be defined within a mutually supportive international context. The welfare objectives of liberal trade may not be achieved in isolation. Nor can liberal trade be blamed as the cause of failure to achieve any broader aims. The international trading system, being inter-governmental, operates as directed by the Member States, it has no policy autonomy. Essentially, this means that the international community must define its objectives in an operational manner.

It is only in relation to dispute settlement that the WTO is called upon to balance economic and non-economic interests. Despite early similarities, the WTO does not now share the breadth of objectives of the Community, the dispute settlement panels do not have the same interpretative role as the ECJ, and do not even have conflicting objectives to balance. The fundamental working objective of the WTO is to liberalise trade, and this is the objective that the panels must inevitably pursue in applying the WTO rules. When called upon to balance interests in relation to environmental protection and Article XX the panel's ability to do so is questionable, not least as a consequence of the lack of legitimacy to perform such a task. This legitimacy problem is exacerbated by the fact that there is no consensus for the panel to even address this task.

This problem increases in relation to human rights, which do not fall easily within one of the Article XX exceptions. Thus the incoherence in the relationship between international

trade law (WTO law) and other branches of international law is apparent. The first question which arises is which rights should be protected in the WTO context, and who should decide. The ILO fundamental rights are potentially significant, but currently there is no means by which to link them into the application of WTO law.

In relation to both environmental protection and human rights it is apparent that while international values, concerns and even law have evolved, international trade law has not kept up. This is ultimately the responsibility of the WTO members, and the international community, rather than the WTO itself. Yet, in order to address this problem, international consensus is required as to the rights which the international community now wishes to prioritise. What is evident is that simply changing the terminology will not address the fundamental problem: what is required is a consensus on a change of priorities, if this is, indeed what the international Community wishes. Without agreement as to a change in priorities there is no possibility, within the current structure, to effectively reconcile the pursuit of economic and non-economic interests.

Lessons from the European Community

It is apparent from the European Community context that a reconciliation of economic and non-economic interests is possible, but that this requires a will and consensus. There is, therefore, no inherent conflict between liberal trade and protection of non-economic interests. They are even, in the long term, mutually dependent. In the short term, however, they may appear to conflict, which requires a balancing exercise between the long term gain and short-term cost. This is a process which is achieved within states (small scale liberal-markets), and it is a process which has been shown to be possible within the European Community. So too, it should be possible within the international legal framework and community. Yet such a process requires common interests, and shared perceptions of the costs and benefits: these are less likely on a global scale. The requisite policy choices are easier to make within a smaller, more homogenous bloc.

It has, however, proved possible to achieve a common policy choice in relation to international trade, and its benefits: it should, therefore, be possible to build on that to achieve common policy choice in the wider context, particularly if the common objectives of liberal trade and non-economic interests are recalled. The achievements in the context of

liberal trade should be built upon and applied to broader contexts, without necessarily using trade sanctions to promote non-economic interests, but using the universal consensus on the common objectives of free trade and international law.

A European Model for the Integration of Human Rights?

It has been suggested that one way forward would be to put human rights on the level of underlying principles, rather than exceptions, such as occurred within the EC.[17] It may be recalled that human rights were also initially not seen as being relevant to the operation of EC law. It is too simplistic, however, to suggest that the WTO dispute settlement panels should (or even could) incorporate recognition of human rights in the WTO in the same manner as the ECJ has done within the EC. It would also ignore the particular legal and political history which demanded the consideration of human rights as a means of containing individual states' concerns that the then EEC would diminish their constitutional human rights guarantees.

It is far from irrelevant that each of the Community member states had already adhered to the ECHR, and submitted to the jurisdiction of the European Court of Human Rights. The shared obligations that were held by the Community member states do not have an equivalent among the membership of the WTO. Although it is possible that the ILO fundamental rights may constitute an accepted set of rights, there is no binding mechanism by which they may be enforced, or even consensus that they should be. Consequently, there is nothing that impinges upon the WTO legal system in the manner that the ECHR and the shared principles of the Community Member States affected the Community legal system. Without such a factor, there is no reason why the WTO legal system would pursue this development, unless with the consensus of the Member States.

It appears, therefore, that Marceau's approach,[18] adopting a good faith interpretation of the WTO rules, which respects international human rights obligations is, notwithstanding its limitations, the strongest way forward under the current international institutional framework.

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[17] *Supra* Chapter 1.
[18] Marceau G, *supra* note 7 of Chapter 5.

Conclusion

These final comments do not seek to reiterate the detailed analysis of the relationship between economic and non-economic interests in international trade. They seek, rather, to draw out some key strands running consistently through this complex issue. The ECJ has proved itself willing to balance economic and non-economic interests, even with some legitimacy, yet its function (in relation to a body of law which pursues a variety of objectives, which are increasingly being integrated) is very different to that of the WTO dispute settlement body. The same expectations which exist in relation to the function of the ECJ simply cannot be made of the WTO Dispute Settlement Body.

The evolving nature of international values and international law is crucial here. Whereas the Community has clearly developed its protection of non-economic interests from being an "add-on" to be dealt with where they interact with economic interests, the WTO rules have not been amended and the WTO remains primarily concerned with removing restrictions on trade.

While the international Community is moving on, and international law has moved on in many contexts, the WTO has not yet adjusted. This does not leave only the WTO with a problem. The WTO remains the only "international" body which can adjudicate on the balance to be drawn between economic and non-economic interests, yet it remains ill equipped to do so in the light of current values. Thus it leaves the international Community with a problem, given the development of international environmental law, the shift from the concept of labour standards to labour rights, the declaration of fundamental labour rights and the commitment to sustainable development evident in the UN Summit in Johannesburg in August 2002.

If we can learn anything from the European Community in relation to the reconciliation of economic and non-economic interests it is that this is only possible where there is a consensus on the values to be pursued, the extent to which they may be pursued, and the means by which they should interact with other interests. The necessity of consensus can be seen in the Community's approach to human rights in its external relations, where in different contexts different rights are included. The necessity of a common will to pursue

the values included within the common consensus is demonstrated by the failure of the EC-Australia negotiations with respect to the human rights clause.

That the European Community has managed to establish such a consensus is a reflection not only of the relative homogeneity of its members, but also, in relation to fundamental rights, of the fact that those members were all already bound by the ECHR. The fact that that consensus is in the process of deepening is a reflection of the nature of the Community, its supra-nationality and developing polity.

All of these render the Community experience very different to that of the WTO, and all contribute to the extent to which it can develop, balance and pursue potentially conflicting objectives.

This does not, however, mean that the Community experience can offer no practical assistance to this issue: it demonstrates, for all its imperfections, that economic and non-economic interests may be reconciled, and that it is possible to develop the necessary consensus to do so. Yet to establish consensus, there must be political will, which must reflect democratic choice. Yet, the short-term interest may not be conducive to the establishment of a necessary consensus of common values and interests. Thus it may be difficult for Governments to take the electoral risk of putting long-term interests ahead of short term.

In addressing this issue it is useful to consider one of the weaknesses of the Community approach: the very lack of consistency of definition of rights in what is intended to be a policy ensuring the universality of its rights protection in its relations with third states. At this point what is required is recognition of the reality that "rights" (in this context) is not a particularly useful term. As in relation to international labour standards/rights it may be more beneficial to try and work towards a definition of core values and objectives which can be accepted as universal and which would be consistent with the pursuit of sustainable development: stemming perhaps from the Brundtland definition.

There is no doubt that any measures taken in these contexts should avoid protectionism. Thus, consistency and universality are essential. So too, however, is a recognition from the developed world that any values agreed (with the developing world) as core or universal

must be supported – thus where standards are to be attained and maintained this cannot be achieved in a vacuum, but will almost undoubtedly require support in the way of technical and material aid and cooperation, (incentives rather than sanctions). This reflects the reality that "trickle down" will not effectively (or efficiently) occur unless the trickle is assisted. It is equally imperative that any such agreed standards should be consistently applied.

Until that can be achieved there appears to be little doubt that the most *persuasive* terminology is that of "universal" or "fundamental" human rights. Bringing environmental protection under that umbrella (as the EU has moved some way towards doing in making it a "principle" in the Charter of Fundamental Rights for the EU) would probably strengthen its persuasive value in the current framework of international law, if not in the WTO context.

It appears that the current framework of international law in which this "conflict" operates is not altogether satisfactory. There can be little doubt that the current institutional framework is a weakness, the primary objective of the WTO (liberalisation of trade) hampers the pursuit of non-economic interests, and will continue to do so at least until a more comprehensive definition of the objectives of free trade itself can be laid down. This remains a significant problem for an international community bound by the WTO, but which in other contexts has demonstrated a serious commitment to the pursuit of non-economic interests.

Yet hope for the future may be drawn from the achievements of the European Community. The identification of *prima facie* conflicting objectives need not lead to a breakdown of the international legal system. These interests may be reconciled, facilitating balanced, sustainable, development. This will only be possible, however, if there is a genuine consensus as to the direction of future development, and a common vision of priorities for that development.

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